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THIRD INTERSESSIONAL WORKING GROUP

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REPORT ON THE EIGHTH MEETING OF THE THIRD INTERSESSIONAL WORKING GROUP

REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

Note by the Director

Summary:	See Executive Summary
Action to be taken:	Information to be noted

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EXECUTIVE SUMMARY

Mandate

The Working Group set up by the 1992 Fund Assembly in April 2000 held a meeting in May 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 May 2004

Study of the costs of spills in relation to 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 past, current and future limitation amounts of the relevant Conventions (1969 Civil Liability Convention and 1971 Fund Convention and 1992 Civil Liability and Fund Conventions) and the voluntary industry schemes (TOVALOP and CRISTAL). The study had shown that on the basis of the financial limits of the applicable compensation regime the shipping industry had contributed 45% and oil cargo interests 55% of the total costs of 5 802 incidents that had occurred world-wide (except in the United States of America) in the 25-year period 1978 – 2002. The study had also shown that the sharing of the financial burden varied considerably with different size ranges of ships, with oil cargo interests contributing considerably more to the costs of incidents involving ships up to 20 000 gross tonnes, an equal sharing of the costs between oil cargo interests and the shipping industry in respect of incidents involving ships between 20 000 and 80 000 gross tonnes, and the shipping industry contributing considerably more to the costs of incidents involving ships greater than 80 000 gross tonnes. When the costs of past incidents were inflated to 2002 and predicted 2012 monetary values the relative contribution of oil cargo interests to the costs of oil spills increased considerably.

A number of delegations stated that the results of the study were very helpful in the context of the ongoing discussions regarding the sharing of the financial burden between the two sectors, but cautioned against drawing any firm conclusions regarding future costs on the basis of inflation, since this was a hypothetical exercise that did not take into account other factors affecting costs, including the various initiatives aimed at reducing pollution incidents. Other delegations drew attention to the clear imbalance in the sharing of the financial burden in respect of smaller ships and stated that this, together with the further imbalance that would arise as a result of the Supplementary Fund Protocol, meant that the initiatives of the shipping

industry to increase the financial limit for small ships and/or to contribute to payments made by the Supplementary Fund would help to redress the balance.

General discussion as to whether or not the 1992 Conventions should be revised (Section 7)

The Working Group took note of the views expressed in documents submitted by the delegations of Greece and the Republic of Korea. The Greek delegation considered that no sufficient case had been made for revising the 1992 Conventions and that voluntary schemes offered a more effective way of ensuring that an equitable sharing of the financial burden of oil spills was maintained. The Korean delegation, whilst opposed to any changes to the current limits of the 1992 Civil Liability Convention and the 1992 Fund Convention, was prepared to consider all other proposed changes to the Conventions.

The Working Group noted the information contained in a document submitted by the International Group of P&I Clubs observer delegation and in particular the statement that the Clubs were prepared to recommend to their Boards that the Clubs, on behalf of their shipowner members, should enter into a permanent, contractually binding agreement with the IOPC Funds to share equally the financial burden imposed by the Supplementary Fund Protocol. That delegation also stated that the Clubs were not opposed to a revision of the Conventions in the longer term.

The Working Group noted that documents submitted by France and Spain, by Italy, by Australia, Canada, Finland, New Zealand, Portugal and the United Kingdom, by Italy, Portugal and the United Kingdom and by Japan contained specific proposals requiring the revision of the Conventions and the Working Group considered these proposals in detail during the meeting (see below).

Some delegations stated that none of the proposals for revision would result in more compensation becoming available to victims of pollution damage, that the only issues that needed to be resolved were the sharing of the financial burden between the shipping industry and oil cargo interests and the problem of substandard shipping and that both these issues were best addressed through industry initiatives.

Other delegations expressed the view that although the Conventions had worked well in the past, there were serious deficiencies that went beyond financial considerations and the sharing of the financial burden, such as the need to ensure a quorum at meetings of the Fund's governing bodies, an effective means of enforcing oil reporting requirements and the uniform application of the Conventions. Those delegations therefore considered that a revision of the system was necessary and urgent. The point was also made that liability and compensation for oil pollution damage were matters of important policy considerations, which had to be governed by legislation.

In his summing up the Chairman noted that the Working Group remained divided on the need for a revision of the 1992 Conventions, although there was overwhelming support for protecting the system and maintaining its fundamental objectives. He stated that a balance had to be achieved between making sufficient adjustments for the system to survive whilst at the same time keeping the regime as attractive as possible to most of the membership. He noted that some delegations had expressed the view that the current weaknesses in the system could be addressed through voluntary industry arrangements, whilst others had maintained that there were some issues that could only be resolved through changes to the Conventions.

Shipowners' liability and related issues (Section 8)

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

The Working Group considered two options for revising the level of the shipowners' limitation amount put forward by the delegations of Australia, Canada, Finland, New Zealand, Portugal and the United Kingdom. The first option envisaged an increase in the level of shipowner liability for smaller ships as well as shipowner liability to contribute to the Supplementary Fund. The second option envisaged shipowners paying compensation up to a fixed amount irrespective of the size of the ship, beyond which there would be a shared liability between shipowners and oil cargo interests up to the maximum amount

available under the 1992 Fund Convention, but with no financial involvement of the shipowner in the Supplementary Fund.

Some delegations stated a preference for the first option on the grounds that it closely resembled the current regime, would only require amendment to the 1992 Civil Liability Convention and the Supplementary Fund Protocol, was consistent with the findings of the cost study and was compatible with the proposed voluntary schemes.

Other delegations stated a preference for the second option on the grounds that under the first option shipowners would be largely subsidising the Supplementary Fund, that contributors to the 1992 Fund would get little benefit and that provided the first layer of compensation to be borne solely by the shipowner was not set at too high a level, would have the benefit of involving the 1992 Fund in the assessment and settlement of claims thereby contributing to the uniform application of the Conventions.

In his summing up the Chairman noted that the Working Group appeared to be evenly divided on the two options and recommended the co-sponsors of the proposals to reduce the options to one in the light of the views expressed in the discussion.

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

The Working Group considered proposals for dealing with the substandard transportation of oil in documents submitted by the delegation of Japan, by the delegations of Italy, Portugal and the United Kingdom and by the delegations of France and Spain.

The Japanese delegation proposed two options, one which provided a disincentive to registered owners, and the other a disincentive to both registered owners and oil receivers, to use 'a certain category of ship', which would be defined on the basis of objective criteria, for example, a ship over a particular age, except a ship which was double hulled or certified as level 1 or 2 in the Condition Assessment Programme. The first option envisaged increasing the limit of liability of an owner of such a ship whilst the second option, in addition to increasing the limit of the shipowner's liability, would introduce a new financial burden on those involved in the transportation of oil in such ships, ie individual cargo owners, who would be required to pay contributions to the 1992 Fund and the Supplementary Fund.

The proposals by the delegations of Italy, Portugal and Spain were also intended to provide disincentives for the operation of ships that should no longer be trading by means of extra layers of compensation payable by those using such ships. Again, two options were put forward, both of which involved an increase in the shipowner's limit of liability when pollution damage arose as a result of an oil tanker 'defect' or 'deficiency', and that above this, an amount equal to the extra liability of the shipowner would be levied against the individual cargo receiver in the Contracting State in addition to his normal contributions to the 1992 Fund. Both options also envisaged contributions by the shipowner and the individual cargo receiver to the Supplementary Fund.

A number of delegations expressed support in principle for the Japanese delegation's first option in that it promoted quality shipping, but some expressed concern that if shipowners could obtain the necessary insurance cover for such risks this might act as a disincentive to maintain ships to a high standard.

Other delegations reiterated their opposition to the idea of using the compensation Conventions as a means of promoting quality shipping and drew attention to the potential difficulties that would arise if a ship was categorised as substandard according to criteria laid down in the Conventions, but was at the same time in full compliance with standards laid down in MARPOL.

The Working Group considered a proposal by the delegations of France and Spain, which had approached the issue of promoting quality shipping by focusing on incidents that had resulted from structural defects of ships, which they had defined as a 'defect due to decay or lack of maintenance of a ship, which in part or in whole had contributed to an incident'. The sponsoring delegations had put forward two options regarding the application of Article V.2 of the 1992 Civil Liability Convention governing the shipowner's right to limit liability, one based on the current text of the Convention whereby the burden of proof that an

incident was due to a structural defect lay with the claimant, and an alternative text in which the burden of proof that an incident was not due to a structural defect was placed on the shipowner. The sponsoring delegations had also proposed an amendment to Article VII.8 of the 1992 Civil Liability Convention, which would prevent an insurer from limiting his liability when an incident was caused by a structural defect of the insured vessel.

