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REPORT ON THE SEVENTH MEETING OF THE THIRD INTERSESSIONAL WORKING GROUP

REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

Note by the Director

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EXECUTIVE SUMMARY

Mandate

The Working Group set up by the 1992 Fund Assembly in April 2000 held a meeting in February 2004 under the Chairmanship of Mr A Popp QC (Canada) on the basis of the following mandate given by the Assembly at its October 2001 session:

(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.

The issues referred to in the Assembly's mandate were as follows:

(a) shipowners' liability
(b) environmental damage
(c) alternative dispute settlement procedures
(d) non-submission of oil reports
(e) clarification of the definition of 'ship'
(f) application of the contribution system in respect of entities providing storage services
(g) uniformity of application of the Conventions
(h) various issues of a treaty law nature.

Discussions at the meeting in February 2004

Study of the costs of spills in relation to the past, current and future limitation amounts of the 1992 Conventions (Section 6)

The Working Group had requested the Director to undertake an independent study of the costs of past oil spills in relation to the past, current and future limitation amounts of the compensation Conventions. Preliminary analysis of the raw data submitted by P&I Clubs of the International Group had indicated that considerable further analysis would be required before it could be used to provide useful statistics. The Director was of the view that the study would not be completed until May 2004 at the earliest.

The Working Group decided that whilst the completion of the costs study should not hinder its discussion on the revision of the 1992 Civil Liability Conventions, any decisions by the Group should be on a provisional basis pending the outcome of the study.

The question as to whether the 1992 Civil Liability Convention should be revised in respect of shipowners' liability and related issues (Section 7)

Level of shipowners' limitation amount and its relationship with the compensation funded by oil receivers

The Working Group considered information and/or proposals relating to the shipowners' liability presented by the delegations of Australia, Canada, Finland, France, the Netherlands, the Russian Federation and the United Kingdom (Australia *et al*), the Italian delegation, the observer delegation of the Oil Companies Marine Forum (OCIMF), the observer delegation of the International Group of P&I Clubs and the observer delegations of the International Chamber of Shipping (ICS) and the International Association of Independent Tanker Owners (INTERTANKO).

The delegations of Australia *et al* proposed two options for consideration. Under the first option the limit of liability for small ships and the steepness of the slope of the SDR/tonnage line would be increased,

although no specific figures were presented. The second option envisaged that for incidents involving ships above a certain tonnage, say 5 000 gross tonnes, there would be a balanced sharing of financial responsibility between the shipowner and cargo interests, regardless of the ship's tonnage, up to the existing limit under the 1992 Conventions of 203 million SDR.

The Italian delegation proposed increasing the shipowners' limit of liability under the 1992 Civil Liability Convention and the establishment of an additional tier of compensation, which would be funded by individual cargo owners as opposed to receivers.

The observer delegation of OCIMF proposed two options for consideration. The first option envisaged revising the shipowners' limit under the 1992 Civil Liability Convention to 90 million SDR for all ships, irrespective of size, and revising the Supplementary Fund Protocol to introduce the sharing of contributions to the Supplementary Fund by shipowners and oil receivers on an unspecified percentage basis. The second option involved increasing the limit of liability under the 1992 Civil Liability Convention to around 200 million SDR for all ships, irrespective of size, and an increase of the limit under the 1992 Fund Convention by a corresponding amount.

The observer delegation of the International Group of P&I Clubs did not make any specific proposal, but indicated that in order to address the oil industry's concerns about the impact of the Supplementary Fund on the concept of cost sharing the Clubs were prepared to consider alternative proposals for voluntary solutions to the one originally suggested by the Group of increasing the limits for small ships only.

The observer delegations of ICS and INTERTANKO concurred with the views of the delegation of the International Group of P&I Clubs that any concerns about the impact of the Supplementary Fund on the equitable sharing of the costs of compensation between shipowners and cargo interests should be addressed through voluntary industry solutions.

There was strong support for maintaining a simple and workable international compensation scheme, but the Working Group was divided on whether or not to amend the provisions relating to the shipowners' liability. Some delegations favoured voluntary industry solutions to the potential financial imbalance created by the Supplementary Fund whilst others considered that liability and compensation for oil pollution damage gave rise to important questions of civil law that fell within the field of public policy, which had to be addressed by legislation.

The Chairman stated in his summing up of the discussion that there appeared to be sufficient momentum to keep the question of shipowners' liability under review for the next meeting when, hopefully, the results of the Director's study of the costs of spills would be available. He urged delegations to continue informal discussions in order to achieve consensus, with a view to consolidating the various options that had been put forward or to developing clear proposals regarding the voluntary schemes.

Substandard transportation of oil and the right of the shipowner to limit liability

The Working Group considered a number of proposals submitted respectively by the delegations of Canada and the United Kingdom, the delegation of France, the delegation of Japan and the observer delegation of OCIMF.

The delegations of Canada and the United Kingdom proposed exploring how to introduce cost disincentives to deter substandard shipping whilst at the same time ensuring that operators of well-maintained tankers were not competitively disadvantaged. They proposed that the Working Group give consideration to introducing into the compensation Conventions a formula by which the level of liability of shipowners could be automatically increased in the case of an incident involving a substandard tanker, thereby penalising low operating and maintenance standards and reducing any unjust financial burden on contributors to the 1992 Fund.

The French delegation proposed that an exception should be made to a shipowner's right of limitation when the damage appeared to result from the structural condition of the ship, which in its view was consistent with Article V.2 of the 1992 Civil Liability Convention, and that the 1992 Fund should

systematically take recourse actions against charterers following incidents caused by ships with structural defects. That delegation also proposed that when shipowners were denied the right to limit liability the insurer should continue to provide cover.

The Japanese delegation proposed an amendment to the 1992 Civil Liability Convention to the effect that if an incident caused by a substandard ship registered or chartered by a receiver in a Contracting State to the Supplementary Fund Protocol were to result in compensation being paid by the Supplementary Fund, the owner of that ship should bear an additional liability to that under the 1992 Civil Liability Convention, either on the basis of a fixed amount or as a percentage of the compensation paid by the Supplementary Fund, whichever was the lower. That delegation also proposed that, in addition to increasing the liability of shipowners, receivers of oil after carriage in a substandard ship in a State where an incident occurred should make additional contributions to the Supplementary Fund, firstly for an amount equal to the shipowners' additional liability, or the shipowners' liability in total, and secondly for an amount calculated on the basis of the receivers share of oil received and against the net balance of compensation from the Supplementary Fund.

The observer delegation of OCIMF proposed an amendment to the test of a shipowner's right to limit liability, for example by reverting to the 'fault and privity' test in the 1969 Civil Liability Convention, with the caveat that the 1992 Fund should continue to pay compensation pending resolution of any liability dispute.

The observer delegation of the International Group of P&I Clubs expressed the view that the compensation system should not be used to punish the substandard operator, bearing in mind that shipowners with poor claims records already paid more by way of insurance premiums and that a lowering of the threshold of a shipowner's right to limit liability would lead to the politically unacceptable result that the oil industry would rarely contribute to the cost of compensation for pollution damage.

These views were supported by a number of delegations, which also drew attention to the difficulties of defining 'substandard' ship. Other delegations expressed a willingness to explore further the possibility of embracing the issue of substandard transportation of oil within the legal framework of the compensation Conventions subject to further clarification of some of the conditions under which the shipowner would lose the right to limit liability.

