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THIRD INTERSESSIONAL WORKING GROUP

92FUND/WGR.3/15

REPORT ON THE FIFTH 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:	(1)	to consider the Working Group's report;
	(2)	to consider the Working Group's proposal for a Resolution on the Interpretation and Application of the 1992 Civil Liability Convention and the 1992 Fund Convention;
	(3)	to note the Working Group's planning of its future work; and
	(4)	to give the Working Group such instructions as the Assembly may deem appropriate.

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EXECUTIVE SUMMARY

Mandate

The Working Group set up by the 1992 Fund Assembly in April 2000 held a meeting in February 2003 under the Chairmanship of Mr A Popp QC (Canada) on the basis of the following mandate given by the Assembly at its October 2001 session:

(a) to continue an exchange of views concerning the need for and the possibilities of further improving the compensation regime established by the 1992 Civil Liability Convention and the 1992 Fund Convention, including issues mentioned in paragraph 27.3 of document 92FUND/A.6/4, which had already been identified by the Working Group, but not yet resolved; and

(b) to report to the next regular session of the Assembly on the progress of its work and make such recommendations as it may deem appropriate.

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

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

Discussions at the meeting in February 2003

At the meeting in February 2003 the Working Group considered the shipowners' liability and related issues. It also discussed non-submission of oil reports, refinement of the contribution system, the definition of 'ship', uniform application of the Conventions, alternative dispute resolutions (ADR), mark-up for fixed costs relating to oil combating equipment and the application of the 1992 Conventions to the exclusive economic zone or equivalent area.

Shipowners' liability and related issues (Section 6)

The Working Group considered proposals by the French delegation and the observer delegation of the Oil Companies International Marine Forum (OCIMF) to introduce a limit of shipowners' liability of 89.8 million SDR (£77.7 million) irrespective of the tonnage of the ship and to abolish the exemption from the obligation to maintain insurance for ships carrying less than 2 000 tonnes of oil in bulk as cargo.

The OCIMF observer delegation maintained that the adoption of the Supplementary Fund Protocol would distort the balance between shipping and cargo interests, since it was the intention that only oil receivers would finance the Supplementary Fund. That delegation expressed the view that the compensation scheme should be consistent with the general objective of improving maritime safety and reducing the number of oil spills.

The observer delegations representing shipowners and P & I Clubs took the view that the present regime had ensured an equitable distribution of the economic burden between shipping and cargo interests. They maintained that the proposal by the shipping industry to increase, on a voluntary basis, the limitation amount applicable to small ships to 20 million Special Drawing Rights (£17.3 million) would preserve this balance even after the entry into force of the proposed Protocol establishing a Supplementary Fund, and at the same time avoid the treaty law and transitional problems that would arise through a major revision of the existing regime. Those delegations argued that the primary purpose of the compensation

regime was not to ensure quality shipping but rather full and adequate compensation for victims of oil pollution.

A number of delegations, whilst recognising the short-term benefits of the Protocol establishing a Supplementary Fund and the proposed voluntary increase of the limitation amount for small ships, considered that it was still necessary to take a long and hard look at the current regime and to increase the shipowners' involvement on a firm legal basis.

Several delegations expressed the view that increasing the financial burden on shipowners beyond those already envisaged by the 50% increase that would come into effect in November 2003 and the proposed voluntary increase for small ships was not justified. Those delegations also stated that tonnage-related financial limits were well established in maritime law and stressed the importance of the Civil Liability Convention remaining consistent with other international maritime compensation Conventions.

The Working Group decided that, in view of the apparent disagreement between the shipping industry and the oil industry on the extent to which the financial burden of oil spills had been shared in the past and would be shared in the future, the Director should undertake an independent study of the costs of past spills in relation to the current and future limitation amounts of the 1992 Conventions. The Working Group considered that it was important that the study reflected the costs of past spills and the apportionment of those costs between the shipping and oil industries on the basis of values in 2003 and the likely values in the future, taking into account inflation indices for individual States.

The Working Group considered a proposal by the French delegation to develop new criteria governing the shipowner's right to limitation of liability so as to make it easier to break that right. In a document submitted by France, Spain and the European Commission the view had been expressed that the virtually unbreakable right of limitation of shipowners had hampered the 1992 Fund from effectively taking recourse action against shipowners operating substandard ships.

Most delegations expressed the view that it was inappropriate to lower the threshold for breaking the shipowner's right to limit liability as means of trying to improve the overall quality of shipping, and that in those delegations' view this was best dealt with through other international Conventions, which attached punitive sanctions to non compliance.

The Working Group considered a proposal by the French delegation that the present provisions on channelling of liability, which precluded claims for compensation being pursued against a number of parties (eg the charterer) should be amended so as to revert to the channelling provisions in the 1969 Civil Liability Convention, which barred only claims against the servants or agents of the shipowner.

A number of delegations considered that the benefit to victims afforded by the current channelling provisions was of paramount importance, but supported exploring further a proposal put forward by Italy at a previous meeting of the Working Group to include charterers' (usually cargo owners) liability in the compensation regime.

Non-submission of oil reports and annual membership fee (Section 7)

The Working Group considered a proposal by the Canadian delegation to amend the 1992 Fund Convention so as to require all Contracting States to pay annual membership subscription fees. It was also proposed that if the fee was not paid or if no oil report was submitted by a State by the end of a specific period, the Fund Convention would cease to be in force in respect of the State in question.

Several delegations considered that it was important to distinguish between States that did not submit oil reports and those that reported nil receipts of contributing oil and that it was necessary to continue to look for an effective method of dealing with the former. It was suggested that the method used within the United Nations for the calculation of contributions by States might be more appropriate than a flat membership fee for States with nil oil receipts.

Refinement of the contribution system (Section 8)

The Working Group considered a proposal made by the observer delegation of the Federation of European Tank Storage Associations (FETSA) to find an equitable solution in respect of certain receivers of oil who were contributors to the 1992 Fund under the 1992 Fund Convention although they did not have any interest in the oil received other than providing oil storage services. It was noted that the proposal echoed a previous suggestion by the Netherlands delegation that the definitions of 'contributing cargo' and 'receiver' should be the same as those in the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention).

Although many delegations were sympathetic to the concerns expressed by FETSA they were hesitant to change the current system, which was simple and effective. It was agreed however, that the matter might be reconsidered if a decision were made to revise the Conventions.

Definition of 'ship' (Section 9)

The Working Group considered a proposal by the United Kingdom delegation that it should consider two possible options of amending the definition of 'ship' in the 1992 Civil Liability Convention to avoid ambiguity, namely

Option 1

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

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

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

Option 2

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

'Ship' means any sea going vessel and seaborne craft of any type actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such cargo of oil in bulk aboard.

A number of delegations, whilst agreeing that Option 2 reflected the current policy of the 1992 Fund in respect of unladen tankers, stated their preference for Option 1 in the event that the decision were taken to revise the text of the 1992 Civil Liability Convention.

Uniform application of the Conventions (Section 10)

The Working Group considered a document presented by the Director in which he dealt with certain provisions in the 1992 Conventions in respect of which he felt that in the past the Conventions had not been applied in a uniform way or difficulties had arisen as a result of the relationship between the Conventions and national law, namely channelling of liability, time bar, enforcement of judgements, jurisdiction and distribution of the amounts available for compensation.

The Working Group considered that uniformity of implementation and application of the Conventions was crucial to the equitable functioning of the international compensation regime. It was recognised, however, that this was a difficult issue, since national courts had the last word on the interpretation of the Conventions, although they often lacked relevant experience. It was suggested that if more information

were made available to Member States and national courts on decisions by the IOPC Funds' governing bodies relating to the criteria for admissibility of claims and on other aspects relating to the interpretation of the Conventions, this might contribute to a uniform interpretation and application.

The Director was instructed to consider further the establishment of a database of decisions by national courts on the interpretation of the 1971 and 1992 Fund Conventions and of important decisions by the Assemblies and Executive Committees of relevance to the interpretation of the Conventions and the admissibility of claims.

