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THIRD INTERSESSIONAL WORKING GROUP

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REPORT ON THE NINTH 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:	Consider whether the 1992 Civil Liability Convention and the 1992 Fund Convention should be revised and, if so, which issues should be addressed in any such revision.

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EXECUTIVE SUMMARY

Mandate

The Working Group set up by the 1992 Fund Assembly in April 2000 held a meeting in March 2005 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.

The Working Group's report on its eighth meeting, held in May 2004, was considered by the Assembly at its 9th session in October 2004. In his summing up of the discussion, the Chairman of the Assembly noted that the Working Group was divided into two large groups, one of which was against any revision of the 1992 Conventions and the continuation of the Working Group whilst the other considered that there were a number of outstanding issues that needed to be addressed by the Working Group which could result in the revision of the 1992 Conventions. He also noted that some of those delegations that did not support a revision of the Conventions were nevertheless flexible on whether or not the Working Group should continue its work provided that a definite time limit for its work was set. He further noted that most delegations that had supported the continuation of the Working Group had recognised that it should not continue indefinitely and that it should be in a position to make a final recommendation to the 1992 Fund Assembly in October 2005.

The Assembly decided that the Working Group should meet in February 2005[<1>] and make final recommendations to the October 2005 session of the Assembly on whether or not the Conventions should be revised, and if so, which items required revision (document 92FUND/A.9/31, paragraph 7.11).

Discussions at the meeting in March 2005

Level of shipowner's limitation of liability and its relationship with the compensation funded by oil receivers (Section 6)

The Working Group noted details of the voluntary 'Small Tanker Oil Pollution Indemnification Agreement' (STOPIA) put in place by the International Group of P&I Clubs to address the imbalance in the sharing of the financial burden created by the establishment of the Supplementary Fund. Although the Agreement had been established on a voluntary basis, it was legally binding on those shipowners that were parties to it. Under the Agreement the shipowners and Clubs had undertaken to indemnify the 1992

[<1>] Meeting moved to March 2005.

Fund in respect of all claims up to 20 million SDR where the limitation amount under the 1992 Civil Liability Convention was lower, namely for ships of 29 548 tonnage or less. Although STOPIA would only apply to pollution damage in States that were parties to the Supplementary Fund Protocol, it would operate irrespective of whether or not the Supplementary Fund paid any compensation, and since it was the 1992 Fund that would be indemnified, all contributors to the 1992 Fund and not just those contributing to the Supplementary Fund would benefit.

The Working Group noted that the International Group Clubs had also put forward an alternative proposal establishing the 'Tanker Oil Pollution Indemnification Agreement' (TOPIA) whereby those Clubs would indemnify the Supplementary Fund in respect of 50% of the amounts paid in compensation by the Supplementary Fund. TOPIA was being put forward as an alternative to STOPIA and if the TOPIA proposal were to be accepted, the International Group of P&I Clubs would require the simultaneous implementation of TOPIA and withdrawal of STOPIA. Neither Agreement was being proposed by the International Group as an interim measure; both were conditional on there being no revision of the existing Conventions.

The Working Group took note of the views expressed by the Greek delegation and the observer delegations of the International Chamber of Shipping (ICS) and the International Association of Independent Tanker Owners (INTERTANKO), in particular those delegations' opposition to any revision of the Conventions and their support for the voluntary proposals put forward by the International Group of P&I Clubs. The Working Group also noted the opposite view expressed by the Oil Companies International Marine Forum (OCIMF) that increasing the financial responsibility of the shipowner should be addressed through revision of the 1992 Civil Liability Convention and that the shipowner should also contribute to the Supplementary Fund.

In the ensuing debate it was apparent that the Working Group was evenly divided on the question of whether or not the 1992 Conventions should be revised. The Group therefore decided that it was not in a position to make a recommendation to the 1992 Fund Assembly on this issue, but instead leave the Assembly to make its decision in the light of the debate. The Working Group agreed with the Chairman that for a revision of the Conventions to succeed there had to be broad support.

The Working Group decided that, since the Group had not made any recommendation as to whether the 1992 Conventions should be revised, it should consider a number of other issues set out in a document submitted by the Chairman so as to advise the Assembly which items should be included if a revision of the Conventions were to take place. The Working Group's consideration of these issues was without prejudice to the position of those delegations that were opposed to any revision of the 1992 Conventions.

Substandard transportation of oil (Section 7)

The Working Group took note of the views expressed by the International Group of P&I Clubs on the issue of addressing substandard shipping within the ambit of the international compensation regime, in particular that there was no evidence that the imposition of additional liability would improve the behaviour of the substandard operator and that any punitive intent against such operators would not be achieved since the insurance mechanism would result in the burden of increased liability falling upon the shipping industry generally.

The Working Group noted a number of concrete proposals by the International Group of P&I Clubs in the light of the study carried out by the Maritime Transport Committee of the Organisation for Economic Co-operation and Development (OECD) on the removal of insurance cover for substandard shipping. The International Group had proposed the establishment of an informal working group which could meet during the meetings of the IOPC Funds to consider the initiative further and to report to the 1992 Fund Assembly and the International Maritime Organization (IMO).

There was considerable support for the proposal by the International Group of P&I Clubs, although some delegations expressed concerns that the issue of substandard transportation of oil was essentially technical in nature and should be addressed under the auspices of IMO. The point was made that, if such a working

group were to be established, its terms of reference should remain focused on the insurance aspect and not stray into technical areas.