Definition of 'ship' (Section 8)

The Working Group considered treaty texts submitted by Australia *et al* to amend the definition of 'ship' under the 1992 Conventions in order to clarify the circumstances under which the Conventions would apply to unladen tankers, and in particular whether the proviso in Article I.1 of the 1992 Civil Liability Convention applied to all tankers and not only to ore/bulk/oil ships (OBOs). Two options were put forward by the sponsoring delegations, one which sought to remove the ambiguity in the definition as currently interpreted by the 1992 Fund Assembly, ie that the proviso in the definition applied to all tankers, the other amending the definition so as to exclude from the proviso all dedicated tankers, including those constructed or adapted for the carriage of non-persistent oil.

Some delegations favoured the existing interpretation, making the point that the compensation Conventions related solely to incidents involving the transportation of persistent oil, and that excluding all dedicated tankers from the proviso would result in incidents involving spills of bunker fuel from chemical tankers being covered by the Conventions which, in their view, had never been the intention when the Conventions were drafted.

Some delegations were not convinced of the need to amend the definition of 'ship'. However, there was an overall preference for amending the definition to exclude from the proviso dedicated tankers, although it was considered that the draft text proposed by Australia *et al* was ambiguous and that further work on it was therefore required.

Tacit amendment procedures (Section 9)

The Working Group considered a proposal by the delegations of *Australia et al* to amend the tacit

amendment procedure to enable the financial limits of the Conventions to be revised on a more regular basis along similar lines to the procedures contained in the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air. The limits under that Convention are reviewed every five years and revisions become effective six months after States Parties had been notified thereof unless a majority of States registered their disapproval within three months after the notification.

There was considerable support for the proposal in principle. Although some delegations favoured the approach adopted under the 1999 Montreal Convention, others preferred the procedure in Article 24 of the Supplementary Fund Protocol, which was modelled on the tacit amendment procedure in the 1992 Fund Convention, but with considerably shorter time periods for the various steps involved in increasing the limits.

The Working Group also considered a proposal by the delegations of Australia *et al* that the tacit amendment procedure should be used to introduce certain administrative changes that could improve or solve problems relating to the operation of the 1992 Fund, such as the functions of the Assembly and the Director and the requirements for the constitution of a quorum of the Assembly.

A number of delegations, whilst acknowledging the potential benefits of introducing tacit amendment procedures in respect of administrative matters, particularly to address the problem relating to a quorum, stated that caution was required to ensure that any changes were consistent with international law and that amendments to administrative procedures could affect the constitution of the Fund.

In his summing up the Chairman stated that the issue of a quorum was a serious one, particularly if the lack of a quorum were to ever prevent the Fund from dealing with a major pollution incident, and that this issue therefore needed further consideration in order to find a lasting solution.

Refinement of the contribution system (Section 10)

The Working Group noted a proposal by the Netherlands delegation to incorporate into a revised version of the 1992 Convention two provisions contained in the 1996 Convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea (HNS Convention), one relating to the concept of 'receiver' and the other relating to the definition of 'contributing oil'. The former would give storage companies, under certain conditions, the possibility to pass levies for contributions to their principals, whilst the latter would result in oil which was transferred directly, or through a port or terminal, from one ship to another, in the course of carriage from the port or terminal of original loading to the port or terminal of final destination being considered as contributing oil only in respect of receipt at the final destination.

Future work (Section 11)

Due to lack of time not all issues raised by delegations in documents were addressed, namely: refinement of the contribution system; submission of oil reports and payment of contributions; compulsory insurance for ships carrying less than 2 000 tonnes of cargo; merger of the Civil Liability and Fund Conventions into a single Convention; deletion of the six year time bar provisions in the 1992 Conventions; and, minimum entrance fee to the Fund.

It was agreed that the agenda for the next meeting of the Working Group should, in addition to addressing the above outstanding issues, include consideration of more precise proposals, preferably in the form of treaty texts, in respect of a total compensation package, including the issue of substandard shipping, and proposals by industry delegations for voluntary schemes to address issues relating to the sharing of costs of oil spills and the substandard transportation of oil.

Next meeting

The Working Group decided to hold a meeting during the week of 24 May 2004 in connection with sessions of the IOPC Funds' governing bodies.

1 Introduction

1.1 The 3rd intersessional Working Group was established by the 1992 Fund Assembly at its 4th extraordinary session, held in April 2000, to assess the adequacy of the international compensation system created by the 1992 Civil Liability Convention and the 1992 Fund Convention. The Group held its seventh meeting from 24 to 27 February 2004 under the Chairmanship of Mr Alfred Popp QC (Canada)[<1>].

1.2 In accordance with the decision of the Assembly, 1971 Fund Member States as well as States and Organisations which had observer status with the 1992 Fund were invited to participate as observers.

2 Participation

2.1 The following Member States were represented at the Working Group's seventh meeting:

Algeria	Germany	Panama
Antigua and Barbuda	Ghana	Philippines
Argentina	Greece	Poland
Australia	Grenada	Portugal
Bahamas	India	Republic of Korea
Belgium	Ireland	Russian Federation
Cameroon	Italy	Singapore
Canada	Japan	Spain
China (Hong Kong Special Administrative Region)	Liberia	Sweden
	Malta	Tanzania
Colombia	Marshall Islands	Trinidad and Tobago
Congo	Mexico	Tunisia
Cyprus	Netherlands	United Arab Emirates
Denmark	New Zealand	United Kingdom
Finland	Nigeria	Vanuatu
France	Norway	Venezuela

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

Brazil	Ecuador	Pakistan
Chile	Iran (Islamic Republic of)	Saudi Arabia

2.3 The following intergovernmental and international non-governmental organisations participated in the Working Group's meeting as observers:

Intergovernmental organisations:
International Maritime Organization (IMO)
International Oil Pollution Compensation Fund 1971
European Commission

International non-governmental organisations:
BIMCO
Comité Maritime International (CMI)
Federation of European Tank Storage Associations (FETSA)
Friends of the Earth International (FOEI)
International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)
International Group of P&I Clubs
International Salvage Union (ISU)

[<1>] The sixth meeting of the Working Group, which was due to have been held on 23 October 2003, was cancelled due to insufficient time being available during the October 2003 sessions of the IOPC Funds' governing bodies.

International Tanker Owners Pollution Federation Limited (ITOPF)
Oil Companies International Marine Forum (OCIMF)

3 The Working Group's mandate

3.1 At its 6th session, held in October 2001, 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.

3.2 The issues referred to in the Assembly's decision were as follows:

(a) shipowners' liability

(b) environmental damage

(c) alternative dispute resolution procedures

(d) non-submission of oil reports

(e) clarification of the definition of 'ship'

(f) application of the contribution system in respect of entities providing storage services