The Working Group approved the text of a Resolution on uniformity of interpretation and application of the 1992 Conventions for submission to the Assembly for consideration.

Alternative dispute settlement procedures (Section 11)

The Working Group considered a proposal by the United Kingdom delegation that the Fund should be more proactive in encouraging claimants to have their claims dealt with through arbitration and that it should clarify its policy on arbitration through amendments of the Internal Regulations and the 1992 Fund Claims Manual. That delegation suggested that the 1992 Fund should only agree to arbitration if the arbitrator would have full regard to the Fund's policies, practices, decisions and precedents and where no new issues of principle were involved.

There was general support for the proposal but with an acknowledgement that there were a number of practical issues relating to the Fund's policies, practices, decisions and precedents which would need to be addressed if the proposal was to be pursued further.

Admissibility of claims for fixed costs (Section 12)

The Working Group considered a proposal by the delegations of Italy, the Netherlands, Poland, Spain and the United Kingdom to amend the text of the 1992 Fund's Claims Manual to allow for the payment of a mark-up on claims for fixed costs of equipment used to control and prevent pollution damage. It was noted that the sponsoring delegations had argued that the inclusion of such a mark-up would provide an incentive to States to maintain specialised oil spill combating equipment thereby minimising the environmental and financial impact of oil spills.

Although a number of delegations considered that it was important to encourage States to maintain a good oil combating capability there was insufficient support for the proposal as drafted since it could not be implemented without amendments to the Conventions. It was agreed however, that the matter should be considered further on the basis of a revised proposal.

Application of the 1992 Conventions to the EEZ or an area designated under Article II(a)(ii) of the 1992 Civil Liability Convention and Article 3(a)(ii) of the 1992 Fund Convention

The Working Group considered a proposal by the Algerian delegation to adopt on a provisional basis the Search and Rescue divisions agreed between coastal States Parties to the 1979 Convention on Maritime Search and Rescue to resolve the practical problem faced by States bordering enclosed or semi-enclosed seas of declaring exclusive economic zones. The Algerian delegation further proposed that the Articles in the 1992 Conventions relating to the geographical scope should be amended to take into account the particular nature of enclosed and semi-enclosed seas.

Some delegations expressed the view that the issue raised by the Algerian delegation was different to the others considered by the Working Group in that it was essentially a political matter, which was best resolved by agreements between the States involved in particular area.

Next meeting

The Working Group decided to hold a short meeting during the week of 20 October 2003 in connection with the Assembly's autumn session to consider the progress made during informal discussions.

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 first meeting on 6 July 2000, its second meeting on 12 and 13 March 2001, its third meeting from 26 to 29 June 2001, its fourth meeting on 30 April, 1 and 2 May 2002, and its fifth meeting from 4 to 7 February 2003, all 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 fifth meeting:

Algeria	Italy	Qatar
Argentina	Japan	Republic of Korea
Bahamas	Liberia	Russian Federation
Belgium	Malta	Singapore
Cameroon	Marshall Islands	Spain
Canada	Mexico	Sweden
Denmark	Morocco	Trinidad and Tobago
Finland	Netherlands	Tunisia
France	Norway	Turkey
Germany	Panama	United Kingdom
Greece	Philippines	Uruguay
Grenada	Poland	Venezuela
Ireland	Portugal	

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

States which had deposited instruments of ratification, acceptance, approval or accession to the 1992 Fund Convention:

Nigeria

Other States:

Chile	Iran, Islamic Republic of	Peru
Ecuador	Malaysia	

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

Intergovernmental organisations:
International Oil Pollution Compensation Fund 1971
European Commission

International non-governmental organisations:
Comité Maritime International (CMI)
Federation of European Tank Storage Associations (FETSA)
Friends of the Earth International (FOEI)
International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)

International Group of P & I Clubs
International Tanker Owners Pollution Federation Limited (ITOPF)
Oil Companies International Marine Forum (OCIMF)

3 The Working Group's mandate

3.1 At its 6th session, held in October 2001, the Assembly gave the Working Group the following revised mandate (document 92FUND/A.6/28, paragraph 6.49):

(a) to continue an exchange of views concerning the need for and the possibilities of further improving the compensation regime established by the 1992 Civil Liability Convention and the 1992 Fund Convention, including issues mentioned in paragraph 27.3 of document 92FUND/A.6/4, which had already been identified by the Working Group, but not yet resolved; and

(b) to report to the next regular session of the Assembly on the progress of its work and make such recommendations as it may deem appropriate.

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

(a) shipowners' liability

(b) environmental damage

(c) alternative dispute 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

4 Documents considered at the Working Group at its fifth meeting

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

92FUND/WGR.3/14	List of previous documents (Director)
92FUND/WGR.3/14/1	Fine tuning of the contribution system (FETSA)
92FUND/WGR.3/14/2	Proposal for the revision of the CLC and IOPC Fund Conventions (OCIMF)
92FUND/WGR.3/14/3	Uniform application of the Conventions (Director)
92FUND/WGR.3/14/4	Shipowner's responsibility (France)
92FUND/WGR.3/14/5	Liability of parties involved in the carriage of oil by sea (France, Spain and the European Commission)
92FUND/WGR.3/14/6	EEZ (Algeria)
92FUND/WGR.3/14/7	International Group of P & I Clubs
92FUND/WGR.3/14/8	Non-submission of oil reports (Canada)
92FUND/WGR.3/14/9	Proposal for the payment of a mark-up on claims for fixed costs for equipment used to control and prevent oil pollution (Italy, Netherlands, Poland, Spain and United Kingdom)
92FUND/WGR.3/14/10	INTERTANKO
92FUND/WGR.3/14/11	Proposal for the revision of the definition of 'ship' under Article I of the 1992 Conventions (United Kingdom)
92FUND/WGR.3/14/12	Alternative dispute settlement procedures (United Kingdom)
92FUND/WGR.3/14/13	Shipowners' liability (United Kingdom)
92FUND/WGR.3/14/14	Uniform application of the Conventions and other related issues (Japan)

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

5 Issues considered at the Working Group's fifth meeting

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

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

   (a) level of shipowners' limitation amount and its relationship with the liability funded by the oil receivers;
   (b) criterion governing the shipowners' right to limitation; and
   (c) channelling of liability

2. Issues where amendments might be considered if a revision were to take place:

   (a) non-submission of oil reports
   (b) refinement of the contribution system
   (c) definition of 'ship'

3. Issues which may not require amendment to the Conventions:

   (a) Uniform application of the Conventions
   (b) Alternative dispute resolutions
   (c) Mark-up for fixed costs

4. Application of the 1992 Conventions to the EEZ or an area designated under Article II(a)(ii) of the 1992 Civil Liability Convention and Article 3(a)(ii) of the 1992 Fund Convention.

5.2 The Working Group also agreed with the Chairman's proposal to focus its considerations at the fifth meeting primarily on shipowners' liability and related issues and thereafter deal with the other issues.

6 Shipowners' liability and related issues

6.1 The Working Group took note of the documents submitted by the Oil Companies International Marine Forum (document 92FUND/WGR.3/14/2), by France (document 92FUND/WGR.3/14/4, by France, Spain and the European Commission (document 92FUND/WGR.3/14/5), by the International Group of P & I Clubs (document 92FUND/WGR.3/14/7), by the International Association of Independent Tanker Owners (document 92FUND/WGR.3/14/10) and by the United Kingdom (document 92FUND/WGR.3/14/13).

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

6.2 Introducing document 92FUND/WGR.3/14/4 the French delegation expressed the view that it was important for the 1992 Fund Convention to retain its subsidiary compensation role and that a number of major incidents had demonstrated that pollution damage caused by small tankers could be disproportionate to the shipowner's liability limit. That delegation also expressed reservations regarding the proposal by the International Group of P&I Clubs to increase voluntarily the minimum limit for small ships from about 4 million SDR to 20 million SDR in those States that were Party to the Protocol Establishing a Supplementary (third tier) Fund, since, in its view, the mixing of international conventions with private arrangements was not consistent with international public law.