The Working Group decided to recommend to the 1992 Fund Assembly that it consider whether to establish an informal working group to examine the issue of substandard transportation of oil.

Tacit amendment procedures (Section 8)

At previous meetings there had been general agreement that the existing procedure for increasing the financial limits laid down in the 1992 Conventions ('tacit amendment procedure') needed improvements, either to allow an automatic revision of the financial limits under the Conventions in accordance with a suitable formula that would trigger any increase, or to reduce the time periods in the current procedure.

The Working Group decided to recommend to the 1992 Fund Assembly that, if it were to decide that the Conventions should be revised, the procedure for changing the financial limits under the Conventions should be amended.

Compulsory insurance (Section 9)

In previous meetings there had been considerable support for the widening of the compulsory insurance obligation under Article VII.1 of the 1992 Civil Liability Convention to include vessels carrying less than 2 000 tonnes of oil in bulk as cargo.

The Working Group agreed that a recommendation should be made to the Assembly that, if it were to decide that the Conventions should be revised, the compulsory insurance requirements should be amended to include all ships regardless of the quantity of oil carried on board.

Non-submission of oil reports (Section 10)

The non-submission of oil reports by a number of States has been a problem within the Fund system and a proposal had been made at a previous meeting that provisions should be incorporated into the 1992 Fund Convention corresponding to Article 15 of the Supplementary Fund Protocol under which compensation was denied in respect of States that had failed to fulfil their obligations to submit oil reports.

The Working Group decided that a recommendation should be made to the Assembly that, if it were to decide that the Conventions should be revised, the issue of sanctions against non-reporting States should be addressed.

Quorum for meetings of the 1992 Fund Assembly (Section 11)

It has become increasingly difficult to achieve a quorum for meetings of the 1992 Fund Assembly. In order to prevent this paralysing the operation of the Fund, the Assembly had in October 2002 created an Administrative Council with a less strict quorum requirement to act on its behalf if the former failed to achieve a quorum.

The Working Group decided that, whilst the problem of achieving a quorum for meetings did not itself justify a revision of the 1992 Fund Convention, it should be included for further consideration in the event that a revision went ahead.

Definition of 'ship' (Section 12)

The ambiguity in the definition of 'ship' had been sufficiently serious to warrant the creation of a separate Working Group to establish the 1992 Fund's policy on the interpretation of the definition. The recommendation of that Working Group had been endorsed by the Assembly in October 2000. The interpretation of this definition adopted by the Assembly was being challenged in the Greek courts in connection with the *Slops* incident.

The Working Group decided to recommend to the Assembly that, in the event that it were to decide that the Conventions should be revised, the definition of 'ship' should be amended to remove any ambiguity.

Uniform application of the Conventions (Section 13)

Problems have arisen in some jurisdictions as a result of decisions by the courts that conflicted with the intentions behind the Conventions.

The Working Group decided that the issue of the uniform application of the Conventions was sufficiently important to remain on the agenda if the Conventions were to be revised.

Breaking of limitation of liability (14)

The Working Group had discussed on a number of occasions the test for the breaking of the shipowner's right to limitation of liability in the 1992 Civil Liability Convention. Whilst some delegations had favoured reverting to the less onerous test contained in the 1969 Civil Liability Convention, there had been no widespread support within the Working Group for such an amendment to the Convention.

The Working Group decided that it should not recommend that an amendment of the test for the breaking of limitation of liability should be maintained on the agenda if the Conventions were to be revised, although this should not be interpreted that the Working Group did not maintain an interest in the promotion of quality shipping.

Problems faced by oil storage companies (Section 15)

In 2004 the Working Group had considered a proposal 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 revision would give storage companies, under certain conditions, the possibility to pass the obligation to pay 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. When the matter was considered by the Working Group in 2004, there had been little support for amending the definitions of 'receiver' or 'contributing oil'.

The Working Group took note of information provided by the Federation of European Tank Storage Associations (FETSA) giving an arithmetical analysis of the potential effects on contributions to the 1992 Fund if oil storage companies were able to identify their principals for the purpose of passing on the responsibility for paying contributions to those principals. The results of the study suggested that the disclosure of the identities of the principals would not endanger the financial viability of the 1992 Fund and could possibly result in an increase in the overall volume of contributing oil.

Although some delegations were in favour of amending the contribution system of the 1992 Fund, others were concerned about the complexity and administrative burden that would result from a change.

The Working Group decided to recommend to the 1992 Fund Assembly that any consideration of changing the contribution system should be deferred until such time as the HNS contribution system had been tried and tested.

Cargo owner liability (Section 16)

The Working Group in previous meetings had considered several proposals establishing an additional tier of liability imposed on cargo owners that used substandard ships, thereby alleviating the increased financial burden that would be borne by responsible receivers of contributing oil on account of the entering into force of the Supplementary Fund Protocol.

The Working Group decided to recommend to the Assembly that the issue of cargo owner liability should be dropped from the agenda in the event that a revision of the Conventions were to go ahead.

Minimum annual contribution to the 1992 Fund (Section 17)

The Working Group had at previous meetings considered a proposal that all Member States, irrespective of whether or not any contributing oil was received after sea transportation in the State concerned, should be required to pay a minimum annual contribution to the 1992 Fund based either on a minimum deemed quantity of contributing oil as required under the Supplementary Fund Protocol or on a fixed percentage of the total financial burden on the 1992 Fund.