(g) uniformity of application of the Conventions

(h) various issues of a treaty law nature

4 Documents considered by the Working Group at its seventh meeting

4.1 The following documents were submitted to the Working Group's seventh meeting:

92FUND/WGR.3/19/14	List of previous documents (Director)
92FUND/WGR.3/19	Study of the costs of past spills in relation to the current and future limitation amounts of the 1992 Conventions (Director)
92FUND/WGR.3/19/1	Balance of financial responsibility between shipowners and cargo interests (Australia, Canada, Finland, France, the Netherlands, New Zealand, the Russian Federation and the United Kingdom)
92FUND/WGR.3/19/2	Definition of 'ship', tacit amendment procedure, non-submission of oil reports and insurance cover for vessels carrying less that 2 000 tonnes of oil as cargo (Australia, Canada, France, Italy, the Netherlands, New Zealand, the Russian Federation and the United Kingdom)
92FUND/WGR.3/19/3	Review of the objectives and purposes of the Conventions on Liability and Compensation for Oil Pollution Damage (OCIMF)
92FUND/WGR.3/19/4	Possible improvements to the International Compensation Regime for Oil Pollution Damage (OCIMF)
92FUND/WGR.3/19/5	Refinement of the contribution system (the Netherlands)
92FUND/WGR.3/19/6	Amendment of Article VIII of the 1992 Civil Liability Convention and Article 6 of the 1992 Fund Convention (Friends of the Earth International)
92FUND/WGR.3/19/7	Insurance, certification and liability considerations (Canada and the United Kingdom)
92FUND/WGR.3/19/8	Issues relating to the liability of the shipowner and insurer (France)

92FUND/WGR.3/19/9	Shipowner's right to limit his liability, channelling of liability and sharing of compensation payments (International Group of P&I Clubs)
92FUND/WGR.3/19/10	Measures taken by P&I Clubs in relation to substandard shipping (International Group of P&I Clubs)
92FUND/WGR.3/19/11	Liability of cargo owners (Italy)
92FUND/WGR.3/19/12/Rev.1	Promotion of quality shipping (Japan)
92FUND/WGR.3/19/13	Shipowners' liability, sharing of compensation payments and substandard oil transportation (ICS and INTERTANKO)
92FUND/WGR.3/19/15	An audited quality system of ships (International Group of P&I Clubs)
92FUND/WGR.3/19/16	Tank storage companies should be entitled to disclose their principals to avoid payment of contributions (FETSA)

4.2 During the discussions reference was made to the Working Group's Reports on its second, third, fourth and fifth meetings (documents 92FUND/A.6/4 (cf 92FUND/WGR.3/9), 92FUND/A.7/4 (cf 92FUND/WGR.3/12) and 92FUND/A/ES.7/6 (cf 92FUND/WGR.3/15)). As regards the documents submitted to these meetings, reference is made to these reports.

5 Issues considered at the Working Group's seventh meeting

The Working Group endorsed the Chairman's proposal to structure the discussions as follows:

1. Study of the costs of spills in relation to past, current and future limitation amounts of the 1992 Conventions.

2. The question as to whether the 1992 Civil Liability Convention should be revised in respect of shipowners' liability and related issues:

   (a) level of shipowners' limitation amount and its relationship with the compensation funded by the oil receivers;
   (b) substandard transportation of oil;
   (c) criterion governing the shipowners' right to limitation;
   (d) insurer's right to revoke cover.

3. Other issues where amendments might be considered if a revision were to take place:

   (a) definition of 'ship';
   (b) tacit amendment procedures;
   (c) refinement of the contribution system;
   (d) time bar provisions.

6 Study of the costs of spills in relation to past, current and future limitation amounts of the 1992 Conventions

6.1 The Working Group took note of the information contained in document 92FUND/WGR.3/19 submitted by the Director. It was noted that the Director had received, via the International Tanker Owners Pollution Federation Ltd (ITOPF), cost data that had been submitted by all but two of the P&I Clubs belonging to the International Group in respect of some 7 800 pollution incidents. It was also noted that a preliminary analysis of the raw data had indicated that considerable further analysis would be required before it could be used to provide useful statistics, since the Clubs had presented figures of total payments per incident which did not, for example, differentiate between payments made under the Civil Liability Conventions, payments made in excess of the Conventions' limits or payments made by way of reimbursements to the Funds. It was further noted that the Director was of the view that the study would not be completed until May 2004 at the earliest.

6.2 The observer delegation of the International Group of P&I Clubs stated that, whilst it regretted that the considerable amount of data submitted by the Clubs was not in a form that could be used for the study, many of the Clubs did not retain incident files for more than two years after the files were closed and that, as a result, complete records of compensation payments were not always available. It further stated that the Clubs were currently reviewing their records to establish the extent to which they could distinguish between payments for compensation for pollution damage and other costs, such as those in respect of wreck removal and legal and technical fees, and that they would report back to the 1992 Fund in the near future.

6.3 The Working Group decided that whilst the completion of the costs study should not hinder its discussion on the revision of the 1992 Civil Liability Convention, any decisions by the Group should be on a provisional basis pending the outcome of the study.

7 Shipowners' liability and related issues

7.1 The Working Group took note of the information contained in the following documents:

92FUND/WGR.3/19/1 (Australia, Canada, Finland, France, the Netherlands, the Russian Federation and the United Kingdom);

92FUND/WGR.3/19/2 (Australia, Canada, France, Italy, the Netherlands, New Zealand, the Russian Federation and the United Kingdom);

92FUND/WGR.3/19/3, 92FUND/WGR.3/19/4 (Oil Companies International Marine Forum);

92FUND/WGR.3/19/7 (Canada and the United Kingdom);

92FUND/WGR.3/19/8 (France);

92FUND/WGR.3/19/9, 92FUND/WGR.3/19/10, 92FUND/WGR.3/19/15 (International Group of P&I Clubs);

92FUND/WGR.3/19/11 (Italy);

92FUND/WGR.3/19/12/Rev.1 (Japan);

92FUND/WGR.3/19/13 (International Chamber of Shipping and International Association of Independent Tanker Owners).

Level of shipowners' limitation amount and its relationship with the compensation funded by oil receivers

7.2 The United Kingdom delegation introduced document 92FUND/WGR.3/19/1 on behalf of the sponsoring delegations of Australia, Canada, Finland, France, the Netherlands, the Russian Federation and the United Kingdom (Australia *et al*) and stated that following the adoption of the Supplementary Fund Protocol in 2003 it was now necessary to carry out a fundamental review of the financial responsibilities in the underlying regimes with the aim of introducing greater equity in contributions between shipowners and insurers on the one hand and cargo interests on the other. The sponsors of the document outlined two possible options, one increasing the shipowners' tonnage-based limits under the 1992 Civil Liability Convention, the other reducing the limits under that Convention but introducing a sharing of financial responsibility between shipowners and cargo interests up to the existing 1992 Fund limit.

7.3 The Working Group noted that under the first option the limit of liability for small ships up to a certain, but unspecified, tonnage would be increased beyond the existing limit of 4.5 million SDR for small ships. It was noted that for larger ships the sponsoring delegations had proposed that the additional amount in SDR per gross tonne should be increased in such a way that the existing limit of 90 million SDR under the 1992 Civil Liability Convention would apply to ships with a

lower tonnage than is currently the case. It was also noted that in proposing these amendments to the 'small ship minimum' and the slope of the SDR/tonnage line the sponsoring delegations had not specified any figures. It was noted, however, that those delegations had argued that experience of past incidents had clearly shown that the tonnage of a particular vessel was not necessarily the most important factor in determining the total cost of claims arising from an incident, and that a number of incidents involving ships at the lower end of the tonnage scale, such as the *Nakhodka* (13 195 GT) and the *Erika* (19 666 GT), had resulted in the financial exposure of cargo interests being disproportionate to that of the shipowner. The Working Group noted that the proposal went beyond the proposed voluntary Small Tanker Oil Pollution Indemnification Agreement (STOPIA) that was being developed by the International Group of P&I Clubs which would only apply to vessels entered with Clubs belonging to the International Group and would be limited to pollution damage in States that were parties to the Supplementary Fund Protocol. It was noted that the sponsoring delegations believed that the voluntary nature and other limitations of STOPIA were such that a revision of the 1992 Civil Liability Convention limits through an amendment of Article V was called for.