6.3 The French delegation also considered that the limitation amount applicable to all ships should be the maximum amount laid down in Article V.1 of the 1992 Civil Liability Convention (89.8 million SDR from 1 November 2003) irrespective of the tonnage of the ship and that in the event of pollution damage in a State Party to the Protocol Establishing a Supplementary Fund, the shipowner should be required to make a contribution to the amount of compensation paid by that Fund. The French delegation proposed the following text in respect of Article V.1:

> *The owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an amount of 89 770 000 units of account. However, where the pollution damage affects a State Party to the International Convention on the Establishment of a Supplementary Fund, the owner shall also be required in respect of the Supplementary Fund to contribute x% of the amount of the compensation paid by that Fund. The amount in question may not in any event exceed x million units of account.*

6.4 The French delegation expressed the view that the exemption from the obligation to maintain insurance for ships carrying less than 2 000 tonnes of oil in bulk as cargo in Article VII.1 of the 1992 Civil Liability Convention should be abolished and proposed the following revised text for that provision:

> *The owner of a ship registered in a Contracting State and carrying 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 an amount corresponding to the sums laid down in Article V.1.*

6.5 The observer delegation of the Oil Companies International Marine Forum (OCIMF) introduced its proposals as set in document 92FUND/WGR.3/14/2 stating that they were designed to ensure that shipowners and their P&I insurers had an appropriate and significant interest in the direct costs of oil spills, whilst at the same time encouraging shipowners to adopt best practices leading to fewer oil spills and cleaner seas. That delegation referred to the study commissioned by the International Group of P&I Clubs, which had shown that 95% of all tanker spills during the period 1990-1999 would have been fully compensated by the shipowner under the terms of the 1992 Civil Liability Convention and that the total value of compensation paid in respect of all spills during that period had been shared equally between tanker owners under the 1992 Civil Liability Convention and oil receivers under the 1992 Fund Convention (document 92FUND/WGR.3/8/3, paragraph 4). The OCIMF delegation questioned the accuracy and conclusions of the study, and drew attention to the results of its own study based on data taken from the IOPC Funds Annual Report for 2001, which had shown that of the incidents referred to in that report, the shipowners had paid US$280.5 million and the IOPC Funds had paid US$1 814 million.

6.6 The OCIMF delegation stated that the International Group of P&I Clubs' offer to increase voluntarily the limit for pollution damage in respect of small tankers in States that were Parties to the Supplementary Fund Protocol was helpful, but that this offer did not go far enough without the shipowners also funding the Supplementary Fund on a dollar for dollar basis with the oil receivers.

6.7 The OCIMF delegation proposed that the limit of liability under the Civil Liability Convention should be 90 million SDR regardless of ship size and that all ships capable of carrying 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 Convention. The OCIMF delegation further proposed that when an incident occurred in a State Party to the 1992 Conventions and the Protocol establishing a Supplementary Fund, the administration and settlement of claims should be dealt with in accordance with the existing Memorandum of Understanding between the International

Group of P&I Clubs and the 1992 Fund, if it was likely that the aggregate amount of the admissible claims would exceed a specified sum, even if that aggregate amount was such that the 1992 Fund would not be called upon to pay any compensation .

6.8 The observer delegation of the International Group of P&I Clubs introduced document 92FUND/WGR.3/14/7 and expressed the view that substantive changes to the current Conventions would not be to the benefit of claimants and that the prolonged transition period that would ensue as a result of introducing new instruments would bring about a repeat of the confusion and problems that occurred during the transition from the 1969/1971 to the 1992 regime. That delegation also pointed out that whilst the Clubs were considering further ways of improving the standards of ships and the performance of shipowners, there was no evidence in the Clubs' experience of a link between high levels of civil liability and the quality of ships and their operators, since major claims under the Civil Liability Convention were in reality borne by all shipowners rather than an individual shipowner.

6.9 The delegation of the International Group of P&I Clubs stated that the reason for the Group's proposed voluntary increase in the limit under the 1992 Civil Liability Convention from 4 million SDR to 20 million SDR was to overcome the insurmountable problems of treaty law that would arise if tanker owners were required formally to share in the funding of the Supplementary Fund, whilst at the same time balancing the exposure of the oil receivers when the Supplementary Fund was implemented. That delegation further pointed out that since the voluntary increase in the shipowner's limit would apply to all incidents in States Party to the Supplementary Protocol, whereas the Supplementary Fund would only apply to incidents involving large claims, the balance of exposure would fall more heavily on shipowners than on cargo interests.

6.10 In introducing document 92FUND/WGR.3/14/10 the delegation of the International Association of Independent Tanker Owners (INTERTANKO) stated that the liability and compensation regime should continue to focus on the provision of timely and adequate compensation to victims and endorsed the establishment of a third tier Supplementary Fund at an appropriate level and the proposed voluntary increase in the minimum limit under the 1992 Civil Liability Convention, since this would avoid the treaty law and transitional problems that would arise through a major revision of the existing regime.

6.11 A number of delegations expressed the view that it was necessary to take a long and hard look at the current regime, and that whilst the Protocol establishing a Supplementary Fund and the proposal by the International Group of P&I Clubs for a voluntary increase of the limitation amount for smaller ships were very welcome short-term solutions, this was no substitute for the longer-term goal of increasing the involvement of shipowners on a firm legal basis. Those delegations did not regard the treaty law problems as insurmountable, although they considered that there might be benefit in the 1992 Fund studying these in more detail.

6.12 Some delegations noted the apparent disagreement between the shipping industry and the oil industry on the extent to which the financial burden of oil spills had been shared in the past and would be shared in the future. It was the view of those delegations that an independent study was required to see how the burden had been shared in the past and how this would be affected by the introduction of an oil industry funded Supplementary Fund in tandem with the voluntary increases proposed by the P&I Clubs for smaller ships.

6.13 The delegation of the International Group of P&I Clubs stated that the raw data that the Group had used in the study referred to in paragraph 6.5 was confidential to the individual Clubs and that this was the reason why the data had not been presented in the report of the study.

6.14 Other delegations pointed out that the total amount of compensation available under the 1992 Conventions had proved sufficient in all but two incidents and that increasing the financial burden on shipowners beyond the limitation amount already envisaged by the 50% increases that would come into effect in November 2003, as well as the voluntary increases proposed by the P&I

Clubs, could not be justified. Those delegations also stated that that tonnage related financial limits were well established in maritime law and that it was important for the Civil Liability Convention to remain consistent with other international maritime compensation conventions.

6.15 A number of delegations, whilst supporting the principle of tonnage-related financial limits for ships, argued that there was scope for altering both the starting point for the sliding scale and the slope of the tonnage/financial limit line.

6.16 One delegation expressed the view that the proposal to abandon the compulsory insurance exemption for ships carrying less than 2 000 tonnes of oil in bulk as cargo could present a major administrative burden and that a possible compromise would be to follow the provisions of the HNS Convention, which allowed Parties to that Convention to exempt ships that did not exceed 200 tonnes.

6.17 The needs of developing countries were highlighted by some delegations, many of which found the existing Conventions adequate, bearing in mind that these countries could at any time in the future avail themselves of the extra level of compensation that would be available from the Supplementary Fund by becoming Parties to the Protocol establishing that Fund.

6.18 The observer delegation of the International Chamber of Shipping stated that claims in excess of the current regime limits had arisen due to incidents involving a particular cargo, heavy fuel oil, which was normally carried in relatively small ships, and that it was this that had resulted in the distortion of the normal sharing of the financial burden between the shipping and oil industries. In that delegation's view the proposed voluntary increase in the small ship minimum limit had specifically addressed this problem, but that this minimum could easily be adjusted in the future in the light of claims experience.

6.19 The Working Group invited the Director to undertake an independent study of the costs of past spills in relation to the current and future limitation amounts of the 1992 Conventions, recognising that the usefulness of such a study would be dependent on obtaining the raw data from the P&I Clubs and the oil industry. The Working Group considered that it was important that the study reflected the costs of past spills and the apportionment of those costs between the shipping and oil industries on the basis of values in 2003 and the likely values in the future, taking into account inflation indices for individual States.