A number of delegations expressed doubts about the viability of the proposal on the grounds of the legal difficulties that would be faced in proving that an incident was caused by a structural defect, lack of compatibility with other liability Conventions that might apply to the same incident and lack of incentive to promote quality shipping if insurers continued to spread the financial risks.

Some delegations considered that the proposal deserved further consideration since it was important that all options be considered that might lead to an effective means of holding shipowners accountable for inappropriate behaviour.

Cargo owner liability

The Working Group considered a proposal by the Italian delegation to establish an additional tier of compensation by imposing a liability on cargo owners. The proposal envisaged that a cargo owner, as identified through the bill of lading, would be required to insure his liability and that a ship would be required to carry a certificate attesting such insurance, which would cover the cargo from the loading port to the discharge port even if the cargo were to be sold during a voyage.

The Italian delegation stated that it could accept, as an alternative to its own proposal, one that imposed a liability on the charterers of substandard ships, as proposed by other delegations.

Definition of 'ship' (Section 9)

The Working Group considered a proposal by the delegations of Australia, Canada, Italy, New Zealand and the United Kingdom to amend the definition of 'ship' in the 1992 Civil Liability Convention. Under that proposal the Conventions would apply to pollution damage caused by bunker fuel of dedicated tankers irrespective of whether or not they had residues of cargo onboard. As regards other vessels the Conventions would, under the proposal, only apply to pollution damage caused by bunker fuel if the vessels were carrying 'oil' as defined by Article I.5 of the 1992 Civil Liability Convention by sea as cargo or during subsequent voyages by sea, provided that they had residues of such oil onboard.

All delegations that intervened in the discussion agreed that there was a need to amend the definition of 'ship' in order to remove the ambiguity in the current definition. Most delegations could not agree to the text proposed by the co-sponsors, largely due to the fact that there remained disagreement as to what the scope of the definition should be, some delegations preferring a wide definition with the proviso relating to unladen vessels applying only to combination carriers, and other delegations favouring a restrictive definition with the proviso applying to all vessels, including dedicated oil tankers.

Tacit amendment procedure (Section 10)

The Working Group considered two options for amending the tacit amendment procedure in respect of the financial limits of the 1992 Conventions proposed by the delegations Australia, Canada, Italy, New Zealand and the United Kingdom.

The first option was based on the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air (1999 Montreal Convention), which provided for modest, but regular increases of the limits of liability in the form of a five-yearly review on the basis of inflation in those States whose currencies comprised the Special Drawing Right. The second option was to adopt the same provisions as contained in the Supplementary Fund Protocol, whereby the overall time period which would elapse before any proposal to amend the limits could enter into force was reduced from 11 years, currently provided under the 1992 Conventions, to 8 years.

Most delegations that intervened considered that the tacit amendment procedure should be amended if the 1992 Conventions were to be revised. Some delegations preferred the first option on the grounds that it provided for regular and automatic increases and was therefore more predictable. Other delegations indicated a preference for the second option since it would be compatible with the provisions of the Supplementary Fund Protocol, whilst one delegation suggested that there might be merit in considering a third option based on the procedure under the 1999 Montreal Convention, but adapted to suit the particular needs of the 1992 Fund.

Refinement of the contribution system (Section 11)

The problems faced by oil storage companies

The Working Group considered 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 on to their principals. 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.

A number of delegations supported in principle the proposal to amend the definition of receiver in line with the HNS Convention, which in their view was more equitable. Other delegations were opposed to the proposal, arguing that the HNS Convention was a special case and that the contribution system under the HNS Convention had yet to be proven to be workable compared with the simpler and well tried and tested system operated by the 1971 and 1992 Funds. The point was made that a commercial solution between the storage companies and their principals was the ideal solution, although it was recognised that there were practical obstacles to such a solution due to the long time period between the oil being passed on from the storage company to the principal and the Fund levying contributions.

There was little support for amending the definition of 'contributing oil' so as to exempt oil received after transfer directly or via shore-based terminals from one ship to another from the contribution system.

Minimum annual contribution to the 1992 Fund

The Working Group considered a proposal by the delegations of Canada, Italy and Spain that all Member States should be required to pay a minimum annual contribution to the 1992 Fund based either on a minimum deemed quantity of contributing oil (ie on the same basis as such a fee would be payable to the Supplementary Fund) or on a fixed percentage of the total financial burden on the Fund.

A number of delegations expressed reservations about burdening small countries with such contributions, but stated that they could accept the proposal provided that the amounts involved were very small. Other delegations were opposed to the proposal, arguing that small countries contributed indirectly to the 1992 Fund as a result of major contributors passing on the costs of their contributions through sales of oil products in those countries.

Non-submission of oil reports (Section 12)

The Working Group considered a proposal by the delegations of Canada and the United Kingdom to include in a revised 1992 Fund Convention provisions corresponding to Article 15 of the Supplementary Fund Protocol, which required States to report in cases where there were no persons liable to pay contributions, denied compensation payments in respect of a Member State until oil reports had been submitted and denied compensation in respect of an incident if a Member State failed to submit the reports within one year of notification of failure to report.

The majority of delegations supported the proposal in principle, although some questioned whether the

text of Article 15 was sufficiently firm in dealing with Member States that had never submitted oil reports, pointing out that it did not preclude a Member State waiting until it had suffered an incident before submitting all its reports.

Two delegations expressed reservations about the proposals on the grounds that the proposed sanctions would largely affect innocent victims rather than those responsible for submitting oil reports. In their view, the reasons for a State having failed to submit oil reports should be taken into account when the Assembly took a decision as to whether to deny compensation. They considered that alternative sanctions were required such as suspension of Member States' rights to participate in Fund meetings, levying fines and denying compensation to government agencies that had undertaken clean-up and preventive measures.

Compulsory insurance (Section 13)

The Working Group considered a proposal by the delegations of Australia, Canada, Italy, New Zealand and the United Kingdom that all vessels that carried oil in bulk as cargo should be required to maintain insurance or other financial security in accordance with Article VII.1 of the 1992 Civil Liability, ie that the exemption for ships carrying less than 2 000 tonnes of oil should no longer apply.

There was considerable support for widening the compulsory insurance obligation to include all vessels carrying oil in bulk as cargo, since experience had shown that vessels carrying less than 2 000 tonnes of oil were capable of causing serious pollution damage and that the IOPC Funds had on a number of occasions been the only source of compensation as a result of the shipowner having had neither the insurance cover nor the financial capability to pay claims.

Quorum for meetings of the 1992 Fund Assembly (Section 14)

The Working Group considered a proposal by the delegations of Australia, Canada, Italy, New Zealand, Portugal and the United Kingdom to amend Article 20 of the 1992 Fund Convention to address the problem faced by the Assembly in obtaining a quorum. The sponsoring delegations made the point that the proposal sought to ensure that there was an element of balance by requiring the active participation of States with large and those with small contributions, with neither group being able to achieve a quorum on its own.

A number of delegations supported the proposal in principle, but expressed reservations about the precise wording of the proposed provisions. Opinion was divided on whether, for the purpose of achieving a quorum, it was appropriate to create different categories of Member States based on quantities of contributing oil received. The point was made that the proposed criteria could make it possible for groups of countries to hold an Assembly in a particular region of the world without the participation of others.

Other issues (Section 15)

Merging of the Conventions

The Working Group recalled a previous proposal by the delegations of Australia, Canada, France, Italy, Netherlands, New Zealand, the Russian Federation and the United Kingdom to merge the 1992 Civil Liability Convention and the 1992 Fund Convention into a single Convention in order to facilitate the ratification process, provide greater scope for ensuring uniform application and simplify treaty law issues when the regime was revised. The sponsoring delegations requested other delegations to assist them in preparing a joint document for consideration by the Working Group at its ninth meeting.

Treaty law issues

The Working Group noted that the Director had in various documents submitted to previous meetings of the Group raised a number of treaty law issues and that further documents would be submitted on these issues if it were decided that the 1992 Conventions should be revised.

Future work (Section 16)

The Chairman stated that in view of the divided opinion on whether or not the 1992 Conventions should be revised, he believed that more time was needed to enable new proposals to be put forward and for consultations to take place between those States in favour of a revision and those that were not.

It was decided that the next meeting of the Working Group would take place in February 2005.

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 eighth meeting from 25 to 28 May 2004 under the Chairmanship of Mr Alfred Popp QC (Canada).