7.4 The Working Group noted that under the second option the sponsoring delegations had proposed that for incidents involving ships over a given tonnage, say 5 000 gross tonnage, for which the shipowners' limit was currently 4.5 million SDR, there would be a balanced sharing of financial responsibility between the shipowner and the cargo interests, regardless of the ship's tonnage, of the payments of claims up to the existing limit under the 1992 Conventions of 203 million SDR. It was noted that the sponsoring delegations had not specified how the payments of claims should be shared under the proposal, and that this sharing would in their view have to be decided by a Diplomatic Conference. It was noted, however, that the sponsoring delegations envisaged that if the total claims were to exceed the limit under the 1992 Conventions, the Supplementary Fund Protocol in its existing form would apply in those States that chose to become parties to the Protocol. It was also noted that the second option would, in the sponsoring delegations' view, require a more substantial change to the underlying Conventions, since the emphasis would shift from that of limits of liability under each Convention to one of quantum of claims falling first to the shipowner and then jointly to the shipowner and the 1992 Fund.

7.5 The Italian delegation introduced document 92FUND/WGR.19/11 in which it proposed a revision of the compensation regime so as to establish a more equitable balance amongst all States Parties to the Conventions with regard to the payment of compensation, thereby ensuring that the system remained politically sustainable. The Working Group noted that the specific proposals by the Italian delegation were to raise the liability limit of the shipowner under the 1992 Civil Liability Convention and to establish an additional tier of compensation which would be funded by individual cargo owners (as opposed to oil receivers) as identified by a particular cargo's bill of lading. It was noted that the financial contribution of the cargo owner should, in the Italian delegation's view, be covered by financial guarantees or insurance with limits equivalent to at least the ceiling established in respect of shipowners' liabilities.

7.6 The Working Group noted the information contained in document 92FUND/WGR.3/19/3 submitted by the Oil Companies Marine Forum (OCIMF), which provided the historical background leading to the 1969, 1971, 1984 and 1992 Diplomatic Conferences through which the existing liability and compensation regime had evolved. It was noted that the document focused on the main objectives of the Conferences, the concerns that were raised by delegations at the time and how these had led to compromises in adopting the final texts of the Conventions.

7.7 In introducing its second document (document 92FUND/WGR.3/19/4) the OCIMF observer delegation explained the basis of its proposal, which was intended to ensure that two primary objectives were fulfilled, namely to provide prompt and proper compensation to those suffering pollution damage from oil spills and to provide an incentive for a reduction in the occurrence of oil spills by creating a mechanism for encouraging improvements in maritime safety. It was noted that the OCIMF delegation had expressed the view that, since spills from small vessels could be as expensive as spills from large vessels, it was illogical and inappropriate to have a sliding scale for the shipowners' liability, and it therefore proposed a fixed limit of liability under the 1992 Civil Liability Convention which would apply to all tankers irrespective of their size or capacity.

It was also noted that the OCIMF delegation had proposed that in order to avoid any adverse effects on small ships in some States, a provision similar to that in the HNS Convention could be introduced into the Civil Liability Convention whereby States could exempt tankers under a certain gross tonnage that were engaged only in domestic coastal trade from the application of the Convention, which could be covered by specific national requirements for such tankers.

7.8 The Working Group noted two specific options proposed by OCIMF. The first option envisaged a revision of the 1992 Civil Liability Convention introducing a flat limit of liability of 90 million SDR for all ships irrespective of size and a revision of the Supplementary Fund Protocol with contributions to the Supplementary Fund being shared between shipowners and oil receivers on a percentage basis to be determined. The second option envisaged a revision of the 1992 Civil Liability Convention increasing the limit of liability to around 200 million SDR for all ships irrespective of size and a revision of the 1992 Fund Convention introducing a corresponding increase in the Fund limit.

7.9 In introducing document 92FUND/WGR.3/19/9 the observer delegation of the International Group of P&I Clubs stated that, whilst the cost study referred to in section 6 would undoubtedly provide interesting background information, in that delegation's view, both shipowners and cargo interests had contributed roughly comparable amounts over the period of the study, and that the conclusions of the study should therefore not of themselves determine the position of the Working Group on outstanding issues, including sharing the burden. The delegation further stated that whilst the claims history suggested that the Supplementary Fund would rarely be called upon, the Clubs were prepared to explore other proposals for voluntary solutions instead of their original proposal to increase the limits for small ships (STOPIA), in order to address the impact of the Supplementary Fund on the concept of cost sharing if that issue was of concern to States and the oil industry, since the Clubs considered that voluntary industry solutions on sharing could obviate the need to amend the Conventions and thereby avoid the legal and practical problems that would ensue.

7.10 The observer delegations of the International Chamber of Shipping (ICS) and the International Association of Independent Tanker Owners (INTERTANKO) introduced document 92FUND/WGR.3/19/13. Those delegations expressed the view that the increases in the level of compensation available under the 1992 Civil Liability and Fund Conventions which had entered into force in 2003 had addressed any inadequacies and that any concerns about the impact of the Supplementary Fund on the concept of equitable sharing of the costs of compensation between shipowners and cargo interests should be addressed through voluntary industry solutions. Those delegations urged the Working Group to defer further consideration of the issue until the results of the Director's study on the costs of spills and the industry's proposals to address equitable sharing were available.

7.11 The Chairman noted that the Working Group had to consider six options which in principle were as follows:

1) the traditional revision of the limits in the 1992 Civil Liability Convention by increasing the small ship minimum and the steepness of the slope of the SDR/tonnage line for larger ships (Australia *et al.*);

2) the sharing of the liability under the present Civil Liability Convention between shipowners and oil receivers (Australia *et al.*);

3) raising the limit of liability of the shipowner under the Civil Liability Convention and the introduction of a third tier cargo liability (Italy);

4) increase in the limits under the 1992 Civil Liability Convention and the 1992 Fund Convention (OCIMF);

5) increase of the shipowners' liability to a flat amount, independent of the ship's tonnage, and/or a sharing of the contributions to the Supplementary Fund between the shipowner and the oil receivers (OCIMF).

6) adjustment of the sharing of the financial burden between shipowners and cargo interests by means of voluntary solutions (International Group of P&I Clubs)

7.12 A number of delegations expressed the view that, whilst the Supplementary Fund had the potential for creating an imbalance if that Fund was called upon to pay compensation, this did not justify a revision of the 1992 Conventions, which could, in their view, endanger the whole compensation system. Those delegations considered that the most appropriate solution would be for the shipping and oil industries to reach an agreement on how to address the imbalance through self-regulation by means of voluntary solutions.

7.13 Other delegations expressed the opposite view and stated that one of the conditions that had been agreed when the Supplementary Fund Protocol was adopted was that the 1992 Civil Liability Convention should be revised. Those delegations noted that the original basis of the 1971 Fund Convention had been to ensure that there was adequate compensation available beyond what was realistically insurable at that time, but that now that adequate insurance cover was available to shipowners, the emphasis should be on equitable sharing. Those delegations believed that whilst the voluntary industry proposals were commendable and could play a useful role during any transitional period before widespread ratification of revised Conventions, the treaty law problems were not insuperable and did not justify maintaining the *status quo*.