6.20 In his summing up the Chairman noted the prevailing view that the Working Group should take a long hard look at the level of shipowners' liability in the light of the results of the study to be carried out by the Director. He stated that on the basis of this preliminary discussion there appeared to be little support for abandoning tonnage-related financial limits in respect of shipowners' liability. He further stated that a number of delegations had favoured adjustments to the small ship minimum and the slope of the tonnage/financial limit line, but that these issues would have to be considered again in the light of the results of the study referred to in paragraph 6.19.

Criterion governing the shipowner's right to limitation

6.21 The Working Group noted that in document 92FUND/WGR.3/14/4 the French delegation had made the point that the corollary of a regime combining no-fault liability with the right of limitation was that in the event of established fault the right to limitation should be withdrawn. It was noted that in that delegation's view, the test of fault in the 1992 Civil Liability Convention was not justified, and that whilst the test of actual fault and privity established under the 1969 Civil Liability Convention had been deemed to be too broad, there was a need to develop new criteria that gave the possibility of denying the shipowner the right to limit his liability in the event of fault.

6.22 It was noted that the French delegation had proposed the following amended text in respect of Article V.2:

> *The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from his fault or negligence.*

6.23 The Working Group noted that in document 92FUNDWGR.3/14/5 submitted by France, Spain and the European Commission the point had been made by those delegations that negligence or even gross negligence on the part of the shipowner did not meet the existing criteria in the 1992 Civil Liability Convention for breaching the shipowner's right to limit his liability and that in most circumstances it would be very difficult to break that right. It was suggested by these delegations that the recent trend in environmental liability regimes was to abolish limitation of liability, and that whilst this did not pose problems in the case of land-based pollution sources, where the polluter and the jurisdiction were known, the situation was different as regards marine pollution where the polluter might be of any nationality and not easy to trace, hence the need for compulsory insurance and a right of direct action against the insurer to protect victims.

6.24 The Working Group also noted that the delegations of France, Spain and the European Commission had expressed the view that the unbreakable right of limitation of shipowners had hampered the 1992 Fund from effectively taking recourse actions against persons operating substandard ships and that Article V.2 of the 1992 Civil Liability Convention should be carefully scrutinized with the aim of lowering the threshold for the loss of the shipowner's limitation right so that exposure to liability was more closely related to the conduct of the shipowner, as reflected in the corresponding article in the 1969 Civil Liability Convention.

6.25 It was noted that the 1992 Civil Liability Convention, as well as the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention) and the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Convention), mirrored the 1976 Convention on Limitation of Liability for Maritime Claims in respect of the right of limitation of the shipowner, the latter Convention having abolished the old test of 'fault and privity' on the grounds that it had led to a proliferation of litigation, which had been to the detriment of claimants. It was also noted that the more stringent test of breakability in these Conventions was not unique to the maritime sector

6.26 A number of delegations expressed reservations about reverting to the breakability test in the 1969 Civil Liability Convention but instead favoured looking at ways of strengthening the 1992 Fund's right to pursue recourse actions.

6.27 In his summing up the Chairman noted that most delegations had expressed the view that it was inappropriate to lower the threshold for breaking the shipowner's right to limit liability as means of trying to improve the overall quality of shipping, and that in those delegations' view the latter was best dealt with through other international Conventions, which attached punitive sanctions to non compliance.

Channelling of liability

6.28 The Working Group noted the view of the French delegation expressed in document 92FUND/WGR.3/14/4 that the protection enjoyed by charterers under Article III.4(c) of the 1992 Civil Liability Convention, which was identical to that enjoyed by the shipowner under Article V.2, was not justified. That delegation made the point that where pollution damage was the result of negligence on the part of the charterer as opposed to the shipowner, it was only natural that the charterer should bear the burden of compensating victims to the extent that they were unable to recover all their losses from the shipowner, who would be entitled to limit his liability.

6.29 The Working Group noted that the French delegation proposed reverting to the text of the 1969 Civil Liability Convention in respect of Article III.4 to read:

> *No claim for compensation for pollution damage shall be made against the owner otherwise than in accordance with this Convention. No claim for pollution damage under this Convention or otherwise may be made against the servants or agents of the owner.*

6.30 The Working Group took note of the comments made by the delegations of France, Spain and the European Commission on the channelling of liability contained in document 92FUND/WGR/3/14/5. It was noted that in those delegations' view, channelling of liability should continue to be an integral part of the compensation regime in the interests of clarity as to the liable party, avoiding multiple insurance and providing higher levels of liability to be insured. It was further noted however, that those delegations considered that the type of channelling provided under Article III.4 (c) of the 1992 Civil Liability Convention gave protection to a number of key players, who may exercise as much control over the transportation of oil as the shipowner, with the implication that they could act with almost assured immunity from compensation claims following an oil pollution incident, and that this was counterproductive to the efforts within the international marine community to create a sense of responsibility in all parts of the marine industry. It was noted that the co-sponsors of the document had considered that a re-examination of the protection offered to key players as set out in Article III.4 (c) of the Convention was called for.

6.31 The Italian delegation stated that in the interests of upholding the 'polluter pays' principle it was important that the other key player in the transport of oil, the charterer, who was often the cargo owner, should become part of the compensation system, preferably through an intermediate third tier of compensation between that provided by the shipowner and that provided by oil receivers. That delegation referred to document 92FUND/WGR.3/5/9 submitted to the Working Group in March 2001.

6.32 The Director explained that the channelling provisions in the 1992 Civil Liability Convention had been tightened up in comparison with those in the 1969 Convention due to concerns that the insurance market would not have sufficient capacity if liability was extended beyond the shipowner. He stated that the final text of the 1992 Convention therefore represented a package deal whereby substantially higher limits and the avoidance of protracted litigation were the benefits of a system that channelled liability to the registered shipowner.

6.33 A number of delegations considered that the benefits to victims afforded by the channelling provisions was of paramount importance, but considered that the proposal by the Italian delegation was worth further consideration. Those delegations also considered that the Working Group should explore ways of making it easier for the 1992 Fund to pursue recourse action against other parties such as the charterer.

6.34 The Working Group further noted that in document 92FUND/GR.3/14/4 the French delegation had proposed that the obligation of the shipowner to maintain insurance and the right of direct action against the insurer required strengthening through clarification of Article VII.8 of the 1992 Civil Liability Convention so as to highlight the fact that even where the shipowner was not entitled to limit his liability, the insurer was still required to compensate victims subject to the limits provided for in Article V.1 of the Convention, although this would not prejudice the insurer's right to take recourse action. The following proposed revised text of Article VII.8 was noted:

> *Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the owner's liability for pollution damage. In such case the defendant may, even if the owner is not entitled to limit his liability according to Article V.2, avail himself of the limits of liability prescribed in ArticleV.1. He may further avail himself of the defences (other than bankruptcy or winding up of the owner) which the owner himself would have been entitled to invoke.*[<1>] *The defendant shall in any event have the right to require the owner to be joined in the proceedings.*

6.35 In summing up the discussion the Chairman noted that a common strand had been the need to ensure that victims received prompt compensation and that this might be jeopardised if claims were to be pursued against other parties. He further noted that there had been some support for exploring ways of widening the scope for recourse action against other parties and for giving further consideration to the question of cargo owners' liability.

7 Non-submission of oil reports and annual membership fee

Previous consideration

7.1 The 1971 Fund had encountered significant difficulties in the operation of the contribution system due to the fact that a number of Member States did not fulfil their obligation under the 1971 Fund Convention to submit their reports on oil receipts, which had made it impossible for the Fund to issue invoices to contributors in those States. The non-submission of oil reports was also becoming a problem for the 1992 Fund. This issue had previously been considered at various sessions of the 1992 Fund Assembly.

7.2 Article 15.4 of the 1992 Fund Convention made a Member State which had not submitted its oil reports liable to compensate the 1992 Fund for any financial loss suffered by the Fund as a result thereof. This sanction could not, however, be implemented in respect of States which had failed to submit reports, since the loss suffered by the 1992 Fund could not be calculated until the reports had actually been submitted.