The Working Group decided to recommend to the 1992 Fund Assembly that this item should not be retained in the event that the 1992 Conventions were to be revised.

Merging of the Conventions (Section 18)

At previous meetings several delegations had proposed merging the 1992 Civil Liability and Fund Conventions and the Supplementary Fund Protocol into a single instrument to facilitate the ratification process, provide better scope for ensuring their uniform application and simplify treaty law issues involved in any future revision of the regime.

The Working Group concluded that there was no support for including on the agenda the issue of the merging of the 1992 Conventions at present, should it be decided that the Conventions should be revised, but that it might be worth revisiting the issue at some future date.

Treaty law issues (Section 19)

The Working Group noted that if the 1992 Fund Assembly were to decide that the Conventions should be revised, the Director intended to submit further documents on these issues.

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 ninth meeting on 18 and 21 March 2005 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 ninth meeting:

Algeria	Ireland	Philippines
Antigua and Barbuda	Italy	Poland
Argentina	Japan	Portugal
Australia	Kenya	Qatar
Bahamas	Latvia	Republic of Korea
Belgium	Liberia	Russian Federation
Cameroon	Lithuania	Sierra Leone
Canada	Malta	Singapore
China (Hong Kong Special Administrative Region)	Marshall Islands	Spain
	Mexico	Sweden
Cyprus	Monaco	Trinidad and Tobago
Denmark	Morocco	Tunisia
Finland	Netherlands	Turkey
France	New Zealand	United Arab Emirates
Gabon	Nigeria	United Kingdom
Germany	Norway	Uruguay
Ghana	Oman	Vanuatu
Greece	Panama	Venezuela

2.2 Malaysia, which had deposited an instrument of ratification to the 1992 Fund Convention, but for which the Convention had not yet entered into force, was represented as an observer.

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

Benin	Democratic People's Republic of Korea	Peru
Brazil		Saudi Arabia
Chile	Ecuador	
Côte d'Ivoire	Iran (Islamic Republic of)	

2.4 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 (1971 Fund)
International Oil Pollution Compensation Supplementary Fund (Supplementary Fund)

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 Union of Marine Insurers (IUMI)
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

3.3 The Working Group's report on its eighth meeting, held in May 2004, was considered by the Assembly at its 9th session in October 2004. In his summing up of the discussion, the Chairman of the Assembly noted that the Working Group was divided into two large groups, one of which was against any revision of the 1992 Conventions and the continuation of the Working Group whilst the other considered that there were a number of outstanding issues that needed to be addressed by the Working Group which could result in the revision of the 1992 Conventions. He also noted that some of those delegations that did not support a revision of the Conventions were nevertheless flexible on whether or not the Working Group should continue its work provided that a definite time limit for its work was set. He further noted that most delegations that had supported the continuation of the Working Group had recognised that it should not continue indefinitely and that it should be in a position to make a final recommendation to the 1992 Fund Assembly in October 2005.

3.4 The Assembly decided that the Working Group should meet in February 2005[<2>] and make final recommendations to the October 2005 session of the Assembly on whether or not the Conventions

[<2>] Meeting moved to March 2005.

should be revised, and if so, which items required revision (document 92FUND/A.9/31, paragraph 7.11).

4 Documents considered by the Working Group at its ninth meeting

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

92FUND/WGR.3/25	Study of the removal of insurance from substandard shipping carried out by the Maritime Transport Committee of the OECD (Director)
92FUND/WGR.3/25/1	Proposal by the Chairman of the third intersessional Working Group to submit agenda items to the 1992 Fund Assembly for decision (Chairman)
92FUND/WGR.3/25/2	Sharing the burden (International Group of P&I Clubs)
92FUND/WGR.3/25/3	Proposals made in relation to substandard shipping (International Group of P&I Clubs)
92FUND/WGR.3/25/4	Review of the international compensation regime (Greece)
92FUND/WGR.3/25/5	An essential case for the revision of the 1992 Civil Liability and Fund Conventions (OCIMF)
92FUND/WGR.3/25/6	Numerical elaboration on the proposal that tank storage companies may disclose their principals thus avoiding the risk that advanced levy payments would not be compensated (FETSA)
92FUND/WGR.3/25/7	Review of the international compensation regime (International Group of P&I Clubs)
92FUND/WGR.3/25/8	Sharing of financial responsibility (ICS and INTERTANKO)
92FUND/WGR.3/25/9	Substandard shipping (ICS and INTERTANKO)
92FUND/WGR.3/25/10	List of previous documents (Director)

4.2 During the discussions reference was made to the Working Group's Reports on its second, third, fourth, fifth, seventh[<1>] and eighth 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), 92FUND/A.9/5 (92FUND/WGR.3/20) and 92FUND/A.9/5/1 (cf 92FUND/WGR.3/23)). As regards the documents submitted to these meetings, reference is made to these reports.

5 Issues considered at the Working Group's ninth meeting

The Working Group endorsed the Chairman's proposal to structure the discussion on the basis of the issues set out in document 92FUND/WGR.3/25/1 as follows:

1 Level of shipowner's limitation amount and its relationship with the compensation funded by oil receivers.

2 Substandard transportation of oil.

3 Tacit amendment procedures.

4 Compulsory insurance.

5 Non-submission of oil reports.

6 Quorum for meetings of the 1992 Fund Assembly.

[<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.