7.14 Several delegations emphasised that the main purpose of the international compensation regime was to ensure prompt and adequate compensation to victims. They expressed the view that the regime had in general worked well and that one reason was its relative simplicity. It was maintained that it was important therefore to ensure that any changes did not hamper the functioning of the regime to the detriment of victims.

7.15 Several delegations considered it inappropriate to rely permanently on voluntary solutions, since in their view, liability and compensation for oil pollution damage gave rise to important questions of civil law that fell within the field of public policy, which had to be addressed by legislation. It was also pointed out that not all ships transporting persistent oil as cargo were entered in P&I Clubs belonging to the International Group.

7.16 The observer delegation of the International Group of P&I Clubs stated that the proposal under consideration by the shipping and oil industries whereby the two industries would contribute to the Supplementary Fund were not seen by the P&I Clubs as an interim solution pending revision of the 1992 Conventions, nor did they consider them akin to the voluntary schemes of TOVALOP and CRISTAL which had applied worldwide. That delegation stated that the shipowners' participation in the third tier of compensation would have legal standing in as much as future charter party agreements would ensure that shipowners contributed to the compensation paid under the Supplementary Fund Protocol.

7.17 A number of delegations stated that they considered the proposals by Australia *et al* worthy of further consideration, but expressed the view that the proposal by Italy might create problems of jurisdiction bearing in mind that cargoes frequently changed ownership during a voyage from a loading terminal to their final destination. Some delegations stated that whilst they did not favour a voluntary system based on industry self-regulation, they were not yet in a position to decide on the best approach as regards revising the Conventions pending the outcome of the costs study to be undertaken by the Director.

7.18 Some delegations expressed interest in the Italian proposal which in their view merited further consideration.

7.19 In summing up the debate the Chairman noted that whilst there was strong support for maintaining a simple and workable international compensation regime, the Working Group was

divided on whether or not to amend the provisions relating to the shipowners' liability, which was at the heart of any decision to revise the regime. He pointed out that the present regime had in general worked well and had made it possible to settle a very high percentage of all claims without litigation and that problems had mostly been encountered in relation to a few large incidents where the total amount of compensation had been insufficient to pay all claimants in full. He made the point that it was nevertheless essential from time to time to step back and examine how the system was working and whether there was a need to update the regime. He stressed the importance of continuing to work towards a consensus, since it would be very regrettable and to the detriment of victims of oil pollution damage if some States decided to opt out of the system to pursue their own solutions. He further stated that the Working Group had had for consideration a large number of options and that it was important to try and reduce the options to two, which could be considered by the Working Group. He also stated that if a revision were to take place, it would be necessary to integrate these options into one workable proposal, which could be put forward to a future Diplomatic Conference. He stated that whilst there was some support for voluntary schemes, some scepticism had also been expressed about relying on such schemes as a permanent solution. The Chairman considered that besides the question of whether to adopt voluntary or legal arrangements there were other issues and concerns regarding the Conventions that could only be addressed through their revision.

7.20 In conclusion the Chairman stated that he believed that the debate had created sufficient momentum to keep the question of shipowners' liability under review for the next meeting of the Working Group in May 2004 when, hopefully, the results of the Director's study of the costs of oil spills would be available. He urged delegations to continue informal discussions in the meantime in order to achieve consensus, with a view to consolidating the various options or developing clear proposals regarding voluntary schemes.

Substandard transportation of oil and the right of the shipowner to limit liability

7.21 In introducing document 92FUND/WGR.3/19/7 the delegations of Canada and the United Kingdom stated that any review of the compensation regime should address the need to minimise the risk of pollution incidents without penalising well maintained vessels and responsible owners or detracting from the regime's main objective of ensuring prompt compensation to victims of oil pollution damage. Those delegations referred to the study of the international maritime insurance system being carried out by the Maritime Transport Committee of the Organisation for Economic Co-operation and Development (OECD) to establish whether, without prejudice to potential victims, it was feasible to remove insurance cover for substandard shipping, while still maintaining the necessary risk spreading coverage for the rest of the industry. The point was made that the outcome of the OECD study had a direct bearing on the work of the Working Group in so far as the operation of substandard tankers was likely to give rise to, or pose a risk of, claims for compensation under the 1992 Civil Liability and Fund Conventions and the Supplementary Fund Protocol. Those delegations stated that the compensation regime was never intended to provide a means of underwriting the consequences of incidents involving substandard tankers and that it would be unacceptable if the high levels of financial protection now available were to act as a safety net for failures to invest in ship safety and maintenance or to comply with international standards.

7.22 The sponsoring delegations proposed exploring how to introduce cost disincentives to deter substandard shipping whilst at the same time ensuring that operators of well-maintained tankers were not competitively disadvantaged. The point was made that whilst Port State Control inspections had resulted in the banning of substandard ships in some regions, their continuing operation in other parts of the world meant that pollution incidents would still occur, thus exposing the 1992 Fund to further calls to meet compensation payments. Those delegations called on the P&I Clubs to be more transparent as regards their practices in monitoring safety and management standards of ships and what disincentives, if any, were in place to deter substandard shipping. The sponsoring delegations proposed that in the light of the outcome of the OECD study which was expected to be finalised by April 2004, the Working Group should give consideration to introducing into the compensation Conventions a formula by which the level of liability of shipowners could be automatically increased in the case of an incident involving a

substandard tanker, thereby penalising low operating and maintenance standards and reducing any unjust financial burden on contributors to the 1992 Fund.

7.23 The French delegation introduced document 92FUND/WGR.3/19/8, which called for a review of the shipowner's right to limit liability and the role of the insurer in cases where the ship was in poor condition. The point was made that the existing compensation Conventions acted contrary to the other Conventions adopted by the International Maritime Organization in that far from encouraging the use of safe, quality shipping, they made it possible, by limiting liability of the shipowner, to restrict the financial risk involved in using substandard vessels. The French delegation recalled that previous discussions in the Working Group had established that there was no consensus in favour of a return to the provisions in the 1969 Civil Liability Convention that determined when a shipowner should be deprived the right to limit liability, or of extending the right of action against the charterer in the case of negligence. The French delegation therefore proposed that the Conventions be amended in such a way that the cost of pollution damage was borne by those using substandard ships, without imposing any additional burden on shipowners who promoted quality shipping, whilst at the same time ensuring the prompt compensation of victims. The French delegation noted that under the current regime the insurer had the right to revoke insurance cover in the event that the shipowner was not entitled to limit his liability. That delegation proposed two amendments to the liability regime, firstly that an exception should be made to a shipowner's right of limitation when the damage appeared to result from the structural condition of the ship and secondly that in such circumstances the insurer should continue to provide the necessary cover. The French delegation expressed the view that its proposal in respect of breaking a shipowner's right to limit liability was consistent with Article V.2 of the 1992 Civil Liability Convention. That delegation also proposed that the 1992 Fund should systematically take recourse actions against charterers following incidents caused by ships with structural defects.