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 eighth meeting:

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

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

Albania	Ecuador	Peru
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:
European Commission
International Maritime Organization (IMO)
International Oil Pollution Compensation Fund 1971

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

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

92FUND/WGR.3/22/19	List of previous documents (Director)
92FUND/WGR.3/22	Study of the costs of spills in relation to past, current and future limitation amounts of the 1992 Conventions (Director)
92FUND/WGR.3/22/1	Revision of the 1992 Conventions (Greece)
92FUND/WGR.3/22/2	Promotion of quality shipping (France and Spain)
92FUND/WGR.3/22/3	Contracts involved in the carriage of cargo by sea (OCIMF)
92FUND/WGR.3/22/4	Introduction of a third tier of liability for cargo owners (Italy)
92FUND/WGR.3/22/5	The role of SIRE in the vetting of tankers (OCIMF)
92FUND/WGR.3/22/6	Compulsory insurance and its application to ships carrying less than 2 000 tonnes of oil cargo (Australia, Canada, Italy, New Zealand and the United Kingdom)
92FUND/WGR.3/22/7	Achieving a quorum for meetings of the 1992 Fund Assembly (Australia, Canada, Italy, New Zealand, Portugal and the United Kingdom)
92FUND/WGR.3/22/8	Amendment of the tacit amendment procedure for increasing the financial limits under the 1992 Conventions (Australia, Canada, Italy, New Zealand and the United Kingdom)
92FUND/WGR.3/22/9	Amendment of the shipowners' liability (Australia, Canada, Finland, New Zealand, Portugal and the United Kingdom)
92FUND/WGR.3/22/10	Amendment of the definition of 'ship' (Australia, Canada, Italy, New Zealand and the United Kingdom)
92FUND/WGR.3/22/11	Joint industry discussions on the sharing of costs of oil spills and initiatives relating to the sub-standard transportation of oil (International Group of P&I Clubs, ICS, INTERTANKO, and OCIMF)

92FUND/WGR.3/22/12	Disincentives for the use of deficient oil tankers (Italy, Portugal and the United Kingdom)
92FUND/WGR.3/22/13	Proposals by the International Group of P&I Clubs in respect of the sharing of the burden of compensation and substandard shipping (International Group of P&I Clubs)
92FUND/WGR.3/22/14	Amendment of the contribution system (Canada, Italy and Spain)
92FUND/WGR.3/22/15	Requirement that oil reports and contributions must be submitted within a reasonable time so as to maintain coverage under the regime (Canada and the United Kingdom)
92FUND/WGR.3/22/16	Introduction of a mechanism to promote quality shipping (Japan)
92FUND/WGR.3/22/17	Increase in the limitation amounts under the 1992 Civil Liability and 1992 Fund Conventions (Republic of Korea)
92FUND/WGR.3/22/18	Various issues of a treaty law nature (Director)

4.2 During the discussions reference was made to the Working Group's Reports on its second, third, fourth, fifth and seventh[<1>] meetings (documents 92FUND/A.6/4 (cf 92FUND/WGR.3/9), 92FUND/A.7/4 (cf 92FUND/WGR.3/12), 92FUND/A/ES.7/6 (cf 92FUND/WGR.3/15) and 92FUND/A.9/5 (92FUND/WGR.3/20)). As regards the documents submitted to these meetings, reference is made to these reports.

5 Issues considered at the Working Group's eighth 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 General discussion on whether or not the 1992 Conventions should be revised.

3 Shipowners' liability and related issues:

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

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

(a) definition of 'ship';
(b) quorum requirements for the Assembly;
(c) tacit amendment procedure;
(d) refinement of the contribution system;
(e) non-submission of oil reports.

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.3/22 submitted by the Director, which set out the findings of his study of the costs of pollution damage

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[<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.

in respect of 5 802 incidents that occurred world-wide (except for the United States of America) in the 25-year period 1978 - 2002.

6.2 It was noted that on the basis of the financial limits of the relevant Conventions (1969 Civil Liability and 1971 Fund Conventions and 1992 Civil Liability and Fund Conventions) and/or the voluntary schemes (TOVALOP and CRISTAL)[<1>], including reimbursements made by shipowners to parties to CRISTAL that made contributions to 1971 Fund incidents, the shipping industry and oil cargo interests had contributed 45% and 55% of the total costs respectively. It was further noted that when payments by the shipping industry to the 1971 and 1992 Funds and to third parties (governments and private claimants) as a result of recourse actions were taken into account, the sharing of the financial burden between the shipping industry and oil cargo interests was found to be 53% and 47% respectively.

6.3 It was also noted that the sharing of the financial burden varied considerably with different size ranges of ships. For ships up to 5 000 gross tonnes, the shipping industry had contributed 37% and oil cargo interests 63% of the total costs of 1 275 incidents on the basis of payments made within the financial limits of the relevant Conventions and/or voluntary schemes. For ships in the size range 5 000 – 20 000 gross tonnes the shipping industry had contributed only 16% of the costs of 1 127 incidents. Even after successful recourse actions against shipowners by the 1971 and 1992 Funds were taken into account, the shipping industry had only contributed 39% of the total costs for incidents involving ships in this size range. In contrast, there was a 50:50 sharing of the financial burden between the shipping industry and oil cargo interests for incidents involving ships in the size range 20 000 and 80 000 gross tonnes both before and after the effects of recourse actions were taken into account. As regards ships in the size range between 80 000 and 140 000 gross tonnes, the shipping industry and oil cargo interests had paid 79% and 21% respectively, and for those over 140 000 gross tonnes the sharing of the financial burden between the shipping industry and oil cargo interests was 95% and 5% respectively.

6.4 The Working Group noted that when the costs of all 5 800 incidents were inflated to 2002 monetary values the total cost would be some US$6 584 million. On the basis of the existing financial limits under the 1992 Conventions, which had become effective on 1 November 2003, and the Supplementary Fund Protocol, the 1992 Fund would only have been required to pay compensation in respect of 50 incidents and the Supplementary Fund would only have been liable to pay compensation in respect of six incidents. The oil cargo interests and the shipping industry would have contributed 57% and 43% of the total costs respectively. If the anticipated full admissible costs of the *Erika* and *Prestige* incidents were taken into account, the total costs would be in the region of US$7 480 million and the contributions by oil cargo interests and the shipping industry would become 62% and 38% respectively.

6.5 It was finally noted that when the costs of all incidents, including the anticipated full admissible costs of the *Erika* and *Prestige* incidents, were inflated to predicted monetary values in 2012 the total costs would be some US$12 031 million. On the basis of the existing financial limits under the 1992 Conventions and the Supplementary Fund Protocol, the 1992 Fund would have been required to pay compensation in respect of 61 incidents and the Supplementary Fund would only have been liable to pay compensation in respect of eight incidents. The oil cargo interests and the shipping industry would have contributed 68% and 32% of the total costs respectively.

6.6 A number of delegations stated that the results of the cost study were very helpful in the context of the ongoing discussions regarding the sharing of the financial burden between the shipping

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[<1>] The Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) and the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL), which were broadly similar in scope to the 1969 Civil Liability Convention and the 1971 Fund Convention respectively, were introduced by the shipping and oil industries prior to the entry into force of those Conventions. In 1987 the voluntary schemes were amended to introduce levels of compensation similar to those available under the 1984 (subsequently the 1992) Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention (cf document 92FUND/WGR.3//22, section 2)

industry and oil cargo interests, but cautioned against drawing any firm conclusions regarding future costs on the basis of inflation, since this was a hypothetical exercise that did not take into account other factors affecting costs including the various initiatives aimed at reducing pollution incidents.

6.7 Other delegations drew attention to the clear imbalance in the sharing of the financial burden in respect of smaller ships that the study had highlighted and stated that this, together with the further imbalance that would arise as a result of the Supplementary Fund Protocol, meant that the initiatives of the shipping industry to increase the financial limit for small ships[<2>] and/or to contribute to payments made by the Supplementary Fund would help to redress the balance.

6.8 In his summing up the Chairman thanked the Director for the report of the study, which provided a useful tool for the Working Group in its deliberations. He noted that a number of delegations had made the point that such studies should be undertaken on a more regular basis in future.

7 General discussion on whether or not the 1992 Conventions should be revised

7.1 The Working Group took note of the views expressed by the Greek delegation in document 92FUND/WGR.22/1 that no sufficient case had been made for revising the 1992 Conventions, that the intended benefits were unlikely to materialise, and that they did not justify the risks of undermining the current widespread and very successful system. It was noted that the Greek delegation considered that voluntary industry schemes offered a more effective way of ensuring that an equitable sharing of the financial burden of oil spills was maintained.

7.2 It was noted that the Greek delegation was also opposed to any return to the less strict test for breaking the shipowner's right of limitation under the 1969 Civil Liability Convention on the grounds that it was necessary for the 1992 Conventions to remain consistent with other liability Conventions and that reverting to the 1969 test in respect of the shipowner would be valueless unless the shipowner's insurer's right of limitation was also removed.