7 Definition of 'ship'.

8 Uniform application of the Conventions.

9 Breaking of limitation of liability.

10 The problems faced by oil storage companies.

11 Cargo owner liability.

12 Minimum annual contribution to the 1992 Fund.

13 Merging of the Conventions.

14 Treaty law issues.

6 Level of shipowner's limitation of liability and its relationship with the compensation paid by oil receivers

6.1 The Working Group took note of the information contained in document 92FUND/WGR.3/25/2 submitted by the International Group of P&I Clubs, which contained details of the voluntary arrangements that had been put in place by the P&I Club members of the Group to address the imbalance in the sharing of the financial burden created by the establishment of the Supplementary Fund, which was to be funded by oil receivers in States that become parties to the Supplementary Fund Protocol. It was noted that the International Group Clubs had established the 'Small Tanker Oil Pollution Indemnification Agreement' (STOPIA) whereby shipowners and Clubs had undertaken to indemnify the 1992 Fund in respect of all claims up to 20 million SDR where the limitation amount under the 1992 Civil Liability Convention was lower, namely for ships of 29 548 tonnage or less, to the effect that the maximum amount of compensation payable by the owners of such ships would be 20 million SDR. It was also noted that although STOPIA would only apply to pollution damage in States that were parties to the Supplementary Fund Protocol, it would operate irrespective of whether or not the Supplementary Fund paid any compensation. It was further noted that since it was the 1992 Fund that would be indemnified, all contributors to the 1992 Fund and not just those contributing to the Supplementary Fund would benefit from STOPIA. It was further noted that STOPIA constituted a legally binding agreement to indemnify the 1992 Fund, which would be guaranteed by the International Group of P&I Clubs.

6.2 The Working Group noted that the Boards of the International Group Clubs had also agreed to an alternative proposal establishing the 'Tanker Oil Pollution Indemnification Agreement' (TOPIA) whereby those Clubs would indemnify the Supplementary Fund in respect of 50% of the amounts paid in compensation by the Supplementary Fund. It was noted that although the oil companies represented by OCIMF had not associated themselves with the proposal, that did not, in the Group's view, affect its viability, since it would operate without the explicit agreement of the oil receivers.

6.3 The Working Group noted that TOPIA was being put forward as an alternative to STOPIA and that if the TOPIA proposal were to be accepted, the International Group of P&I Clubs would require the simultaneous implementation of TOPIA and withdrawal of STOPIA. It was also noted that the agreements were not being proposed by the International Group as an interim measure and that both were conditional on there being no revision of the existing Conventions.

6.4 The Working Group took note of the views expressed by the Greek delegation in document 92FUND/WGR.3/25/4, which drew attention to the legal and practical difficulties that could result from any revision of the Conventions, the division of opinion amongst members of the

Working Group about the need for revision and the potential for fragmentation of the current uniform compensation regime if revision went ahead.

6.5 It was noted that the Greek delegation had considered that the voluntary STOPIA initiative by the International Group of P&I Clubs removed any practical need for changing the legal liability limits, since it gave legal rights, which the 1992 Fund would be able to enforce against shipowners and directly against their P&I insurers. The Greek delegation drew attention to the fact that over 95% of the world's tanker fleet would be covered by the Agreement, including ships for which there was not currently a right of claimants to take direct action against the insurer on account of them being below the minimum tonnage for which certificates of insurance were required under the 1992 Civil Liability Convention.

6.6 The Working Group noted that ICS and INTERTANKO in document 92FUND/WGR.3/25/8 had firmly commended the principles underpinning the International Group of P&I Clubs' proposal to establish either STOPIA or TOPIA as a way of resolving rapidly the contentious issue of the equitable sharing of the financial burden without the need to embark on a revision of the existing Conventions.

6.7 The Working Group noted the opposite view expressed by OCIMF in document 92FUND/WGR.3/25/5, that increasing the financial responsibility of the shipowner should be addressed through revision of the 1992 Civil Liability Convention and that the shipowner should also participate in the Supplementary Fund. It was noted that OCIMF had argued that such an increase in the financial responsibility of the shipowner would have a beneficial effect on safety of navigation and pollution prevention. It was further noted that in OCIMF's view, the Supplementary Fund was an interim solution only. The Working Group noted that OCIMF did not support the proposed voluntary arrangements on the grounds that they would not cover all ships and that the arrangements could be withdrawn or amended unilaterally at any time.

6.8 The Working Group took note of the document presented by the International Group of P&I Clubs (document 92FUND/WGR.3/25/7) addressing some of the points dealt with in document 92FUND/WGR.3/25/5 submitted by OCIMF.

6.9 A number of delegations stated that the cost study undertaken by the Director reported in document 92FUND/WGR.3/22 had revealed an imbalance in the sharing of the financial burden in the past and that this would become more distorted with the entry into force of the Supplementary Fund Protocol such that some States would not be prepared to join the Supplementary Fund. Those delegations welcomed the voluntary initiative of the P&I Clubs to establish STOPIA as an interim measure, but could not understand the Clubs' resistance to revision. Those delegations stressed the need for a limited revision of the Conventions to address the financial imbalance and to ensure the uniform application of the Conventions. The point was made that had the two Conventions been merged into a single Convention in the same way as the HNS Convention, it would have been inconceivable for the cargo owners' financial liability to be increased without at the same time increasing the shipowners' liability.