7.24 The Japanese delegation introduced document 92FUND/WGR.3/19/12/Rev.1 which set out specific proposals for cases involving the Supplementary Fund whereby shipowners would bear some additional financial burden beyond the current limits under the 1992 Civil Liability Convention, which would contribute to promoting quality shipping and thereby reduce the risk of pollution damage. That delegation proposed that if an incident caused by a substandard ship were to result in compensation being paid by the Supplementary Fund, the owner of that ship should bear an additional liability to that under the 1992 Civil Liability Convention, either on the basis of a fixed amount or as a percentage of the compensation paid by the Supplementary Fund, whichever was the lower. The Japanese delegation proposed that the 1992 Civil Liability Convention be amended so as to impose this additional liability on the owners of ships registered or chartered by a receiver in a Contracting State of the Supplementary Fund Protocol. That delegation further proposed that in addition to increasing the liability of shipowners, receivers of oil after carriage in a substandard ship in a State where an incident occurred should make additional contributions to the Supplementary Fund, firstly for an amount equal to the shipowner's additional liability or the shipowner's liability in total and secondly for an amount calculated on the basis of the receivers share of oil received and against the net balance of compensation from the Supplementary Fund. The Japanese delegation proposed that in order to avoid difficulties in defining a 'substandard ship' or delays in paying compensation pending the establishment of whether or not a particular ship was substandard, all ships over a certain age, except those which were double-hulled or certified as CAP level 1 or 2, would be regarded as substandard for the purpose of imposing an increased financial burden on the shipowner and the oil receiver chartering the vessel.

7.25 The Working Group noted the proposal by OCIMF in paragraph 5.1 of document 92FUND/WGR.3/19/4 to amend the test of a shipowner's right to limit liability, for example by reverting to the 'fault or privity' test in the 1969 Civil Liability Convention, so as to ensure that the limit could be broken in cases where there was a demonstrable failure by the shipowner. It was noted that OCIMF further proposed that to avoid delays in compensation payments in cases where there was a dispute between a particular shipowner and the 1992 Fund on the issue of liability, the Fund should continue to pay compensation pending resolution of the dispute.

7.26 The observer delegation of the International Group of P&I Clubs introduced document 92FUND/WGR.3/19/10, which set out the measures taken by the Clubs in relation to substandard ships. The Working Group also took note of the information contained in document 92FUND/WGR.3/19/15, which described the specific measures taken to this effect by one P&I Club. The delegation of the International Group stated that one of the difficulties that the Clubs experienced was that information on ship inspections, such as those carried out by members of OCIMF, was, for legal reasons, confidential. That delegation stated that the Clubs were obtaining legal advice on the sharing of information on ship inspections and were also proposing the establishment of high level, joint industry group, which could include representatives of IMO and the IOPC Funds, to explore ways of developing a transparent system of improving ship standards. The point was made, however, that the Clubs could not be expected to police ship standards.

7.27 The Working Group noted the reasons set out in document 92FUND/WGR.3/19/9 submitted by the International Group of P&I Clubs as to why the Clubs opposed any amendment to the provisions relating to a shipowner's right to limit liability. It was noted that the Clubs considered that any weakening of a shipowner's right in this regard would result in the oil industry rarely contributing to the cost of compensation for pollution damage, which States might find politically unacceptable. It was also noted that the Clubs considered that the compensation system should not be used to punish the substandard operator, bearing in mind that shipowners with poor claims records already paid more by way of premium and that exposure to large claims fell randomly on all shipowners and should therefore be shared by the whole ship-owning community.

7.28 The Working Group noted the information contained in document 92FUND/WGR.19/13 submitted by the observer delegations of ICS and INTERTANKO. It was noted that, according to ICS and INTERTANKO, particularly damaging cargoes would in future only be carried in double hulled tankers, that single hulled tankers were being phased out at an accelerated pace and that tanker owners had invested some US$100 billion in double hulled tankers since the early nineties. It was further noted that in the view of those delegations, it was measures such as those above that influenced the quality of shipping services rather than changes in the liability regime and that it was inappropriate to lower the threshold for breaking a shipowner's right to limit liability as a means of trying to improve the overall quality of shipping, which was best dealt with through other international conventions.

7.29 A number of delegations stated that whilst they fully supported measures to eliminate substandard ships they doubted that the compensation Conventions were the appropriate instruments to bring about improvements in standards. They also pointed out that there were already regulations pertaining to eliminating substandard ships and that any definition of the term 'substandard' that was incorporated into the liability Conventions would become out of date by the time any new treaty came into force. The point was also made that if regulations adopted by IMO enabled older ships to continue to trade, it made no sense to increase the financial burden on the owners of such vessels.

7.30 Other delegations expressed the view that greater levels of liability for compensation would inevitably lead to enhanced responsibility on the part of shipowners, which would in turn lead to a reduction in the number of pollution incidents. The point was made that whilst many States had made considerable efforts to eliminate substandard tankers, the widespread ratification of the compensation Conventions meant that the 1992 Fund's exposure would remain if these vessels simply moved to other parts of the world. The point was also made that if insurance continued to be available to substandard tankers the costs of pollution would continue to fall on the contributors to the Fund, and that it would be preferable for insurance to be withdrawn before an incident occurred rather than after the event.

7.31 A number of delegations expressed interest in the proposal by the French delegation referred to in paragraph 7.23 but considered that further clarification was required with regard to what was meant by 'standards laid down by international conventions' and how the condition of a particular vessel could be established after an incident. One delegation expressed the view that the proposal by the French delegation had merit if the burden of proof relating to the condition of the vessel was shifted from the claimant to the shipowner. Several delegations expressed concerns, however,

in respect of the proposal that the exception should apply when the damage 'appeared to result' from the condition of the ship, since this would give rise to considerable uncertainty as to the scope of the exception. Some delegations doubted whether the exception from a shipowner's right to limit his liability proposed by the French delegation was in conformity with the current text of Article V.2 of the 1992 Civil Liability Convention and that any attempt to invoke such an exception could lead to different interpretations by national courts, thereby undermining the uniform application of the Convention.

7.32 Delegations representing the shipping and insurance industries pointed out that most major pollution incidents involved a degree of negligence even when the ships involved were of impeccable quality. Those delegations stated that it would be unrealistic for the insurers to cover unlimited liability in such cases.

7.33 In summing up the discussion the Chairman noted that some delegations had expressed a willingness to explore further the possibility of linking the issue of substandard transportation of oil within the legal framework of the compensation Conventions and an interest in the outcome of the study being carried out by OECD. He noted that other delegations remained sceptical about linking compensation with safety issues and had expressed the view that the complications that this would create could undermine what was a simple and effective regime, thereby slowing down compensation payments. He referred to the problems raised by the International Group of P&I Clubs relating to the sharing of information on ship inspections and suggested that Governments might be able to give assistance in this regard.

7.34 The Chairman stated that the documents presented needed reworking for the next meeting of the Working Group. He noted that there had been considerable interest in the proposals by the French delegation and that that delegation had agreed to take the various points raised by delegations into consideration with a view to producing a revised text.

8 Definition of 'ship'

8.1 The Working Group noted that the definition of 'ship' contained in Article I.1 of the 1992 Civil Liability Convention read as follows:

> *"Ship" means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.*

Previous consideration

8.2 The 2nd intersessional Working Group, set up by the Assembly at its 3rd extraordinary session held in April/May 1998, had concluded that an unladen tanker fell within the definition of 'ship' under Article I.1 of the 1992 Civil Liability Convention during any voyage after the carriage of a cargo of persistent oil, but fell outside the definition if it was proved that it had no residues of such cargo onboard. This conclusion had been endorsed by the 1992 Fund Assembly at its 5th session in October 2000 (document 92FUND/A.5/28, paragraph 23.2).