7.3 This issue had been dealt with in 1992 Fund Resolution N°5 on Establishment of the Executive Committee. Pursuant to paragraph (d) of the Resolution, the Assembly may, when electing members of the Committee, take into account the extent to which a particular State had fulfilled its obligation to submit reports on receipts of contributing oil (document 92FUND/A.2/29, Annex I).

7.4 At its third session, held in October 1998, the Assembly had considered the following possible options to determine the quantities of oil received in States which had not submitted oil reports (document 92FUND/A.3/27, paragraph 12.3):

> Invoices could be based on the figures of the latest report submitted by the State in question for the entity concerned. However, it would not be possible to apply this approach to those States that had not submitted any reports on oil receipts since joining the 1992 Fund. Furthermore, this approach took no account of the annual variations in quantities received.
>
> The 1992 Fund could contact contributors directly and invite them to submit the oil reports directly to the Fund, with a copy to the

[<1>] The proposal would result in the following sentence being deleted: *Furthermore, the defendant may avail himself of the defence that the pollution damage resulted from the wilful misconduct of the owner himself, but the defendant shall not avail himself of any other defence which he might have been entitled to invoke in proceedings brought by the owner against him.*

competent authority. However, there would be no legal obligation for the contributors to respond to such a request, the procedure might undermine the reporting system laid down in the 1992 Fund Convention and, furthermore, this procedure did not resolve the problem of those States that had never submitted any reports to the Fund.

Indirect contacts could theoretically be made with contributors, but, in the Director's view, such approaches would be inappropriate and the result haphazard.

7.5 The discussion in the Assembly was summarised in the Record of Decisions (document 92FUND/A.3/27, paragraphs 12.4, 12.9 – 12.12 and 12.14):

The Director stated that it would not be practicable to determine the quantities of the receipts of individual contributors on the basis of publicly available statistics on oil receipts, since such statistics would normally relate to aggregate quantities received in particular States and would therefore not provide information on receipts by individual entities.

A number of delegations stressed the duty of Member States to fulfil their obligations as Parties to the 1992 Fund Convention and reference was made to the principle of pacta sunt servanda (treaties are to be kept) contained in Article 26 of the 1969 Vienna Convention on the Law of Treaties. One delegation suggested that the non-submission of oil reports might be a "material breach of a multilateral treaty" as it could be construed as a "violation of a provision essential to the accomplishment of the object or purpose of the treaty" (cf Article 60.3 of the Vienna Convention on the Law of Treaties) and that such non-submission could therefore be invoked as a ground for terminating the treaty or suspending its operation in whole or in part.

It was suggested that a Member State that did not fulfil its obligation to submit oil reports could be invited to denounce the 1992 Fund Convention. It was recognised, however, that a State could not be deprived of its sovereign rights with regard to accession to and denunciation of a treaty.

Some delegations raised the possibility of withholding compensation payments to claimants in States that had not submitted oil reports. Many delegations were of the view, however, that such a course of action could be considered only in respect of claims submitted by a Government or Government authority.

The question was raised whether States that did not submit oil reports should be eligible to the Executive Committee. It was recalled that this issue had been considered by the Assembly at its 2nd session. It was noted that the Assembly had recognised, however, that there might be cases in which States could have valid reasons for having been unable to fulfil their obligations to submit oil reports to the 1992 Fund and that it would therefore be inappropriate to impose automatically the sanction of ineligibility in all cases of the non-submission of reports. It was also recalled that the Assembly had considered that this sanction should be imposed on States only in cases of continued non-fulfilment of the obligation to report. It was recalled that it had been agreed that, in the case of incomplete reports, sanctions should be imposed only if

the reports were incomplete in a significant respect (document 92FUND/A.2/29, paragraph 12.4).

It was suggested that a State which did not fulfil its obligation to submit oil reports should not be entitled to vote in the 1992 Fund bodies. It was recalled, however, that this issue had been examined by the Assembly at its 1st extraordinary session on the basis of a study carried out by the Director which concluded that, since the issue was not dealt with in the 1992 Fund Convention, the Assembly would be acting outside the powers invested in it under the Conventions if it were to decide to restrict the voting rights of Member States (document 92FUND/A/ES.1/4, paragraph 3.2.2).

7.6 The Assembly had repeatedly emphasised that it was crucial for the functioning of the international regime that States submitted the reports on oil receipts and had restated its instruction that, if a State did not submit its oil reports, the Director should make contacts with that State and emphasise the concerns expressed by the Assembly in this regard. The Director had been instructed to inform the competent persons of the States concerned that the Assembly would review individually each State which had not submitted its report and that it would then be for the Assembly to decide on the course of action to be taken for each such State (document 92FUND/A.5/28, paragraph 15.3).

7.7 At its second meeting, the Working Group had considered the following proposals set out in the document submitted by the delegations of Australia *et al* (document 92FUND/WGR.3/5/1, paragraph 2.29):

a) All Contracting States should be required to pay an annual membership fee to the Fund. For States with one or more persons receiving more than 150 000 tonnes of contributing oil, and consequently liable to pay contributions, the administrative fee would be included in the levy for the General Fund. For nil-reporting or non-reporting States, the fee would be set by the Assembly on an annual basis having regard to the level of administrative costs required for the coming year. This fee would help to spread the administrative costs of the Fund more equitably in respect of those States that currently enjoyed the protection of the Fund but did not make any financial contributions to it.

b) A provision should be inserted in Protocols to the Fund Convention to the effect that if no reports were received or the membership fee remained unpaid at the end of a specified period, the Fund Convention would cease to be in force in respect of that State.

7.8 At the Working Group's second meeting a number of delegations had stated that they were strongly opposed to the introduction of a fee for nil-reporting States or States where no entity received more than 150 000 tonnes of contributing oil, since this might deter developing countries from joining the international system. The policy towards contributing to the basic costs of the Secretariat varied from one convention to another and that it was wrong to suggest that such States did not contribute anything to the system established by the Fund Conventions since the cost of operating the regime was already included in that of imported refined products. The point was made that the provision limiting the obligation to pay contributions to those entities that

received more than 150 000 tonnes per year would not have been included if the original intention had been that all States should contribute.

7.9 One of the delegations that had presented the proposal set out in paragraph 7.7 stated that it was not the intention to set the fee at a high level but to require the payment of a nominal fee in order for the States in question to enjoy the benefits of protection by the Fund.

7.10 As regards non-reporting States, one delegation had queried whether this actually posed a major problem since many of those States would actually be nil-reporters and therefore the total impact on the 1992 Fund's budget was insignificant, whilst another delegation suggested that in any case those States were unlikely to ratify an instrument containing the proposed provisions.

7.11 A number of delegations had considered that ways must be found to ensure that all Member States fulfilled their obligation to submit oil reports, recognising that it would not be easy to find a workable solution. It had been suggested that measures should be included in the Rules of Procedure to the effect that States which did not submit such reports would not be eligible for election to the Executive Committee and would lose their voting rights in the Assembly. Reference had also been made to the possibility of including in the revised Convention a provision to the effect that the Fund Convention would cease to be in force for States that did not submit oil reports.

7.12 In summing up the discussion at the second meeting the Chairman had stated that there had been a general recognition that the non-submission of oil reports was an important issue and that a solution had to be found which ensured that States fulfilled their obligation to submit these reports. He had stated that there had not been much support for the proposal to introduce a fee of the kind referred to in paragraph 7.7 (a) above. The Chairman had concluded that other solutions had to be explored.

Consideration at the fifth meeting

7.13 At its fifth meeting the Working Group considered proposals set out in the document presented by the delegation of Canada (document 92FUND/WGR.3/14/8) which repeated the proposals contained in the document by Australia *et al*, of which Canada was a co-sponsor (document 92FUND/WGR.3/5/1), which had been presented at the second meeting. The Canadian delegation stated that the non-submission of oil reports was a recurring problem which needed to be solved and that, despite the lack of support for these proposals when they had been discussed previously, no other solutions had been identified. It was also stated that it was important to avoid repetitive and time-consuming debate of the issue and that if no agreement could be reached by the Working Group the matter should not be included on the agenda of future sessions of the 1992 Fund Assembly.