6.10 An almost equal number of delegations were opposed to any revision of the Conventions on the grounds that the voluntary arrangements put in place by the International Group of P&I Clubs had dealt effectively with the imbalance in the sharing of the financial burden without the delays that would result from revision and implementation. The point was made that it was very unlikely that a revision process would succeed with so many States opposed to it. Some delegations were not opposed to revision at some stage in the future but believed it was premature to revise the Conventions at this stage and argued that the new voluntary arrangements should be allowed time in order to enable States to see how they worked in practice.

6.11 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 obligations 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. The point was also made that liability and compensation for oil pollution damage raised important policy considerations which had to be governed by legislation.

6.12 Some delegations stated that it was unfortunate that the two sides of the industry had been unable to reach agreement and that this was a major obstacle to any further progress. Those delegations urged the two sides to continue to work towards consensus so as to avoid the fragmentation of the compensation regime.

6.13 One delegation suggested that STOPIA would be more attractive if it were to apply to pollution damage in all 1992 Fund Member States and not just to such damage in those States that were Members of the Supplementary Fund. Another delegation considered that a combination of STOPIA and TOPIA would address both the current imbalance as regards small ships and the future imbalance created as a result of the entry into force of the Supplementary Fund Protocol.

6.14 The observer delegation of the International Group of P&I Clubs stated that the Clubs' main objection to any revision was the risk that it could lead to a wide-ranging review of the Conventions. That delegation pointed out that cover under STOPIA was not restricted to Clubs of the International Group, but also to insurers in China, the Russian Federation and the Republic of Korea that were reinsured through the pooling arrangements of the International Group. That delegation stated that the Clubs would go back to their Boards on the issues of whether STOPIA could be extended to all 1992 Fund incidents and whether shipowners would be prepared to operate both STOPIA and TOPIA instead of one or the other.

6.15 Several delegations emphasised that any revision would be restricted to a limited number of issues and that the fear of the International group of P&I Clubs of an open-ended revision was misplaced.

6.16 In his summing up of the discussion the Chairman noted that the Working Group was evenly divided on the question of whether or not the Conventions should be revised. The Chairman therefore stated that in view of the divergence of opinion, the Group was not in a position to make a recommendation to the 1992 Fund Assembly on this issue and that it would therefore be for the Assembly to make a decision in the light of the debate. He expressed his hope that in the meantime the two opposing sides would continue to discuss the issues and to explore ways of narrowing the gap between them. The Chairman stressed the importance of maintaining a global and universally applicable regime and that for a revision of the Conventions to succeed, there had to be broad support.

6.17 The Working Group agreed with the Chairman's summing up and decided not to make a recommendation to the 1992 Fund Assembly as to whether or not the Conventions should be revised.

6.18 The Working Group further decided that, since the Group had not made any recommendation as to whether the 1992 Conventions should be revised, it should consider the various issues set out in the document presented by the Chairman (92FUND/WGR.3/25/1) so as to enable it to advise the Assembly which items should be included if a revision of the Conventions were to take place. It was noted that the Working Group's consideration of these issues was without prejudice to the position of those delegations which opposed any revision of the 1992 Conventions.

7 Substandard transportation of oil

7.1 The Working Group took note of the views expressed by the observer delegation of the International Group of P&I Clubs in document 92FUND/WGR.3/25/3 in which it argued that the proposals that had been put forward by members of the Working Group to address the problem of substandard shipping within the ambit of the international compensation regime were misplaced

for two broad reasons. It was noted that according to the International Group, there was no evidence that the imposition of additional liability would improve the behaviour of the substandard operator and that the punitive intent of the proposals would not be fulfilled, since the burden of increased liability would, through the insurance mechanism, fall upon the shipping industry generally and not upon the individual substandard operator. It was further noted that the Clubs had proposed that the primary aim should be to create the conditions that would deter or prevent the substandard operator from trading altogether rather than imposing greater liability.

7.2 The Working Group took note of the 'Report on Ship Safety' attached as an appendix to the document by the International Group of P&I Clubs and in particular of a number of concrete proposals by the International Group in the light of the study carried out by the Maritime Transport Committee of the Organisation for Economic Co-operation and Development (OECD) on the removal of insurance cover for substandard shipping. It was noted that the International Group had proposed the establishment of an informal working group which could meet during the meetings of the IOPC Funds to consider the initiative further and to report to the 1992 Fund Assembly and IMO. It was noted that the Clubs had in mind specific issues for consideration by the informal working group which included reviewing ship vetting procedures to identify any weaknesses, exploring the benefits of adopting unified surveys and sharing of information and a review of the procedures for certification.

7.3 The Working Group noted that in document 92FUND/WGR.3/25/9 the observer delegations of ICS and INTERTANKO had agreed with the International Group of P&I Clubs that additional liability would not improve the behaviour of the substandard operator, since the principle of compulsory insurance, introduced to ensure that pollution victims were not denied compensation, had the effect of cushioning a shipowner against the impact of increased liability. It was noted that ICS and INTERTANKO had acknowledged the important role of the P&I Clubs in ensuring that substandard tankers did not obtain insurance cover and supported fully the practical steps that the Clubs had put in place as outlined in the Group's 'Report on Ship Safety', which were complementary to the measures being taken by IMO and States as well as by associated industries. ICS and INTERTANKO questioned, however, whether meetings of the 1992 Fund provided the appropriate forum for the informal working group proposed by the International Group, bearing in mind IMO's broader work and role in tackling substandard ships.