8.3 During the discussions on the issue of unladen tankers at the 2nd intersessional Working Group it had been acknowledged that any final decision regarding the interpretation of the Conventions rested with the national courts in Contracting States and that the 1992 Fund Assembly had decided that any remaining ambiguity in the definition of 'ship' in the 1992 Conventions should be considered by the 3rd intersessional Working Group as part of its review of the adequacy of the international compensation system.

8.4 The Working Group recalled that at its fifth meeting the delegation of the United Kingdom had proposed a revision of the definition of 'ship' in Article I.1 of the 1992 Civil Liability Convention,

in particular as regards the extent to which unladen tankers were covered by the Convention (cf document 92FUND/WGR.3/14/11).

8.5 The Working Group recalled that it had at its fifth session considered two possible options of amending the definition of 'ship' in the 1992 Civil Liability Convention to avoid ambiguity, namely

Option 1

To amend the 1992 Civil Liability Convention to the effect that:

(a) a dedicated oil tanker (ie a tanker capable of carrying persistent oil and non-persistent oil) was always a 'ship' for the purpose of the 1992 Civil Liability Convention; and

(b) that the proviso in the definition of 'ship' would apply only to vessels and craft capable of carrying oil, including non-persistent oil, and other cargoes.

Option 2

To remove the existing ambiguity by amending Article I.1 of the 1992 Civil Liability Convention which would result in a more effective application of the Fund's current policy.

8.6 It was recalled that the Working Group had accepted that the interpretation of the definition of 'ship' adopted by the Assembly could give rise to problems since the national courts might not accept this interpretation but that the 1992 Fund should maintain that policy as long as the 1992 Civil Liability Convention was not revised on this point. It was also agreed that if the Convention were to be revised, it would be appropriate to amend the definition of 'ship' so as to remove any ambiguity.

Consideration at the seventh meeting

8.7 The Working Group considered treaty texts for the two options referred to in paragraph 8.5 above which had been submitted by the delegations of Australia *et al* as set out in section 2 of document 92FUND/WGR.3/19/2 as follows.

Option 1

'Ship' means:

a) any sea-going vessel and seaborne craft of any type whatsoever which is constructed or adapted for the carriage of persistent or non-persistent oil in bulk as cargo; and

b) any sea-going vessel and seaborne craft of any type whatsoever which is actually carrying persistent oil in bulk as cargo or which is on any voyage following such carriage unless it is proved that it has no residues of such cargo of persistent oil in bulk aboard

Option 2

'Ship' means any sea going vessel and seaborne craft of any type whatsoever ~~constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of~~ actually carrying oil ~~and other cargoes shall be regarded as a ship only when it is carrying oil~~ in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such cargo of oil in bulk aboard.

8.8 A number of delegations favoured option 2 on the grounds that the compensation Conventions related solely to incidents involving ships engaged in the transportation of oil. The point was made that if option 1 were to be adopted, incidents involving spills of bunker fuel from chemical

tankers would be covered by the Conventions, which had never been the intention when the Conventions were drafted. The point was also made that option 1 would extend the cover of the Conventions to storage tankers, which would be in contradiction of the policy decision taken by the 1992 Fund Assembly.

8.9 A number of delegations favoured option 1, although some of those delegations considered that the definition as drafted in document 92FUND/WGR.3/19/2 was misleading in that it was not clear whether paragraphs a) and b) were intended to be cumulative or mutually exclusive.

8.10 Some delegations were not convinced of the need to amend the definition of 'ship'.

8.11 In his summing up of the discussion the Chairman said that whilst there appeared to be a preference for option 1, further discussion was required with a view to reaching a consensus on the appropriate scope of cover of the Conventions, which should be tied to the transportation of oil, following which a suitable definition could be drafted.

9 Tacit amendment procedures

9.1 The Working Group recalled that at its fifth meeting it had considered a proposal by the United Kingdom delegation (document 92FUND/WGR.3/14/13) to amend the tacit amendment procedure in the 1992 Conventions so as to allow an automatic revision of the Conventions' limits in accordance with a suitable formula that would trigger any increase. It was recalled that the United Kingdom delegation had argued that the time periods in the current tacit amendment procedures were too long from the point of view of maintaining realistic levels of compensation and also from the point of view of contributors to the Fund, who had a preference for regular, modest - rather than large, infrequent increases in the limits.

9.2 The Working Group considered the amendment to the tacit amendment procedures proposed by the delegations of Australia *et al* set out in section 3 of document 92FUND/WGR.3/19/2, which envisaged an automatic revision of the limits on a more regular basis along similar lines to the tacit amendment procedure contained in the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air under which the limits of liability were reviewed at five-year intervals. It was noted that reviews under that Convention were made by reference to an inflation factor based on the average annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the SDR, namely US dollar, pound sterling, Japanese yen and euro. It was further noted that any revision became effective six months after States Parties had been notified thereof unless a majority of States had registered their disapproval within three months after the notification.

9.3 The Working Group also considered a proposal by the delegations of Australia *et al* set out in section 4 of document 92FUND/WGR.3/19/2 that the tacit amendment procedures should be used also to address other issues, such as the introduction of administrative changes which could improve or solve problems relating to the operation of the 1992 Fund. It was noted that the sponsoring delegations had considered that the scope for adopting such procedures should be limited to those Articles of the 1992 Fund Convention that dealt with essentially technical matters, eg Article 18 (Functions of the Assembly), Article 20 (Quorum) and Article 29 (Functions of the Director).

9.4 There was considerable support for the proposal to amend the procedures for increasing the limits under the Convention so as to bring about more modest changes with shorter intervals so that the limits could be adjusted in line with inflation and to protect shipowners and contributors to the Fund from infrequent but large increases. Some delegations favoured the approach used in the 1999 Montreal Convention in that it stipulated how the limits should be revised, thus avoiding the need for political decisions. Other delegations preferred to follow the same procedure as the one in Article 24 of the Supplementary Fund Protocol, which was modelled on Article 33 of the final clauses in the 1992 Fund Convention but with considerably shorter time periods for the various steps leading to such increases.

9.5 In his summing up the Chairman concluded that there was general support for the proposal that the tacit amendment procedure should be amended so as to allow more frequent but modest increases in the limits and that the Montreal Convention might provide an appropriate model for a more automatic system.

9.6 A number of delegations stated that whilst the proposal to introduce tacit amendment procedures in respect of administrative matters was worthy of further consideration, caution was required to ensure that any changes in this regard were consistent with international law. The point was made that the tacit amendment procedure had been developed as an innovative way of ensuring that the effects of inflation on costs and advances in technological development could be accommodated in international treaties. It was pointed out that the extension of the tacit amendment procedure to administrative matters could affect the constitution of the Funds. Some delegations considered that any widening of the scope of tacit amendment procedures could result in adverse changes in relationships between Member States.

9.7 Some delegations referred to the specific problem already faced by the 1992 Fund's governing bodies in trying to achieve a quorum, which was likely to become increasingly acute as more States joined the Fund. Those delegations considered that there was a need to balance the desirability of the governing bodies maintaining their truly international nature and at the same time ensure that they were not paralysed due to the lack of a quorum. One delegation suggested that the tacit amendment procedure was not the appropriate way of dealing with the quorum because the changes might not be timely enough to keep pace with the growing membership of the Fund. That delegation suggested that the specific problem regarding a quorum required its own solution.