7.3 It was also noted that the Greek delegation did not support using the 1992 Conventions as a means of reducing oil pollution incidents, since in the view of that delegation this could not be achieved within the compensation regime but rather there should be a focus on all causes of marine casualties through the further development and enforcement of SOLAS and MARPOL. It was finally noted that the Greek delegation was of the view that if the 1992 Civil Liability Convention were to be revised with the aim of providing incentives for higher standards of shipping, the focus should be on the charterers of substandard ships by means of an additional tier of liability in respect of such charterers, backed by compulsory insurance, and/or enhanced contributions to be paid to the 1992 Fund and the Supplementary Fund by receivers of heavy fuel oil.

7.4 The Working Group noted the views expressed by the delegation of the Republic of Korea in document 92FUND/WGR.3/22/17. It was noted that whilst that delegation opposed any changes in the current limits of the 1992 Civil Liability and 1992 Fund Conventions, it was prepared to consider all other proposed changes to the Conventions. The Korean delegation made the point that there was already inequality and inequity in the 1992 Fund contributing system between developed and developing countries in that contributions were calculated on an equal basis for all States but the amounts of compensation paid differed according to the level of economic development of the respective State, including developing countries. That delegation further stated that the Supplementary Fund would provide protection for developed countries, but that if the 1992 Fund limit were to be increased, thereby reducing the amount covered by the Supplementary Fund, the burden would be shifted from contributors in developed countries to contributors in developing countries. For that reason the Korean delegation considered that

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[<2>] The Small Tanker Oil Pollution Indemnification Agreement (STOPIA) proposed by the International Group of P&I Clubs under which the shipping industry would increase, on a voluntary basis, the limitation amount applicable to small ships to 20 million Special Drawing Rights (cf document 92FUND/WGR.3/11/1, section 6).

efforts to redress the imbalance in the sharing of the financial burden between the shipping industry and oil cargo interests created by the Supplementary Fund should be resolved by the industries concerned within the framework of that Fund.

7.5 The Working Group took note of the information contained in document 92FUND/WGR.3/22/11 submitted by the International Group of P&I Clubs, ICS, INTERTANKO and OCIMF. It was noted that the oil and shipping industries had commenced high-level discussions aimed at developing acceptable long-term solutions to managing the issues of substandard oil transportation and the sharing of the costs of oil spills. It was also noted that the industries would require time to develop a mutually acceptable agreement and that there were no guarantees of success.

7.6 In introducing document 92FUND/WGR.3/22/13 the International Group of P&I Clubs observer delegation stated that the 50% increases in the financial limits that came into effect in November 2003 were likely to result in an increase in the shipping industry's proportion of the compensation payable under the 1992 Conventions, but conceded that such an increase in exposure would be more than offset by the increased exposure of the oil industry under the Supplementary Fund Protocol. That delegation further stated that in order to maintain the stability and balance of the existing structure, the Clubs were prepared to recommend to their Boards that the Clubs, on behalf of their shipowner members, should enter into a contractually binding agreement with the IOPC Funds to share equally the burden imposed by the Supplementary Fund Protocol. That delegation stated that the P&I Clubs saw such a solution as a permanent one and which was acceptable to the Clubs only if the 1992 Conventions were not revised in respect of the limits.

7.7 That delegation also stated that the Clubs were not opposed to a revision of the Conventions in the longer term, and in the light of ongoing reviews and studies of the effects of the recent changes to the Conventions.

7.8 As regards the issue of substandard shipping, that delegation reiterated the P&I Clubs' view that the imposition of additional liability was unlikely to affect the standards of an individual shipowner, since it was the purpose of insurance to spread the risk over the industry as a whole. It was noted, however, that the Clubs were committed to a thorough analysis of the issue of substandard shipping and had proposed the establishment of a Commission with input from States and IMO in order to ensure transparency and accountability. It was noted that, in the Clubs' view, until the findings of 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) were known, it was not possible to draw up a comprehensive list of subjects to be addressed by the Commission.

7.9 It was noted that documents 92FUND/WGR.3/22/2 (submitted by France and Spain), 92FUND/WGR.3/22/4 (submitted by Italy), 92FUND/WGR.3/22/9 (submitted by Australia, Canada, Finland, New Zealand, Portugal and the United Kingdom), 92FUND/WGR.3/22/12 (submitted by Italy, Portugal and the United Kingdom) and 92FUND/WGR.3/22/16 (submitted by Japan) all contained specific proposals requiring the revision of 1992 Conventions. The Working Group considered these proposals in detail later during the meeting (see below).

7.10 A number of delegations stated that none of the proposals for revision would result in more compensation becoming available to victims of pollution damage and that, in their view, the only issues that needed to be resolved were the sharing of the financial burden between the shipping industry and the oil cargo interests and the problem of the substandard transportation of oil. It was the view of those delegations that both these issues were best addressed through industry initiatives.

7.11 Some delegations made the point that the findings of the costs study had demonstrated that the voluntary compensation schemes (TOVALOP and CRISTAL) had in the past helped to redress the sharing of the financial burden and that such schemes should be encouraged in order to deal with the imbalance created by the Supplementary Fund Protocol. Those delegations referred to

criticisms that had been made against the earlier voluntary compensation schemes, which had not always served the interests of victims, but pointed out that the latest proposal by the P&I Clubs envisaged a contract between the Clubs and the Supplementary Fund thereby ensuring that the victims would not be adversely affected.

7.12 Some delegations stated that they were not averse to a revision in the longer term, but that it was necessary to see the effects of the 50% increase in the limits on the 1992 Conventions (which became effective on 1 November 2003) and the Supplementary Fund Protocol prior to any revision being carried out.

7.13 One delegation drew attention to the fact that any revision of the 1992 Conventions proposed by the Working Group and endorsed by the 1992 Fund Assembly would ultimately have to go before the IMO Legal Committee for its consideration. That delegation expressed the view that if all the States Parties to the Conventions were to attend the Legal Committee, there was a considerable likelihood that a proposal to revise the Conventions would not be endorsed by that Committee.

7.14 As regards the proposal that the compensation Conventions should address the issue of the substandard transportation of oil, one delegation pointed out that the introduction into the Conventions of terms such as 'substandard', 'deficient', 'defective' and 'badly maintained' would lead to complications since parties other than shipowners, such as flag States, classification societies and ship builders, would also bear responsibilities in the event of an incident. That delegation further pointed out that there was no specific mandate in the 1992 Conventions to address the substandard transportation of oil, although there could be benefit in the Assemblies of the 1992 Fund and the Supplementary Fund adopting a Resolution calling for the implementation of new regulations relating to shipping standards to be expedited.

7.15 One delegation referred to the numerous initiatives that had been taken to reduce pollution incidents such as enhanced surveys by classification societies, improved vetting procedures by charterers and P&I Clubs and the phasing out of single hull vessels for the carriage of heavy fuel oil. That delegation stated that whilst there was further scope for additional measures, serious incidents had been reduced in recent years by 70% despite a doubling of the tanker tonnage.

7.16 A number of delegations expressed the view that although the Conventions had worked well in the past, there were serious deficiencies that went beyond financial considerations and the sharing of the financial burden, such as the need to ensure that meetings of the governing bodies achieved a quorum, the need to have an effective means of enforcing oil reporting requirements and the need to ensure that the Conventions were applied in a uniform manner, for example in respect of the admissibility of claims, in particular claims for environmental damage. Those delegations therefore considered that a revision of the system was necessary and urgent.

7.17 Attention was drawn to the Resolution that had been adopted by the International Conference that had adopted the Supplementary Fund Protocol, which called on all Member States, as a matter of high priority, to review the international compensation regime and to consider enhancements that could be made to the Conventions (Conference Resolution on review of the international compensation regime for oil pollution damage for possible improvement (document 92FUND/A.8/4, Annex IV)).

7.18 Some delegations, whilst welcoming the latest proposals by the P&I Clubs to redress the imbalance in the sharing of the financial burden created by the Supplementary Fund Protocol, particularly since it could be implemented quickly, nevertheless considered that it should only be regarded as an interim arrangement pending a full revision. Attention was drawn to the fact that around 15% of the world's tanker fleet was not insured by the International Group of P&I Clubs and would not therefore be included in the proposed voluntary scheme. The point was also made that liability and compensation for oil pollution damage raised important policy considerations, which had to be governed by legislation.

7.19 A number of delegations stated that it was not only the Supplementary Fund Protocol that needed revision, but also the underlying Conventions, particularly as regards the sharing of the financial burden.