7.14 The Canadian delegation summarised its proposals as follows:

a) As part of any future amendments to the 1992 Fund Convention, all Contracting States would be required to pay an **annual membership fee** to the Fund. For States having imports of contributing oil in quantities which make them eligible for invoices to be issued to their contributors, the administrative fee would continue to be included in the General Fund. For those Member States having "nil reports" or failing to lodge such reports, the fee would be set by the Assembly on an annual basis having regard to the level of administrative costs required for the coming year. This fee would spread the administrative costs of the Fund more equitable in respect of the States that currently enjoyed the protection of the Fund but did not make any financial contributions to it.

b) A companion provision should be adopted to the effect that if no reports were received or the membership fee remained unpaid at the end of the specified period, the Fund Convention would **cease to be in force** in respect of that State.

7.15 Many delegations stated that it was important to find a solution to the problem of non-submission of oil reports and a number of delegations supported the proposals made by the Canadian delegation. It was stated that whilst the international system of compensation gave protection to States, it also imposed responsibilities. It was suggested that the non-submission of oil reports was not a financial problem but related to the responsibilities of States to fulfil certain obligations laid down in the 1992 Fund Convention.

7.16 One delegation expressed doubt as to whether termination of the Convention for States which did not submit reports would be possible under international law. Other delegations suggested that it would be more appropriate for the application of the Convention to be suspended for a fixed term for such States.

7.17 It was suggested that if a State failed to submit oil reports, the 1992 Fund should not pay compensation for pollution damage in that State.

7.18 Some delegations stated that they were also willing to consider other means to solve the problem. One delegation suggested that an Assembly Resolution could be helpful to the Director in his efforts to obtain outstanding oil reports. Other solutions such as the removal of voting rights were also mentioned.

7.19 The point was made that in other international organisations within the United Nations system, there were operational costs which were shared by all States.

7.20 Several delegations stated that it was important to distinguish between States which did not make reports and those which reported nil receipts of contributing oil. It was also stated that whilst a membership fee might be insignificant to a large State it could be very onerous for a small developing country, which might only have a very small population. It was suggested that the method used within the United Nations for the calculation of contributions by States might be more appropriate than a flat membership fee.

7.21 In summing up the discussion, the Chairman stated that it was necessary to continue work on this subject in order to find the most effective method of resolving the problem of non-submission of oil reports in any future revision of the 1992 Fund Convention. He suggested that in this context consideration should be given to methods used in various United Nations' organisations for calculating contributions. He referred to Article 14 of the draft Supplementary Fund Protocol which provided that the Contracting State assumed the obligations that would be incumbent under this Protocol on any person who would be liable to contribute to the Supplementary Fund in respect of oil received within the territory of that State in so far as no liable person existed for the aggregated quantity of oil received. He also referred to the idea that the administrative costs of the 1992 Fund should be borne by all Member States.

8 Refinement of the contribution system

Previous consideration

8.1 This issue had been considered previously within the IOPC Funds, and in particular within the 1971 Fund in 1980 by an Intersessional Working Group whose report had been considered by the 1971 Fund Assembly at its 1st extraordinary session, held in October 1980, (document FUND/A/ES.1/13, paragraph 10). The Working Group noted the position taken by the 1971 Fund Assembly which was as follows:

> With regard to the question of which person has to be included in the report as the "receiver" of oil, the Assembly agreed that, within the scope of Article 10 of the Fund Convention, Contracting States should have a certain flexibility to adopt a practical reporting system allowing an effective and easy checking of the figures and taking into account the peculiarities of the oil movement and the local circumstances of a particular country and that, failing payment by persons reported other than the physical receivers, the physical receivers should ultimately be liable for contributions irrespective of whether the persons reported had their place of business or residence in a Contracting State or not.

8.2 This interpretation had been confirmed by the 1971 Fund Assembly at its 15th session, held in October 1992, in relation to the application of Article 10 to certain storage companies in the Netherlands (document FUND/A.15/28, paragraph 21.2). The Assembly had taken the view that

the storage companies in the Netherlands were liable to pay contributions in respect of any quantities actually received by them (document FUND/A.15/28, paragraph 21.2). The Administrative Court of Appeal in the Netherlands had agreed with the Assembly as to the interpretation of the Convention on this point (document FUND/A.17/35, paragraph 28.3).

8.3 This issue had been considered by the 1971 Fund Assembly in October 1993 in relation to a request by the Arab Republic of Egypt that the oil passing through the SUMED pipeline running from a terminal in the Gulf of Suez to a terminal close to Alexandria on the Mediterranean Sea should not be taken into account for the purpose of contributions and the Assembly had not granted this request (document FUND/A.16/32, paragraph 27).

8.4 This issue had also been considered at the second meeting of the Working Group on the basis of a document presented by the delegations of Australia *et al* (document 92FUND/WGR.3/5/1, paragraphs 2.53 and 2.54). It was stated in this document that it had been necessary to maintain a proper balance between the contributions paid by different interests. It had been further pointed out that certain contributors did not have any interest in the oil received other than providing temporary storage facilities but that these contributors had on many occasions faced difficulties in charging their principals for any post-event levy and therefore had to pay the levy themselves. It had been suggested that the relationship between the financial interest in the oil for these companies was very different from that of a regular oil company which owned the oil, sold the refined products and could pass the levy of contributions on to the consumer and that this imbalance would be aggravated by the higher limits in the 1992 Fund Convention entering into force in 2003 and by a possible third tier.

8.5 The Working Group had considered the matter further at its third meeting and had noted a proposal by the Netherlands delegation to incorporate into the 1992 Fund Convention the relevant provisions of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention) on 'receiver' and 'contributing cargo', thereby giving storage companies, under certain conditions, the possibility of passing levies on to their principals, provided these were located in a State Party to the 1992 Fund Convention (document 92FUND/WGR.3/8/6). The Netherlands delegation had proposed that the issue should be considered by the Working Group, either as part of the discussion relating to the proposed Supplementary Fund or in the context of the review of the 1992 Conventions.

8.6 At the Working Group's third meeting a number of delegations, whilst sympathetic to the particular problem faced by oil storage companies in some States, considered that any attempt to refine the current simple system would lead to complications. Those delegations also expressed the view that if changes were to be made to the contribution system, the changes would have to apply to both the 1992 Fund and the Supplementary Fund.

8.7 At the fourth meeting of the Working Group, the delegation of the Netherlands had referred to the issue of finding an equitable solution in respect of the obligation to pay contributions to the 1992 Fund by certain oil receivers who did not have any interest in the oil received other than providing storage service. Due to time constraints, this issue was not considered at that meeting.

Consideration at the fifth meeting

8.8 The Working Group considered a proposal made by the observer delegation of the Federation of European Tank Storage Associations (FETSA) concerning a refinement of the contribution system, as set out in document 92FUND/WGR.3/14/1. It was noted that the proposal had the objective of finding an equitable solution in respect of certain receivers of oil who were contributors to the 1992 Fund under the 1992 Fund Convention although they did not have any interest in the oil received other than providing oil storage services.

8.9 The Working Group noted that the proposal by FETSA echoed the proposal made by the delegation of the Netherlands at the Group's fourth meeting by suggesting that the definitions of

"contributing cargo" and "receiver" should be brought into line with those in the HNS Convention. The delegations of the Netherlands, Russia and Singapore stated that the tank storage companies in these States were also affected by this issue and supported the proposal to adopt the HNS Convention model.

8.10 The Working Group considered that, in view of the position taken by the IOPC Funds as to the interpretation of Article 10 of the 1992 Fund Convention, it would be necessary to amend that Article in order to accommodate the concerns expressed by FETSA.

8.11 Many delegations were sympathetic to the concerns expressed by FETSA but were opposed to changing the current system. It was stated that the current system had worked well and that there was a danger that making such a change could result in a loss of contributions which would be to the detriment of other contributors. It was also stated that the definitions in the HNS Convention had been agreed at the Diplomatic Conference adopting that Convention as part of a package but that it had not yet been seen how they would work in practice. One delegation stated that storage companies in its State were not satisfied with the definitions in the HNS Convention and that whilst the suggestion was attractive in principle, a much better understanding of the potential impact of the change would be needed.