7.4 A number of delegations acknowledged the important role of the insurance industry in eliminating substandard shipping and welcomed the proposal by the International Group of P&I Clubs to establish an informal working group. Those delegations stressed that the terms of reference of any such group would need the 1992 Fund Assembly's approval and that it would be important that the group remained focused on the insurance aspects and did not stray into technical areas which were the responsibility of IMO. The point was made that since many delegations to Fund meetings were represented by government departments that were responsible for validating insurance and issuing certificates attesting that ships had cover under the Civil Liability Convention, the Fund was well qualified to consider the role of the insurance industry in eliminating substandard ships.

7.5 Other delegations considered that the issue of substandard transportation of oil was technical in nature and was outside the scope of the Working Group's terms of reference and that it should therefore be addressed under the auspices of IMO. Those delegations expressed the view that the role of IMO could be undermined if a body outside that Organisation were to become involved in such issues and that it would be more appropriate for the IMO Legal Committee to consider the matter with input from the 1992 Fund as appropriate.

7.6 The observer delegation from IMO stated that IMO stood ready to assist in all aspects in the drive to promote quality shipping, and that whilst it might be more appropriate for the Fund to address insurance-related initiatives, the Legal Committee of IMO could also become involved.

7.7 In his summing up of the discussion the Chairman noted that there was considerable support for the proposal by the International Group of P&I Clubs to establish an informal working group to

meet during meetings of the IOPC Funds to consider the initiative referred to in paragraph 7.2, but that it would be necessary for the 1992 Fund Assembly to consider the proposal and to decide whether the Fund should study the problem further, and if so, decide on the appropriate body to undertake the study. The Chairman also made it clear that if such a informal working group were to be established, it should confine itself to issues relating to substandard transportation from an insurance point of view and should not stray into areas that fell under the jurisdiction of IMO. The Chairman also stated that the proposal by the Clubs would not have any bearing on the Assembly's decision as to whether or not to revise the Conventions. He suggested that if an informal working group were to be established by the Assembly, it would be important to invite the participation of the International Association of Classification Societies (IACS), which did not have observer status with the 1992 Fund. The Chairman asked the Director to keep IACS informed of developments.

7.8 The Working Group agreed with the Chairman's summing up and decided to recommend to the 1992 Fund Assembly that it consider whether to establish an informal working group to examine the issue of substandard transportation of oil.

8 Tacit amendment procedures

8.1 It was recalled that the Working Group had previously considered whether changes should be made to the tacit amendment procedure whereby any amendment of the financial limits adopted by the Legal Committee of IMO shall be deemed to be accepted within 18 months of notification of all Contracting States unless within that period not less than a quarter of the States that were Contracting States at the time of the adoption of the amendment by the Legal Committee had communicated to IMO that they did not accept the amendment, in which case the amendment was rejected.

8.2 The Working Group recalled that there had been general agreement that the existing tacit amendment procedure needed improvements either to allow an automatic revision of the financial limits under the Conventions in accordance with a suitable formula that would trigger any increase or to reduce the time periods in the current procedure.

8.3 A number of delegations expressed the view that in the event that a decision were to be taken by the 1992 Fund Assembly that the Conventions should be revised, the procedures for changing the financial limits required amendment so as to safeguard victims of pollution damage and at the same time protect the industry from large increases in financial exposure. Those delegations favoured small, frequent rather than large, infrequent increases.

8.4 The Working Group decided that a recommendation should be made to the Assembly that, if it were to decide that the Conventions should be revised, the procedure for changing the financial limits under the Conventions should be amended.

9 Compulsory insurance

9.1 It was noted that under Article VII.1 of the 1992 Civil Liability Convention only owners of ships which carried more than 2 000 tonnes of oil in bulk as cargo were required to maintain insurance to cover the liability under that Convention.

9.2 The Working Group recalled that in previous meetings there had been considerable support for widening the compulsory insurance obligation to include vessels carrying less than 2 000 tonnes of oil in bulk as cargo.

9.3 The Working Group agreed that a recommendation should be made to the Assembly that, if it were to decide that the Conventions should be revised, the compulsory insurance requirements should be amended to include all ships regardless of the quantity of oil carried on board.

10 Non-submission of oil reports

10.1 The Working Group recalled that the non-submission of oil reports by a number of States had been a problem within the Fund system almost since its inception. It was also recalled that, as the 1992 Fund Assembly had noted on several occasions, the 1992 Fund Convention in its present version did not make it possible to impose any sanctions on States which did not fulfil their treaty obligations in this regard.

10.2 The Working Group recalled that a proposal had been made at a previous meeting of the Working Group that provisions should be incorporated into the 1992 Fund Convention corresponding to Article 15 of the Supplementary Fund Protocol under which compensation was denied in respect of States that had failed to fulfil their obligations to submit oil reports.

10.3 A number of delegations considered that sanctions were necessary to ensure that all Member States complied with their obligations to submit oil reports.

10.4 The Working Group agreed that in the event that the Assembly were to decide that the Conventions should be revised, the issue of sanctions against non-reporting States should be addressed.

11 Quorum for meetings of the 1992 Fund Assembly

11.1 It was recalled that under Article 20 of the 1992 Fund Convention, a majority of the Member States constituted a quorum for its meetings.