7.20 In his summing up the Chairman noted that the Working Group remained divided on the need for a revision of the 1992 Conventions, although there was overwhelming support for protecting the system and maintaining its fundamental objectives. He stated that a balance had to be achieved between making sufficient adjustments for the system to survive whilst at the same time keeping the regime as attractive as possible to most of the membership. He noted that some delegations had expressed the view that the current weaknesses in the system could be addressed through voluntary industry arrangements, whilst others had maintained that there were some issues that could only be resolved through changes to the Conventions.

7.21 The Chairman expressed the view that if progress was to be made towards reaching a consensus there was a need to reduce the number of options for changes. He urged those States that were in favour of revision to engage in further discussions with those States that were either against or undecided.

8 Shipowners' liability and related issues

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

8.1 The Working Group took note of the two options for amending the 1992 Conventions and the Supplementary Fund Protocol put forward in document 92FUND/WGR.3/22/9 submitted by Australia, Canada, Finland, New Zealand, Portugal and the United Kingdom. In introducing the document the co-sponsors stated that their overriding goals were to ensure the international viability of the regime and its long-term future and to address the potential financial imbalance of the system.

8.2 It was noted that option (a) envisaged an increase in the level of shipowner liability for smaller ships as well as shipowner liability to contribute to the Supplementary Fund. It was also noted that this option did not seek to increase the existing maximum limit of shipowners' liability under the 1992 Civil Liability Convention although that limit would apply to ships with a gross tonnage lower than 140 000, the tonnage at which the current maximum liability applied. It was noted that the proposed increase in the small ship minimum was broadly similar to that under the voluntary Small Tanker Oil Pollution Indemnification Agreement (STOPIA) proposed by the P&I Clubs, but that incorporating it into the framework of the Conventions would ensure legal certainty for all incidents in Contracting States. It was further noted that the proposal to involve shipowners in the Supplementary Fund specifically addressed the potential imbalance created by that Fund.

8.3 It was noted that option (b), which represented a more radical approach, envisaged amending the 1992 Civil Liability Convention to the effect that shipowners would be liable to pay compensation up to a fixed amount irrespective of the size of the ship beyond which there would be a shared liability between shipowners and oil cargo interests up to the current maximum amount available under the 1992 Fund Convention. It was also noted that this option did not envisage any amendment to the Supplementary Fund Protocol. It was further noted that the sponsoring delegations had proposed that the initial layer of compensation to be borne by the shipowner and the relative contributions by the shipowner and oil cargo interests to compensation payments in excess of the initial layer would be negotiated at a Diplomatic Conference.

8.4 Some delegations stated a preference for option (a) on the grounds that it closely resembled the current regime, would only require an amendment to the 1992 Civil Liability Convention and the Supplementary Fund Protocol and was compatible with the proposed voluntary schemes. It was pointed out that option (a) addressed the findings of the cost study, which had highlighted the disproportionate amounts paid in compensation by oil cargo interests in respect of incidents involving small ships. It was also pointed out that option (a) was likely to present less of an

insurance problem for small ships whereas under option (b) the owners of such ships would face the same financial exposure as the owners of VLCCs. It was further pointed out by the delegations favouring option (a) that option (b) would erode the concept of shipowner liability and lead to a 50:50 sharing of the financial burden for most incidents, which was not consistent with the preamble of the 1992 Fund Convention stating that the economic consequences of oil pollution damage should not exclusively be borne by the shipping industry but should in part be borne by the oil cargo interests.

8.5 Some other delegations stated a preference for option (b) on the grounds that under option (a) shipowners would be largely subsidizing the Supplementary Fund and contributors to the 1992 Fund would get little benefit. It was also pointed out that option (b) would give some protection to shipowners who tended to be targeted by claimants, and provided the first layer of compensation to be borne solely by the shipowner was not set at too high a level, would also have the benefit of involving the 1992 Fund in the assessment and settlement of daims thereby contributing to the uniform application of the Conventions.

8.6 A number of delegations stated that they did not have a particular preference and would need to reflect on the various options in the light of the findings of the cost study.

8.7 One delegation stated that it was unable to recommend either option without further clarification as to how they would work in practice. That delegation asked whether the intention was to levy contributions from individual shipowners on the basis of public law or a tax. That delegation also expressed doubts as to whether shipowners would be able to get insurance cover for option (b) and stated that if the sliding scale for shipowners' liability were to be eliminated this would be inconsistent with of all other maritime liability Conventions.

8.8 In his summing up the Chairman noted that the Working Group appeared to be evenly divided on the two options and recommended the co-sponsors of the proposals to reduce the options to one in the light of the views expressed in the discussion.

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

8.9 In introducing document 92FUND/WGR.3.22/16 the Japanese delegation reaffirmed its view that the deterrence of the use of substandard ships was important in order to prevent or minimise incidents causing oil pollution damage. It was noted that in the light of the discussion at the seventh meeting of the Working Group the Japanese delegation proposed two options, one of which would provide a disincentive to registered owners, and the other a disincentive to both registered owners and oil receivers, to use a 'certain category of ship', which would be defined on the basis of objective criteria, for example, 'a ship over a particular age, except a ship which was double hulled, or certified as level 1 or 2 in the Condition Assessment Programme'.

8.10 The Working Group noted that the first option proposed by the Japanese delegation envisaged increasing the limit of liability of a registered owner of a 'certain category of ship' under the 1992 Civil Liability Convention to a sufficient level to deter the transportation of oil by such ships. It was noted that the second option envisaged, in addition to increasing the limit of liability of the registered owner, a new financial burden on those involved in the transportation of oil by a 'certain category of ship', ie cargo owners etc. It was also noted that this new financial burden on individual cargo owners would be imposed by way of an obligation to pay contributions to the 1992 Fund and the Supplementary Fund. The Japanese delegation acknowledged that the second option might give rise to some difficulties in identifying cargo owners bearing in mind current maritime transport practices.

8.11 In introducing document 92FUND/WGR.3/22/12 the delegations of Italy, Portugal and the United Kingdom pointed out that there were some similarities between their proposals and those of the Japanese delegation in that they sought to provide disincentives for the operation of ships that should no longer be trading by means of extra layers of compensation payable by those involved in the use of such ships.

8.12 It was noted that the sponsoring delegations had put forward two options for consideration by the Working Group, which were designed to be integrated into options (a) and (b) set out in document 92FUND/WGR.3/22/9 respectively (see paragraphs 8.2 and 8.3 above). It was also noted that both options involved an increase in the shipowners' limit of liability when pollution damage arose as a result of an oil tanker 'defect' or 'deficiency', and that above this, an amount equal to the extra liability of the shipowner would be levied against the individual cargo receiver in the Contracting State in addition to his normal contributions to the 1992 Fund. It was further noted that the additional layers would be on top of the shipowners' liability in the underlying regime and that the proposals also envisaged contributions from the shipowner and the individual cargo receiver to the Supplementary Fund. It was emphasised by the co-sponsors that the additional liability on the individual cargo owner would only be imposed when the defect or deficiency had contributed to the incident. It was also noted that the co-sponsors were of the view that definitions of 'defect' or 'deficiency' as well as treaty text should be considered later in the light of the outcome of the study by OECD on insurance and substandard shipping referred to in paragraph 7.8 above.

8.13 A number of delegations expressed support in principle for the first option proposed by the Japanese delegation and considered that it provided a very good basis on which the compensation Conventions could promote quality shipping. Those delegations were attracted by the simplicity of the proposed system notwithstanding the difficulty of defining 'a certain category of ship' on which that system was based.

8.14 Some delegations, whilst conceding that the first Japanese option was worthy of further consideration, expressed concerns that if shipowners could obtain the necessary insurance to cover such risks this might act as a disincentive to maintain ships to high standard.

8.15 Other delegations reiterated their opposition to the idea of using the compensation Conventions as a means of promoting quality shipping and drew attention to the potential difficulties that would arise if a ship was categorised as substandard according to criteria laid down in those Conventions, but at the same time was in full compliance with standards laid down in MARPOL.

8.16 In his summing up the Chairman noted that there appeared to be a preference for the first option proposed by the Japanese delegation, but that concerns had been expressed about the definition of 'certain category of ship' and the potential for conflict with other IMO Conventions that specifically addressed maritime safety and pollution prevention. He noted that the sponsoring delegations had indicated their intention to revert to the issue in the light of the outcome of the OECD study and stated that it would be helpful to the Working Group if a unified document on this issue were submitted for the next Working Group's meeting.