8.12 The delegation of the Netherlands stated that it was disappointed with the outcome of the discussion and that it was of the opinion that if the definitions in the HNS Convention were workable then it should be possible to use the same system for contributions to the IOPC Funds, with the introduction of additional safeguards, if necessary.

8.13 In his summing up, the Chairman stated that many delegations were hesitant to change the present system which was simple, had been tested and had worked very well.

8.14 The Working Group took the view that the matter could be reconsidered at a later date if a decision were made to revise the Conventions.

9 Definition of 'ship'

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

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

Previous consideration

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

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

Consideration at the fifth meeting

9.4 The delegation of the United Kingdom introduced document 92FUND/WGR.3/14/11 and its proposal for a revision of the definition of 'ship' in Article I.1 of the 1992 Civil Liability Convention, in particular as regards the extent to which unladen tankers were covered by the Convention.

9.5 It was noted that in the United Kingdom delegation's view, the 1992 Fund's policy decisions on the definition of 'ship' might have to be applied in the future, but that national courts were not obliged to respect the decisions, practices or policies of the 1992 Fund and that there was a real risk that different courts might take a different view to the Fund on the interpretation of the Conventions in this regard.

9.6 The Working Group took note of the proposal by the United Kingdom delegation that it should consider two possible options of amending the definition of 'ship' in the 1992 Civil Liability Convention to avoid ambiguity, namely

Option 1

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

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

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

Option 2

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

'Ship' means any sea going vessel and seaborne craft of any type actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such cargo of oil in bulk aboard.

9.7 The Japanese delegation referred to document 92FUND/WGR.2/6/2 submitted by the delegations of Japan and the Republic of Korea to the 2nd intersessional Working Group in March 2000, which set out the reasoning behind their support of Option 2 above. That delegation stated that it continued to support that option, although it would, in its view, be necessary to refer to persistent oil in any revision of the definition.

9.8 A number of delegations, whilst agreeing that Option 2 reflected the current policy of the 1992 Fund in respect of unladen tankers, stated their preference for Option 1 in the event that the decision were to be made to revise the text of the 1992 Civil Liability Convention.

9.9 One delegation questioned whether, in view of the recently-adopted International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Convention), there was a continuing need for the 1992 Conventions to include pollution damage resulting from spills of bunker fuel from unladen tankers.

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

would be appropriate to amend the definition of 'ship' so as to remove any ambiguity. The Working Group noted that it was important that the definition as revised did not result in a vessel falling outside the scope of application of the Civil Liability Convention and the Bunker Convention.

10 Uniform application of the Conventions

Previous consideration

10.1 The issue of uniform application of the 1992 Conventions had been considered by the Working Group at its second, third and fourth meetings (documents 92FUND/A.6/4, section 25 and 92FUND/A.7/4, section 9). At its third and fourth meetings the Working Group had expressed the view that uniformity of implementation and application of the Conventions was crucial to the equitable functioning of the international compensation regime and to equal treatment of claimants in various Fund Member States. It had been recognised that States used different methods for implementing international treaties in their national legal system. It had been noted that it was often not the implementation of the 1992 Conventions that was the problem but rather the application of the relevant provisions in the national statutes.

Consideration at the fifth meeting

10.2 At its fifth meeting the Working Group considered a document submitted by the Director (document 92FUND/WGR.3/14/3) which dealt with certain provisions in the 1992 Conventions in respect of which it was felt that in the past the Conventions had not been applied in a uniform manner or difficulties had arisen as a result of the relationship between the Conventions and national law, namely channelling of liability, time bar, enforcement of judgements, jurisdiction and distribution of the amounts available for compensation.

10.3 During the discussions at the fifth meeting a number of delegations emphasised the importance of uniform application of the Conventions. It was recognised, however, that this was a difficult issue since national courts had the final word on the interpretation of the Conventions, although they often lacked relevant experience. The point was made that as long as it was left to national courts to decide on the interpretation and application of the Conventions, divergences were inevitable, and that the only way to eliminate such differences would be by way of establishing a supranational court which should deal with such issues. It was suggested that the creation of a supranational court was not a realistic option.

10.4 It was suggested that if more information were made available to Member States and national courts on decisions by the IOPC Funds' governing bodies relating to the criteria for admissibility of claims and on other aspects concerning the interpretation of the Conventions, this might contribute to a uniform interpretation. It was further suggested that it might be useful if the IOPC Funds could make available on their website a collection of decisions by national courts relating to the interpretation of the Conventions. In this connection, reference was made to a document presented by the Japanese delegation (document 92FUND/WGR.3/14/4, section 2).

10.5 The Japanese delegation recognised that each claimant in any incident should be treated equally so that the compensation regime could function to the full extent. Therefore, the Japanese delegation supported the initiative at the Working Group's fourth meeting that the IOPC Funds should develop a database of Member States' court decisions on interpretation and application of the Conventions as well as important decisions by the IOPC Funds' governing bodies and that the database should be made available on its web-site.

10.6 It was noted that some judgements by national courts had gone against the decisions of the governing bodies of the IOPC Funds and that if all judgements were collated into a database some of the information could be contradictory and confusing.

10.7 The Japanese delegation expressed the view that it was necessary for the Fund to make its assessments of claims in each incident open and to ensure transparency of the consideration process through strict and uniform application of the Conventions. That delegation suggested that in order to assure uniform application to all claimants, the Fund should set up specific and definitive criteria for the assessment of claims based on the Claims Manual and should be consistent in considering claims from each new incident by referring to precedential cases. Since there had been many cases involving pure economic losses in the tourism sector, the Japanese delegation suggested that in considering future claims such as those from the *Prestige* incident it would be particularly helpful to make information accessible regarding how the Fund assessed the claims from the tourism sector in past cases, including the *Nakhodka* and the *Erika* incidents. It was proposed, therefore, that the Secretariat should prepare a report on this subject.

10.8 The Director mentioned that consideration was already being given to the creation of a database of important decisions by the Assemblies and Executive Committees relevant to the interpretation of the Conventions and the admissibility of claims.

10.9 The Director stated that the criteria for the admissibility of claims had been laid down by the Assemblies and were reflected in the Claims Manual, the text of which had been approved by the governing bodies. He expressed the view that it would be difficult to lay down more precise criteria since each claim should be considered on its own merits. He added that questions of principle were considered by the governing bodies as and when they arose.

10.10 The Working Group noted that one option mentioned by the Director in document 92FUND/WGR.3/14/3 would be to make the provisions in the Conventions more precise, thereby reducing the scope for national courts to arrive at varying interpretations. The Group noted that texts of possible amendments to some provisions to this effect were set out in the Annex to that document. It was also noted that these provisions had been drafted purely for the purpose of illustrating the issues involved and did not constitute proposals by the Director for amendments to the Conventions. It was further noted that, in the Director's view, it would be impossible to be so precise in the text of a Convention as to ensure uniformity in all cases. The Working Group noted the Director's view that it was also impossible, when drafting provisions in Conventions, to foresee how these provisions would be implemented and applied in various Contracting States and that it was often difficult to find a wording which would result in the same interpretation by all courts, given the varying legal traditions under which they operated.

10.11 The Working Group noted the Director's view that it was important that States, when implementing the Conventions in national law, considered carefully how the provisions of the Conventions related to other provisions in their domestic law, so as to prevent an application which in fact was at variance with the Conventions. It also noted that in the Director's view it might be necessary to consider for example the relation between civil liability and criminal liability, or between the time bar provisions in the Conventions and other provisions or jurisprudence on time bar in national law.