11.2 The Working Group recalled that as the membership of the 1992 Fund continued to grow, it had become increasingly difficult to achieve a quorum for meetings of the Assembly, which could lead to a crippling of the Fund and possible disruption of payments of claims. It was also recalled that, in order to prevent a lack of quorum in the Assembly paralysing the 1992 Fund, the Assembly had at its 7th session in October 2002 created an Administrative Council with a less strict quorum requirement which would act on behalf of the Assembly if the latter failed to achieve a quorum (1992 Fund Resolution N°7).

11.3 Some delegations considered that it was necessary to find a lasting solution to the problem that could not be legally challenged and that this would inevitably mean revising the 1992 Fund Convention.

11.4 Other delegations did not see the need for revision of the Convention in order to resolve this problem and considered that the issue could be dealt with through the adoption of a Resolution such as the one already adopted by the Assembly establishing the Administrative Council with a lower quorum requirement in the event that the Assembly did not achieve a quorum. One delegation suggested an alternative solution, namely the adoption of a Resolution whereby the quorum requirement would be reduced if after a certain period of time after the opening of the session of the Assembly there was not a majority of Member States present.

11.5 The Working Group decided that, whilst the problem of achieving a quorum for meetings did not itself justify a revision of the 1992 Fund Convention, it should be included for further consideration in the event that a revision went ahead.

12 Definition of 'ship'

12.1 The Working Group recalled that the ambiguity in the definition of 'ship' had been sufficiently serious to warrant the creation of a separate Working Group to establish the 1992 Fund's policy on the interpretation of the definition and that the recommendation of that Working Group had been endorsed by the Assembly at its 5th session in October 2000 (document 92FUND/A.5/28, paragraph 23.5). It was also recalled that the interpretation of this definition adopted by the Assembly was being challenged in the Greek courts in connection with the *Slops* incident.

12.2 The Working Group decided to recommend to the Assembly that in the event that it were to decide that the Conventions should be revised, the definition of 'ship' should be amended to remove any ambiguity.

13 Uniform application of the Conventions

13.1 The Working Group recalled that problems had arisen in some jurisdictions as a result of decisions by the courts that had conflicted with the intentions behind the Conventions. It was also recalled that the 1992 Fund Administrative Council, acting on behalf of the 1992 Fund Assembly, had adopted 1992 Fund Resolution N°8 on the interpretation and application of the 1992 Civil Liability and Fund Conventions. It was noted that in the Resolution it was stated that it was crucial for the proper and equitable functioning of the regime established by the 1992 Conventions that these Conventions were implemented and applied uniformly in all States Parties. The Resolution emphasised that it was vital that the courts of the States Parties to the 1992 Conventions should take into account the decisions of the governing bodies of the 1992 Fund and the 1971 Fund relating to the interpretation and application of these Conventions. It was noted, however, that although the Resolution captured the essence of the problem, it was not binding on national courts which could still interpret the Conventions differently from the Funds' governing bodies.

13.2 A number of delegations stated that the uniform interpretation of the Conventions was a fundamental issue that had to be addressed in any possible revision of the Conventions. Those delegations recognised that even if the text of the Conventions were amended, its final interpretation would still be a matter for the national courts and that the only way of guaranteeing a uniform application would be by establishing an international dispute settlement system, a solution which had been rejected by the Funds' governing bodies in the past.

13.3 The Working Group decided that the issue of the uniform application of the Conventions was sufficiently important to remain on the agenda if the Conventions were to be revised.

14 Breaking of limitation of liability

14.1 The Working Group recalled that it had discussed on a number of occasions the test for the breaking of the shipowner's right to limitation of liability in the 1992 Civil Liability Convention. It was noted that under the 1969 Civil Liability Convention, the shipowner would be deprived of his right to limitation of liability if the incident occurred as a result of his actual fault or privity, whereas under the 1992 Civil Liability Convention the shipowner would lose this right if it was proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and in the knowledge that such damage would probably result. It was also recalled that whilst some delegations had favoured reverting to the test contained in the 1969 Civil Liability Convention, there had been no widespread support within the Working Group for such an amendment to the Convention.

14.2 The Working Group decided that it should not recommend that an amendment of the test for the breaking of limitation of liability should be maintained on the agenda if the Conventions were to be revised, although this should not be interpreted that the Working Group did not maintain an interest in the promotion of quality shipping.

15 Problems faced by oil storage companies

15.1 It was recalled that the Working Group had in 2004 considered a proposal to incorporate into a revised version of the 1992 Convention two provisions contained in the HNS Convention, one relating to the concept of 'receiver' and the other relating to the definition of 'contributing oil'. It was further recalled that the former would give storage companies, under certain conditions, the possibility to pass the obligation to pay contributions on to their principals. It was also recalled that 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.

15.2 It was recalled that when the issue was discussed in 2004, a number of delegations had supported in principle the proposal to amend the definition of 'receiver' in line with the HNS Convention, which in their view was more equitable. It was also recalled that other delegations had been 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. It was further recalled that the point had been made that a commercial solution between the storage companies and their principals was the ideal solution, although it had been 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.

15.3 It was recalled that when the matter was considered by the Working Group in 2004, there had been 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.