8.17 In introducing document 92FUND/WGR.3/22/2 the delegations of France and Spain stated that they had approached the issue of promoting quality shipping from a different perspective to that of the Japanese delegation and the delegations of Italy, Portugal and the United Kingdom. It was noted that the delegations of France and Spain had focussed their attention on incidents that had resulted from structural defects of ships. It was also noted that those delegations had proposed a definition of structural defect, as a 'defect due to decay or lack of maintenance of a ship, which in part or in whole contributed to the incident', which should, in their view, be included in Article I of the 1992 Civil Liability Convention. It was further noted that it was the sponsoring delegations view that the current text of Article V.2 of that Convention was sufficient for a shipowner's right to limit liability to be broken in the event of an incident due to a structural defect, but that a specific wording to this effect could be included in Article V.2 to avoid any doubts about that aspect.

8.18 It was noted that the sponsoring delegations had proposed two options regarding the application of Article V.2, one based on the current text of the Convention whereby the burden of proof that the incident was due to a structural defect lay with the claimant, and an alternative text in which the burden of proof that the incident did not occur due to a structural defect was placed on the shipowner. It was further noted that the sponsoring delegations had addressed the problem of

insurers revoking insurance cover in the event of the shipowner being deprived of the right of limitation by proposing an amendment to Article VII.8 of the Civil Liability Convention which would prevent an insurer from limiting his liability when an incident was caused by structural defect of the insured vessel. It was finally noted that the sponsoring delegations had not made specific proposals regarding the extent of the additional financial burden that should be imposed on insurers in the event of their being denied the right to limit under the Convention when an incident was caused by a structural defect, but that there were three main options for consideration, namely to impose unlimited liability, limit liability to the maximum insured amount of US1 000 million or limit liability to an amount to be agreed.

8.19 A number of delegations expressed doubts about the viability of the proposal, citing legal difficulties that would be encountered in proving that an incident was caused by a structural defect, lack of compatibility with other liability Conventions that might apply to the same incident and the erosion of the incentive to promote quality shipping if insurers continued to spread the financial risks.

8.20 Some delegations considered that the proposal deserved further consideration since it was important that all options be considered that might lead to an effective means of holding shipowners accountable for inappropriate behaviour.

8.21 Some delegations stated their preference for the breakability test used in the 1969 Civil Liability Convention, the effectiveness of which had been demonstrated by the cost study carried out by the Director. However, those delegations recognised the reasons why it was not possible to revert to that test, and they therefore considered that the proposal by the Japanese delegation, which did not conflict with other Conventions, offered the best way of promoting quality shipping.

8.22 One delegation stated that in order to ensure that recourse actions were effective it would be necessary to ascertain whether an incident was due to a structural defect and that the Fund would therefore have to undertake its own independent investigation into the causes of incidents. The point was made that investigations into the causes of incidents were normally for the purpose of preventing future similar incidents and that it was often a condition of such investigations that the findings could not be used for the purpose of criminal prosecutions.

8.23 The Director stated that the 1992 Fund Convention did not address directly the question of recourse actions and drew attention to the fact that the Fund's right to recovery in recourse actions was normally based on national law. He expressed doubts as to whether States would allow the Fund to undertake its own independent investigations into the causes of incidents. He suggested that Member States should consider the issue of independent investigations in the context of their own legislation.

8.24 In his summing up the Chairman noted that whilst there appeared to be some support within the Working Group for the proposal by the delegations of France and Spain, there was greater support for the proposal by the Japanese delegation, which addressed the same problem from a different angle. He stated that it was unfortunate that the representatives of the International Group of P&I Clubs had not been present to comment on the insurance aspects raised in the proposal by the delegations of France and Spain.

Cargo owner liability

8.25 The Working Group considered the proposal by the Italian delegation to establish an additional tier of compensation by imposing a liability on cargo owners as set out in document 92FUND/WGR.3/22/4. In introducing the document the Italian delegation noted that their original proposal had been taken up to some extent by other delegations in the context of the substandard transportation of oil. It was noted that the Italian delegation's proposal envisaged that the cargo owner, as identified through the bill of lading, would be required to insure his liability and that a ship, before sailing from a loading port, would be required to carry a certificate attesting to that insurance up to the applicable limit, which would cover the cargo as far as the

port of discharge even if the cargo were to be sold during a voyage.

8.26 One delegation expressed the view that the proposed compulsory insurance requirement could have far reaching consequences since it interfered with commercial contracts between parties. That delegation also doubted whether it would be possible to insure liability for pollution damage in respect of cargo owners.

8.27 The Italian delegation stated that it could accept, as an alternative to its own proposal, one which imposed a liability on the charterers of substandard ships, as proposed by a number of other delegations.

9 Definition of ship

9.1 The Working Group considered a proposal to amend the definition of ship submitted by the delegations of Australia, Canada, Italy, New Zealand and the United Kingdom in document 92FUND/WGR.3/22/10.

9.2 In introducing the document the co-sponsors stated that they had taken into account the issues raised at the Working Group's seventh meeting and in particular the need for the definition to be closely linked with the actual transportation of 'oil' as defined in Article I.5 of the 1992 Civil Liability Convention, ie persistent oil. The co-sponsors considered that the definition should provide that the Conventions would apply to pollution damage caused by bunker fuel of dedicated tankers irrespective of whether or not they had residues of cargo onboard, whereas as regards other vessels the Conventions would only apply to pollution damage caused by bunker fuel if the vessels were carrying 'oil' by sea as cargo or during subsequent voyages by sea, provided they had residues of such oil onboard.

9.3 The co-sponsors proposed the following definition to meet the above objectives:

> *'Ship' means*
>
> *(a) any sea-going vessel and any seaborne craft of any type whatsoever, which is constructed or adapted for the carriage by sea of oil in bulk as cargo; or*
>
> *(b) any sea-going vessel and any seaborne craft whatsoever when it is actually carrying oil by sea in bulk as cargo, or during any voyage by sea after such carriage unless it is proved that at the time of an incident it has no residues of such oil onboard.*

9.4 All delegations that intervened in the discussion agreed that there was a need to amend the definition of ship in order to remove the ambiguity in the current definition. Most delegations accepted the text in paragraph (a). A number of delegations stated that they could not accept paragraph (b). The point was made that the Bunker Convention provided the appropriate legal framework governing compensation for pollution damage caused by vessels referred to in paragraph (b). The point was also made that paragraph (b) only referred to ships on passage and did not address pollution damage arising during cargo loading or discharging operations.

9.5 In his summing up the Chairman noted that there was still no consensus on the wording of an amended definition, and that this was mainly due to the fact that there was no agreement as to what the scope of the definition should be rather than a disagreement on the drafting. He also noted that some delegations preferred a wide definition with the proviso relating to unladen vessels applying only to combination carriers, and that other delegations favoured a restrictive definition with the proviso applying to all vessels. He urged the co-sponsors to hold informal discussions to try to resolve this issue before submitting a revised text to the Working Group.

10 Tacit amendment procedure

10.1 The Working Group considered two options, including treaty texts, for amending the tacit amendment procedure in respect of the financial limits of the 1992 Conventions proposed by the delegations of Australia, Canada, Italy, New Zealand and the United Kingdom in document 92FUND/WGR.3/22/8.

10.2 It was noted that the first option was based on the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air (1999 Montreal Convention), which provided for modest, but regular increases of the limits of liability in the form of a five-yearly review on the basis of inflation in those States whose currencies comprised the Special Drawing Right (SDR). It was noted that if the weighted average of annual inflation rates in those States exceeded 10% since the previous review the Depository was required to notify States Parties of a revision of the limits of liability, which became effective six months after notification unless a majority of the States Parties registered their disapproval. It was also noted that the procedure for increasing the limits could be applied at any time provided that one-third of the States Parties expressed a desire to that effect and on condition that the weighted average inflation had exceeded 30% since the previous revision or since the entry into force of the Convention if there had been no previous revision.

10.3 The Working Group noted that the second option proposed by the sponsoring delegations was to adopt the same provisions as contained in the Supplementary Fund Protocol whereby the overall time period which would elapse before any proposal to amend the limits could enter into force was reduced from 11 years, provided under the 1992 Conventions, to 8 years.

10.4 Most delegations intervening in the discussion considered that the tacit amendment procedure should be amended if the 1992 Conventions were to be revised. Some delegations preferred the first option on the grounds that it provided for regular and automatic increases and was therefore more predictable. Other delegations indicated a preference for the second option on the grounds that it would be compatible with the provisions of the Supplementary Fund Protocol. It was noted that in some jurisdictions the constitution required parliamentary approval of any increases in compensation amounts. The point was made that contributors in States that decided not to become parties to the Supplementary Fund Protocol could be placed at a disadvantage as a result of a decision to increase the limit of the 1992 Fund since those contributors would in effect be subsidising the Supplementary Fund. The point was also made that the first option would require IMO, as the depository, to undertake the required reviews and that this could give rise to funding difficulties for IMO. One delegation suggested that there might be merit in considering a third option based on the procedure under the 1999 Montreal Convention, but with different criteria that suited the particular needs of the 1992 Fund.