9.8 In his summing up the Chairman stated that Articles 18 and 29 related to constitutional features of the 1992 Fund Convention and that there appeared to be unease within the Working Group of applying tacit amendment procedures to them. He noted, however, that the issue of a quorum (Article 20) was a serious one, particularly if the lack of a quorum were to ever prevent the Fund from dealing with a major pollution incident, and that this issue therefore needed further consideration in order to find a lasting solution.

10 Refinement of the contribution system

10.1 The Working Group took note of the information contained in document 92FUND/WGR.3/19/5 submitted by the Netherlands delegation and document 92FUND/WGR.3/19/16 presented by the observer delegation of the Federation of European Tank Storage Associations (FETSA) which called for a refinement of the 1992 Fund's contribution system to take into account the particular problem faced by oil storage companies who had no interest in the oil received, other than providing temporary storage, but had difficulties in charging their principals for any post-event levy and therefore had to pay contributions to the 1992 Fund out of their own pockets.

10.2 It was suggested by these delegations that the problems faced by independent storage companies might get worse with the adoption of the Supplementary Fund Protocol due to the greatly enhanced levies that could be required for that Fund. The Working Group noted that the Netherlands delegation proposed incorporating into a revised version of the 1992 Fund Convention two provisions contained in the 1996 HNS Convention, one relating to the concept of 'receiver' and the other relating to the definition of 'contributing oil'. The Working Group noted that the Netherlands delegation had submitted concrete proposals for changes to Article 1 of the 1992 Fund Convention to this effect.

10.3 It was noted that the first Netherlands proposal would give the storage companies, under certain conditions, the possibility to pass the levy to their principals, provided that these were located in a State Party to the Fund Convention. It was also noted that the second proposal would result in oil which was transferred directly, or through a port or terminal, from one ship to another, in the course of carriage from the port or terminal of original loading to the port or terminal of final destination being considered as contributing oil only in respect of receipt at the final destination.

10.4 The Working Group noted the information provided by FETSA regarding the changes that had taken place in the tank storage industry, in particular the nature of its client base, which was now focused on large, globally operating principals. It was noted that according to the Netherlands delegation and FETSA a rearrangement of the funding as proposed by the Netherlands delegation would not affect the volume of contributing cargo received or the levying of contributions to the 1992 Fund.

10.5 It was recalled that the issue of refinement of the contribution system had been discussed previously within the IOPC Funds, most recently by the Working Group at its fifth meeting (document 92FUND/A/ES.7/6, section 8).

10.6 Due to lack of time the proposal by the Netherlands delegation was not discussed. It was agreed therefore that this issue should be considered as a matter of priority at the next session of the Working Group.

11 Future work

11.1 The Working Group noted that, due to lack of time, it had not been possible to address the following matters which had been addressed in documents presented to the present meeting, in particular:

(a) refinement of the contribution system (documents 92FUND/WGR.3/19/5 and 92FUND/WGR.3/19/16);

(b) submission of oil reports and payment of contributions (document 92FUND/WGR.3/19/2, section 5);

(c) compulsory insurance for ships carrying less than 2000 tonnes of oil in bulk as cargo (document 92FUND/WGR.3/19/2, section 6);

(d) merger of the Civil Liability Convention and the Fund Convention into one single Convention (document 92FUND/WGR.3/19/2, section 7);

(e) deletion of the six year time bar period in the 1992 Conventions (document 92FUND/WGR.3/19/6);

(f) minimum entrance fee to the Fund (document 92FUND/WGR.3/19/11, section 3.2).

11.2 The Working Group agreed with the Chairman's proposal that consideration of these matters should be deferred to the next meeting of the Working Group, which was planned for the week of 24 May 2004, and that priority should be given to their consideration at that meeting.

11.3 The Chairman noted that the results of two relevant studies were expected to have been made available by the date of the next meeting, ie that by the Director on the costs of oil spills and that by an OECD Working Group on substandard shipping.

11.4 The Chairman indicated that in his view there were three areas which should be actively explored by delegations before the next meeting, ie:

(a) issues relating to the total compensation package, where delegations should work together to reduce the current options from six to two and to propose appropriate treaty texts;

(b) possible amendments to the 1992 Conventions intended to deter substandard oil transportation, where delegations should explore the possibilities further with the aim of proposing treaty texts, subject to any proposals not being to the detriment of claimants; and

(c) proposals for voluntary schemes on sharing of costs of oil spills, which might include proposals relating to substandard oil transportation.

11.5 The Chairman noted that the first two issues were primarily issues for government delegations to pursue whilst the third was primarily a matter for industry delegations.

11.6 The Working Group agreed with the Chairman's proposal that the agenda for the next meeting should include the following issues:

(a) the outstanding issues listed in paragraph 11.1;

(b) more precise proposals, preferably in the form of treaty texts, relating to the total compensation package, indicating how any revised regime would operate in relation to the existing regime under the 1992 Conventions;

(c) concrete proposals, in the form of treaty texts, on the issue of substandard shipping;

(d) proposals by industry delegations for voluntary schemes to address issues relating to the sharing of costs of oil spills and substandard oil transportation.

11.7 The Chairman made the point that a large proportion of the documents presented to this meeting of the Working Group had been submitted after the three-week deadline which had been fixed by the Assembly at its October 2002 session and that, in order to enable delegations to prepare for the meetings and for the discussions to be productive, it was essential that documents were received in time to enable the Secretariat to distribute them in all the working languages of the 1992 Fund.

11.8 A number of delegations expressed the view that the authors of documents should ensure that they abide by the deadline for the submission of documents. However, it was recognised that, although the goal should be to present treaty texts, this might not be possible in view of the short interval between the February and May 2004 meetings.

11.9 It was noted that it was the Director's intention to convene sessions of the 1992 Fund Executive Committee and the 1971 Fund Administrative Council during week of 24 May 2004 to consider incident-related issues, as well as an extraordinary session of the 1992 Fund Assembly to deal with the preparations for the entry into force of the 2003 Supplementary Fund Protocol.

11.10 Some delegations stated that sufficient time should be allocated during the meeting week in May 2004 for the meeting of the Working Group. These delegations noted that, as a result of the consideration of urgent issues relating to incidents, the time allocated to the current meeting of the Working Group had had to be curtailed, so that it had not been possible to consider all the documents that had been submitted, and this had also occurred at previous meetings of the Working Group.

11.11 The question was raised as to whether it would be possible to have an additional meeting of the Working Group later in 2004. It was agreed that it would not be practicable to hold such a meeting before the summer and that there would be insufficient time available during the October 2004 sessions of the Funds' governing bodies. Depending on the date of entry into force of the Supplementary Fund Protocol, it was suggested that it might be possible to hold an additional meeting of the Working Group later in the year in conjunction with the first Assembly of the Supplementary Fund, which would have to be held within 30 days of the entry into force of the Protocol.

11.12 The question was also raised as to whether it would be possible for the Working Group to meet simultaneously and in parallel with the governing bodies. It was generally considered, however, that this would cause serious problems for a number of delegations.

11.13 One delegation suggested that the Director should prepare a questionnaire to Governments and to observer delegations to identify which modifications to the 1992 Conventions were considered desirable, a procedure frequently used in other organisations. The Working Group considered, however, that this would not be practicable at this stage.