15.4 The Working Group took note of the information contained in document 92FUND/WGR.3/25/6 by the Federation of European Tank Storage Associations (FETSA), which provided an arithmetical analysis of the potential effects on contributions to the 1992 Fund if oil storage companies were able to identify their principals for the purpose of passing on the responsibility for paying contributions to those principals. It was noted that the results of the study suggested that the disclosure of the identities of the principals would not endanger the financial viability of the 1992 Fund and could possibly result in an increase in the overall volume of contributing oil.

15.5 The Working Group recalled that tank storage companies had argued that they had no commercial interest in the oil they stored but, under the present text of the 1992 Fund Convention, were faced with the financial burden of paying contributions to the Fund without the possibility of passing the cost on to their principals, and that this, in those companies' view, sometimes posed a threat to a storage company's economic viability.

15.6 A number of delegations expressed their appreciation for the information provided by FETSA and supported the proposal to identify principals since this would broaden the contributions base and would be consistent with the contribution arrangements under the HNS Convention. Those delegations therefore considered that the issue should be kept on the agenda in the event that the Assembly were to decide that the Conventions should be revised.

15.7 Other delegations, whilst appreciative of the study carried out by FETSA, and sympathetic to the problems faced by oil storage companies, were opposed to any change to the current contribution system, which had proved simple and effective. The point was made by some delegations that the contribution system under the HNS Convention which allowed passing on the responsibility for paying contributions to the principal of the original receiver was proving very complex and that with hindsight it would, in their view, have been preferable if the HNS Convention had provided for the same contribution system as the 1992 Fund Convention. The point was also made that in so far as the oil sector account in the HNS Convention, the contribution system was the same as that in the 1992 Fund Convention in that it did not provide for the possibility of disclosing principals for the purpose of contributions.

15.8 In his summing up the Chairman noted that some delegations were concerned about the complexity and administrative burden that would result from a change in the contribution system of the 1992 Fund. He also noted that some delegations nevertheless were in favour of amending the system. He suggested that, in the event that the Assembly were to decide that the 1992 Conventions should be revised, it might be preferable to wait and see how the HNS contribution system worked in practice before further consideration is given to the issue.

15.9 The Working Group agreed with the Chairman's summing up and decided to recommend to the 1992 Fund Assembly that any consideration of changing the contribution system should be deferred until such time as the HNS contribution system had been tried and tested.

16 Cargo owner liability

16.1 The Working Group recalled that it had at previous meetings considered several proposals establishing an additional tier of liability imposed on cargo owners that used substandard ships, thereby alleviating the increased financial burden that would be borne by responsible receivers of contributing oil on account of the entering into force of the Supplementary Fund Protocol.

16.2 One delegation, which had been in favour of introducing cargo owner liability into the compensation regime, stated that in the interest of bringing about a limited revision of the Conventions it was prepared to withdraw its proposal.

16.3 An observer delegation stated that if a revision of the Conventions were to involve changes in the financial limits for certain categories of ship or certain types of cargo, the involvement of cargo owners in the compensation regime was inevitable.

16.4 The Working Group decided to recommend to the Assembly that the issue of cargo owner liability should be dropped from the agenda in the event that a revision of the Conventions were to go ahead.

17 Minimum annual contribution to the 1992 Fund

17.1 It was noted that under the 1992 Fund Convention, contributions were only payable by entities which actually received contributing oil after sea transport in a Member State. It was also noted that under the Supplementary Fund Protocol, however, for the purpose of the contribution system, at least 1 million tonnes would be deemed to have been received each year in each Supplementary Fund Member State.

17.2 The Working Group recalled that it had at previous meetings considered a proposal 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 as required under the Supplementary Fund Protocol or on a fixed percentage of the total financial burden on the 1992 Fund.

17.3 A large number of delegations considered that it was inappropriate to introduce a minimum annual contribution for the purpose of the 1992 Fund and that the disadvantages of modifying the current system outweighed any possible benefits. The point was made that although it was justified to impose a minimum fee as regards the Supplementary Fund which was an optional third tier of compensation, it was not appropriate to impose such a fee in respect of the 1992 Fund which was a basic layer of compensation.

17.4 The Working Group decided to recommend to the 1992 Fund Assembly that this item should not be retained in the event that the 1992 Conventions were to be revised.

18 Merging of the Conventions

18.1 The Working Group recalled that several delegations had at previous meetings proposed merging the 1992 Civil Liability and Fund Conventions and the Supplementary Fund Protocol into a single instrument to facilitate the ratification process, provide better scope for ensuring their uniform application and simplify treaty law issues involved in any future revision of the regime.

18.2 A number of delegations maintained, however, that despite the very obvious advantages of a single treaty there were practical obstacles to such a merger. The point was made that land-locked countries that registered ships and therefore had to be parties to the Civil Liability Convention for the purpose of issuing insurance certificates, would not have any benefit from the 1992 Fund

Convention. One delegation suggested, however, that this issue had not been considered by the Working Group in any depth and that it would therefore be appropriate to return to the issue at a later stage should the Conventions be revised.

18.3 The Working Group concluded that there was no support for including in the agenda the issue of the merging of the 1992 Conventions at present, should it be decided that the Conventions should be revised, but that it might be worth revisiting the issue at some future date.

19 Treaty law issues

The Working Group recalled that the Director had on the occasion of previous meetings raised a number of treaty law issues, some of them linked to the uniform application of the Conventions. It was noted that if the 1992 Fund Assembly were to decide that the Conventions should be revised, the Director intended to submit further documents on these issues.