10.5 In his summing up the Chairman stated that there was general agreement that the Conventions should provide for regular, modest increases and that there appeared to be a slight preference for the second option, which was based on the text of the Supplementary Fund Protocol. He suggested that further time for consultations was required in order to enable the Working Group to reach agreement on the most appropriate and constitutionally viable tacit amendment procedure.

11 Refinement of the contribution system

The problems faced by oil storage companies

11.1 The Working Group recalled that at its seventh meeting in February 2004 two documents (92FUND/WGR.3/19/5 submitted by the Netherlands delegation and 92FUND/WGR.3/19/16 submitted by the Federation of European Tank Storage Associations (FETSA)) had been introduced, but due to lack of time had not been discussed.

11.2 It was recalled that both documents called for a refinement of the 1992 Fund's contribution system to take into account the particular problem faced by oil storage companies which 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 Fund out of their own pockets. It was further recalled that those delegations had suggested 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.

11.3 The Working Group recalled that the Netherlands delegation had proposed incorporating into a revised version of the 1992 Fund Convention two relevant 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 Working Group also recalled that the Netherlands delegation had submitted concrete proposals for changes to the text of Article I of the 1992 Fund Convention to this effect. It was further recalled that the first proposal by the Netherlands delegation would give the storage companies, under certain conditions, the possibility to pass on the levy to their principals, provided that these were located in a State Party to the Fund Convention. It was also recalled 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. It was recalled that FETSA had provided information 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 further recalled that, according to 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.

11.4 One delegation referred to a request by the Egyptian observer delegation some years ago that oil transiting the SUMED pipeline between a discharge terminal located in the Gulf of Suez and a loading terminal in the Mediterranean Sea should be exempt from contributions (documents 92FUND/A/ES.3/14 and 92FUND/A/ES.3/27, paragraph 13). That delegation recalled that the 1971 Fund and 1992 Fund Assemblies had rejected that request and expressed concern that the proposals being put forward by the Netherlands delegation, if adopted, would go against past treaty practice.

11.5 The Director drew attention to the fact that the Assemblies' decisions on the proposal by the Egyptian delegation had been made on the basis of their interpretation of the text of the 1971 and 1992 Fund Conventions, whereas the proposal by the Netherlands delegation had the purpose of revising the Convention on this point.

11.6 In response to a question as to whether the proposal by the Netherlands delegation might lead to a reduction in the total quantity of contributing oil and, if so, the implications for the 1992 Fund, the Director stated that he could not predict whether there would be any such reduction, but that in any event a reduction in the quantity of contributing oil would not affect the total revenue for the Fund, merely the levy per tonne. He further stated that the proposal might lead to some administrative difficulties, but noted that similar problems were being faced and would be resolved as regards the HNS Convention.

11.7 A number of delegations supported the proposal in principle to amend the definition of receiver in line with the HNS Convention, which in their view was more equitable. Other delegations were opposed to the proposal and pointed out that the HNS Convention was a special case due to the large variation in types and quantities of products involved, and that the contribution system under that Convention had yet to be proven to be workable compared with the simpler and well tried and tested system operated by the 1971 and 1992 Funds.

11.8 In response to a question as to why the oil storage companies could not pass on the costs of contributions to their principals under the terms of their contracts, the Netherlands delegation and the FETSA observer delegation stated that in some cases the storage companies had been able to pass on costs, but that the long time period between the oil being passed from the storage

company to the principal and the Fund levying contributions introduced commercial uncertainties such that the principals could not be held liable in any contract.

11.9 It was recalled that in the early nineteen nineties one oil storage company in the Netherlands had appealed to the Administrative Courts against the Netherlands Government's reporting the company as having received contributing oil, arguing that the 1971 Fund's interpretation of the notion of 'received' in the Fund Convention was incorrect and that it should not be under any obligation to pay contributions to the 1971 Fund. It was also recalled that the company had requested the Courts to declare that the company was not liable to pay compensation to the 1971 Fund. It was further recalled that the Administrative Courts had rejected the appeal (document 71FUND/A.17/25).

11.10 One delegation proposed that a comparative study could be conducted to assess the financial implications of the proposal to redefine the concept of 'receiver' to enable storage companies to achieve a cost neutral position in any accounting year. Some delegations did not consider such a study would be useful. It was noted that there were difficulties in making available confidential commercial information for such a study, although it was suggested that such difficulties might be overcome through collaboration between the Member States concerned and the 1992 Fund.

11.11 A number of delegations opposed the proposal to amend the definition of 'contributing oil' so as to exempt oil received after transfer directly, or via shore-based terminals, from one ship to another from the contribution system, since in those delegations' view, transhipment operations represented a pollution risk associated with the transportation of oil by sea.

11.12 In summing up the Chairman noted that there was little support for changing the contributing system, and that although it was recognised that a commercial solution was the ideal one, there appeared to be great practical obstacles to such a solution. The Chairman noted that it was nevertheless appropriate to reconsider the contribution system as part of the root and branch review of the Conventions and that the issue could perhaps be revisited at a later stage in the light of any study that might be carried out on the financial consequences for the Fund if the 1992 Fund Convention were to be amended along the lines of the proposals.

Minimum annual contribution to the 1992 Fund

11.13 The Working Group took note of the information contained in document 92FUND/WGR.3/22/14 submitted by the delegations of Canada, Italy and Spain and the specific proposal that all Member States should be required to pay a minimum annual contribution (not an entrance fee as stated in the document) to the 1992 Fund on the same basis as such a fee would be payable to the Supplementary Fund, which established a minimum deemed received quantity of contributing oil in each Member State. It was noted that the sponsoring delegations had also suggested an alternative way of determining such a minimum fee, namely to base it on a fixed percentage of the total financial burden of the Fund. It was suggested that the introduction of such a minimum fee could contribute to all Member States having a sense of ownership of the international compensation regime.

11.14 A number of delegations expressed reservations about burdening small countries with a regular annual contribution such as proposed, but could accept the proposal provided the amounts involved were very small. The point was made that, although a minimum fee had been introduced for the Supplementary Fund, that Fund was optional, whereas a revised 1992 Fund Convention would form part of the basic regime and that the introduction of a minimum fee in that regime would be departing from the solidarity underlying the present system. Other delegations stated that they needed further information on how the proposal would work in practice and what the additional administrative cost to the Fund would be before they were in a position to express a view.

11.15 Some delegations were opposed to the proposal on the grounds that small countries contributed indirectly to the 1992 Fund as a result of major contributors passing on those costs through the

sale of oil products in those countries. The point was made that it had been the experience of various United Nations Agencies that some countries refused to pay their contributions and that the introduction of a minimum fee could create an additional administrative burden on the Fund Secretariat. It was suggested that since the idea behind the proposal was not to relieve the burden on contributors, but to increase Member States' sense of ownership of the Fund Convention, more benefit would be achieved through their active participation in meetings of the Fund's governing bodies and in the development of the compensation system.

11.16 One delegation proposed that if the aim was to obtain limited revenues for the general administrative and running costs of the Fund it might be more appropriate for all Member States to make such contributions in order to avoid any inequity arising as a result of some payments being made by oil receivers and others by governments.

11.17 In his summing up of the discussion the Chairman noted that the Working Group was divided as to whether minimum annual contributions payable by States should be introduced in the Fund Convention and that there was considerable hesitation about the wisdom of the proposal even though the Supplementary Fund Protocol included a provision for such a minimum contribution.

12 Non-submission of oil reports

12.1 The Working Group considered a proposal, including a draft treaty text, addressing the issue of non-submission of oil reports contained in document 92FUND/WGR.3/22/15 submitted by the delegations of Canada and the United Kingdom.

12.2 It was noted that the sponsoring delegations proposed the inclusion in a revised Fund Convention of the treaty text contained in Article 15 of the Supplementary Fund Protocol. It was recalled that this Article required States to report in cases where there were no persons liable to pay contributions and also provided that compensation would not be payable in respect of a Member State until all oil reports had been submitted. It was further recalled that Article 15 also provided that if States did not submit the reports within one year of notification of failure to report, then no compensation would be paid in respect of that incident.

12.3 The majority of delegations supported the proposal, but some delegations questioned whether the draft text was sufficiently firm in dealing with Member States that had never submitted oil reports. Some delegations pointed out that the current text did not preclude a Member State waiting until it had suffered an incident before submitting all its reports, and that in their view, once a decision had been taken to deny compensation it should be final and not a temporary suspension. To that end some delegations proposed the deletion of paragraphs 3 and 4 of Article 15 *bis* in the sponsoring delegations' proposal.

12.4 Two delegations expressed reservations about the proposals on the grounds that such sanctions would largely affect innocent victims rather than those responsible for submitting oil reports. They considered that the reasons for a State having failed to submit oil reports should be taken into account when the Assembly took a decision as to whether to deny compensation. Those delegations also considered that alternative sanctions were required such as suspension of the Member States' right to participate in Fund meetings, the introduction of fines and the denying of compensation to government agencies that had undertaken clean-up and preventive measures.

12.5 The Director drew attention to the fact that the proposed text was identical to that contained in the Supplementary Fund Protocol and expressed the view that it was important that the 1992 Fund adopted precise criteria establishing when compensation should be denied, for example whether sanctions should apply in a situation where there was only one outstanding oil report in respect of a particular State.

12.6 In his summing up of the discussion the Chairman noted that although two delegations had expressed reservations the majority had endorsed the proposal in principle, subject to some amendments to the text. He urged members of the Working Group to work towards finalising an agreed text.

13 Compulsory insurance

13.1 The Working Group considered two proposals, including treaty texts, introducing compulsory insurance for ships carrying less than 2 000 tonnes of oil cargo contained in document 92FUND/WGR.3/22/6 submitted by the delegations of Australia, Canada, Italy, New Zealand and the United Kingdom. It was noted that the co-sponsors had proposed that all vessels that carried oil in bulk as cargo should be required to maintain insurance or other financial security in accordance with Article VII of the 1992 Civil Liability Convention. It was also noted that the co-sponsors therefore proposed deleting the reference to ships carrying more than 2 000 tonnes of oil in Article VII.1 of the 1992 Civil Liability Convention. The following revised text of this Article was submitted for consideration:

> *'The owner of a ship registered in a Contracting State and carrying ~~more than 2 000 tonnes of~~ oil in bulk as cargo shall be required to maintain insurance or other financial security, such as the guarantee of a bank or a certificate delivered by an international compensation fund, in the sums fixed by applying the limits of liability prescribed in Article V, paragraph 1 to cover his liability for pollution damage under this Convention'.*

13.2 The point was made by the sponsoring delegations that at the time the 1992 Civil Liability Convention was adopted, offshore facilities were generally located in the territorial sea, whereas in today's operating environment, oil exploration and production was carried out further offshore in areas of the exclusive economic zone (EEZ). It was noted that the co-sponsors had therefore proposed that Article VII.11 of the 1992 Civil Liability Convention be amended to the effect that all vessels entering or leaving a port in its territory, or arriving at or leaving an offshore terminal in its territorial sea, EEZ or more generally in an area referred to in Article II (a) of the Convention should carry insurance. It was noted that the co-sponsors had provided two alternative texts as follows:

> Either:
>
> *'Subject to the provisions of this Article, each Contracting State shall ensure, under its national legislation, that insurance or other security to the extent specified in paragraph I of this Article is in force in respect of any ship, wherever registered, entering or leaving a port in its territory,* ***or arriving at or leaving an offshore terminal under its jurisdiction,*** *if the ship actually carries ~~more than 2 000 tonnes of~~ oil in bulk as cargo'.*
>
> Or
>
> *'Subject to the provisions of this Article, each Contracting State shall ensure, under its national legislation, that insurance or other security to the extent specified in paragraph I of this Article is in force in respect of any ship, wherever registered, entering or leaving a port in its territory,* ***or arriving at or leaving an offshore terminal in the area referred to in Article II, paragraph (a),*** *if the ship actually carries ~~more than 2 000 tonnes of~~ oil in bulk as cargo'.*

13.3 During the discussion there was considerable support for widening the compulsory insurance obligations under the 1992 Civil Liability Convention to include all vessels carrying oil in bulk as cargo, since experience had shown that vessels carrying less than 2 000 tonnes of oil were capable of causing serious pollution damage and that the IOPC Funds had on a number of

occasions been the only source of compensation as result of the shipowner having had neither the insurance cover nor the financial capability to pay claims.

13.4 Most delegations favoured the second option for revising Article VII.11 on the grounds that introducing the notion of jurisdiction, as proposed in the first option, could create problems since Port State Control did not usually extend beyond the territorial sea, whereas two delegations expressed a preference for the first option. Some delegations also expressed reservations regarding the second option, since in their view that option could give rise to problems of jurisdiction within the EEZ.

14 Quorum for meetings of the 1992 Fund Assembly

14.1 The Working Group considered a proposal to amend Article 20 of the 1992 Fund Convention to address the problems faced by the Assembly in obtaining a quorum as set out in document 92FUND/WGR.3/22/7 submitted by Australia, Canada, Italy, New Zealand, Portugal and the United Kingdom.

14.2 It was recalled that at its seventh meeting the Working Group had decided that a solution was required to avoid the very serious consequences that would result if the Assembly did not achieve a quorum. It was also recalled that under the 1992 Fund Convention a majority of the Fund Member States constituted a quorum for the Assembly meetings.

14.3 It was noted that the co-sponsors had proposed that Article 20 should be amended to read as follows:

> *'A quorum for meetings of the Assembly shall be constituted by:*
>
> *1 a majority of its members; or*
>
> *2 at least [half] of the [xx]% of the members with the largest quantities of contributing oil received, and at least as many other members'.*

14.4 The sponsoring delegations made the point that the proposed solution sought to ensure that there was an element of balance in requiring the active participation of both States with large and those with small contributions, with neither group able to achieve a quorum on its own. It was noted, however, that it would be important that the numbers finally chosen to fill the square brackets were not set at too high a level in order to guarantee a quorum.

14.5 A number of delegations supported the proposal in principle, but expressed reservations about the precise wording of the proposed provision. Some delegations objected to creating for the purpose of establishing whether a quorum was achieved, different categories of Member States, dependent on the quantity of contributing oil received, whilst others stated that such criteria were already well established within the Funds for the election of the Executive Committee.

14.6 One delegation stated that there was a danger that the proposed criteria could make it possible for groups of countries to hold an Assembly in a particular region of the world without the participation of others. That delegation further stated that it was one of the duties of Member States to attend meetings of the 1992 Fund Assembly and that it therefore favoured exploring ways of ensuring full participation rather than focusing on the criteria to meet a quorum. Another delegation considered that the existing quorum requirements should be maintained for regular sessions, but that alternative requirements could be established for special sessions.

14.7 In his summing up the Chairman stated that there was a recognition in the Working Group that a solution had to be found to this fundamental problem and that it was important for the Group to remain focused on this issue with a view to reaching an early agreement on what should be done.

15 Other issues

Merging of the 1992 Conventions

15.1 The Working Group recalled that at its seventh meeting the delegations of Australia, Canada, France, Italy, Netherlands, New Zealand, the Russian Federation and the United Kingdom had proposed merging the 1992 Civil Liability and Fund Conventions into a single Convention (document 92FUND/WGR.3/19/2, section 7). It was recalled that in making the proposal the co-sponsors had expressed the view that a single Convention would facilitate the ratification process and provide greater scope for ensuring a uniform application. The point was also made that it would simplify treaty law issues when the regime was revised and that a single Convention would have the advantage of linking the settlement of claims within the two tiers of compensation and facilitate the intervention by the Fund in legal actions when points of principle were involved in respect of incidents where the Fund would not be required to pay compensation.

15.2 The sponsoring delegations requested other delegations to assist them in the preparation of a joint document on the issue for consideration at the next meeting of the Working Group.

Treaty law issues

15.3 The Director referred to document 92FUND/WGR.3/22/18 in which he had listed the various documents dealing with treaty law issues that he had submitted to the second, third and fourth meetings of the Working Group. The Director stated that if it were decided that the 1992 Conventions should be revised he intended to submit further documents on these issues to a future meeting of the Working Group.

16 Future work

16.1 The Chairman stated that in view of the divided opinion on whether or not the 1992 Conventions should be revised, he believed that more time was needed to enable new proposals to be put forward on the basis of consultations between the States which favoured a revision and those which were against a revision. He further stated that there was also a need for consultations amongst those in favour of a revision in view of the wide range of proposals that had been put forward as to what form any revision should take.

16.2 It was decided that the next meeting of the Working Group would take place in February 2005. The Chairman reminded delegations of the need to submit documents in good time, since this was the only way of ensuring that all documents could be issued in the three official languages of the 1992 Fund and also ensuring that members of the Working Group would be able to give any proposals due consideration.