10.12 In this context attention was drawn to the Report of the 7th intersessional Working Group set up by the 1971 Fund Assembly. It was recalled that that Working Group had taken the view that national courts should, when making decisions on the interpretation of the definitions of 'pollution damage' and 'preventive measures', take into account the fact that these definitions were laid down in international treaties. It was recalled that it had been argued by some delegations that the decisions taken by the 1971 Fund Assembly and Executive Committee should be considered as constituting agreements between the Parties to the Fund Convention on the interpretation of these definitions in accordance with Article 31.3(a) and (b) of the Vienna Convention on the Law of Treaties (document FUND/A.17/23, paragraph 7.1.4). It was further recalled that the Working Group's report had been endorsed by the 1971 Fund Assembly at its 17th session held in October 1994 (document FUND/A.17/35, paragraph 26.8). It was also recalled that the 1992 Fund Assembly had, at its first session held in June 1998, decided that the report of that Working Group should form the basis of the policy of the 1992 Fund on the criteria for the admissibility of claims for compensation (document 92FUND/A.1/34, Annex III, Resolution N$^{o.}$ 3).

10.13 It was noted that one option mentioned by the Director in document 92FUND/WGR.3/14/3 could be to insert a provision in the 1992 Fund Convention to the effect that national courts should take into account decisions by the 1992 Fund governing bodies on the interpretation of the 1992 Conventions. It was also noted that the Director raised the question as to whether such a provision would be acceptable to the Member States.

10.14 During the discussions in the Working Group, reference was made to an explanatory document entitled 'Uniform Interpretation' which had been published by IMO together with the MARPOL 73/78 Convention. It was noted, however, that the MARPOL 73/78 Convention largely dealt with technical issues where such a document might make a significant contribution to a uniform application whereas the provisions in the 1992 Conventions dealt with issues within the field of civil and procedural law, and that a similar document would therefore not, in the Director's view, have the same impact on the interpretation of these Conventions.

10.15 It was suggested by a number of delegations that consideration should be given to the adoption by the 1992 Fund Assembly of a Resolution on uniformity of interpretation and application of the Conventions.

10.16 The Working Group considered the text of a draft Resolution prepared by the Director (document 92FUND/WGR.3/WP.3). After an in-depth discussion of the issues involved, the Working Group approved a revised text of a draft Resolution set out in the Annex to the present Report for submission to the 1992 Fund Assembly for consideration.

10.17 The Director was instructed to consider further the establishment of a database of decisions by national courts on the interpretation of the 1992 Conventions and of important decisions by the Assemblies and Executive Committees of relevance to the interpretation of the Conventions and the admissibility of claims.

10.18 In his summing up the Chairman noted that whilst there was support for a database of decisions by national courts and the Funds' governing bodies it was essential that the information was presented in a practical way in order to ensure that it could be fully utilised.

11 Alternative dispute settlement procedures

Previous consideration

11.1 In 1996 a study on alternative procedures for dealing with claims for compensation was carried out by Dr T A Mensah (former Assistant Secretary-General and Director of Legal Affairs and External Relations Division of the International Maritime Organization). The result of this study was submitted to the first extraordinary session of the Assembly of the 1992 Fund in 1996 (document 92FUND A/ES.1/13).

11.2 In 1997 the first Intersessional Working Group set up by the Assembly studied the possibilities of introducing alternative dispute settlement procedures in the compensation system established by the 1992 Conventions for cases in which it had not been possible to reach out-of-court settlements. The Assembly considered that Working Group's Report at its 2nd session, held in October 1997, and the Assembly drew the following conclusions (document 92FUND/A.2/29, paragraphs 20.9 - 20.11):

> Although the Assembly noted that arbitration might in many cases be a quicker and more convenient procedure for the settlement of disputes than court proceedings, it was recognised, however, that in many cases it would be difficult to use arbitration to settle disputes between the 1971 Fund/1992 Fund and claimants. The Assembly considered that this would be the case particularly where the need for speedy procedures was the greatest, namely in respect of incidents which gave rise to a large number of claims and where the total amount of the claims exceeded the maximum amount of

compensation available. The Assembly took the view that the benefits of submitting claims to arbitration would be limited to certain particular cases. It was suggested that it might, for example, be appropriate, in respect of an incident where it was clear that the total amount of the claims would not exceed the maximum amount of compensation available, to submit to binding arbitration an individual large claim or a number of claims which gave rise to a particular question of principle. It was recognised that claimants might be reluctant to submit their claims to arbitration and might insist on having claims decided by the national courts in their own country.

In view of the position taken by the Assembly and the Executive Committee of the 1971 Fund (and endorsed by the 1992 Fund Assembly) that a claim is admissible only if it falls within the definitions of 'pollution damage' or 'preventive measures' laid down in the Conventions as interpreted by the 1971 Fund bodies, the Assembly recognised that the scope for the 1992 Fund to submit claims to arbitration would be limited.

As regards mediation and conciliation, it was suggested that many of the techniques used in the context of mediation and conciliation were already employed by the 1971 and 1992 Funds in their efforts to reach out-of-court settlements. Although it was recognised that it might be difficult to use such procedures, it was nevertheless decided that this matter should be examined further.

11.3 The following statement was included in the Record of Decisions of the Assembly's third session, held in October 1998 (document 92FUND/A.3/27, paragraph 18.4):

> It was suggested that the 1992 Fund could in appropriate cases engage a person with a legal background who would be outside the Fund's structure and whose task should be to facilitate a dialogue between claimants and the 1992 Fund, to promote the claimants' understanding of the compensation system and to present the views of the claimants to the Fund. It was noted that the task of such a person should not be to mediate or propose settlements on the basis of equity, since the 1992 Fund's policy that a claim was admissible only if it fell within the definitions of 'pollution damage' and 'preventive measures' laid down in the Conventions as interpreted by the 1992 Fund bodies should be maintained.

11.4 The question of whether the 1992 Fund should agree with a claimant to submit a claim to binding arbitration was considered at the Executive Committee's 11th session, held in 2001, in respect of the *Slops* incident. In that case a claimant had challenged the Executive Committee's decision that the *Slops* should not be considered as a 'ship' for the purpose of the 1992 Conventions. The Committee endorsed the Director's view that it would be inappropriate to submit to arbitration the question of whether the governing bodies' interpretation of the definition of 'ship' was correct (document 92FUND/EXC.11/6, paragraphs 4.3.8 and 4.3.11).

11.5 During the Working Group's discussion at its second meeting it was generally felt that the 1992 Fund should make strenuous efforts to avoid court proceedings and that the Fund should continue its policy to endeavour to settle claims out of court to the extent possible. For this reason the Working Group took the view that further consideration should be given to the possibilities for the 1992 Fund of using alternative dispute settlement procedures. It was noted that in many countries there had been an increase in the use of such procedures in recent years. It was felt that such procedures could be developed by the 1992 Fund without any amendments to the 1992 Conventions. It was recognised that the 1992 Fund would encounter difficulties of a practical and legal nature in using such procedures. The Working Group considered that, as previously stated by the Assembly, there was only very limited scope for arbitration and that the efforts should be focused on mediation and similar less formal methods. It was agreed that this

issue should be studied further.

Consideration at the fifth meeting

11.6 The Working Group took note of a document submitted by the delegation of the United Kingdom (document 92FUND/WGR.3/14/12).

11.7 It was noted that under Internal Regulation 7.3 the Director was authorised to agree with any claimant to submit a claim to binding arbitration, but that the provisions of the Regulation had never been applied.

11.8 The delegation of the United Kingdom expressed the view that the IOPC Fund's policy should be to encourage, wherever possible, the use of arbitration according to Internal Regulation 7.3, if out-of-court settlements could not be reached. It was suggested that the Fund should clarify its policy on arbitration through an amendment of Internal Regulation 7.3 and 1992 Fund Claims Manual. The United Kingdom delegation expressed the view that the Fund should be more proactive in encouraging claimants, who had a certain type of claim and could not reach agreement with the Fund, to have their claims dealt with through arbitration. In the view of the United Kingdom delegation, the Fund should however only agree to this if the arbitrator had full regard to Fund policies, practices, decisions and precedents and where no new issues of principle were involved. It was emphasised that the normal channels through the national courts would continue to be open to both parties.

11.9 Many delegations supported the United Kingdom proposal in general and agreed that Alternative Dispute Resolution (ADR) was one of the possible measures to speed up the settlement of claims, particularly when the dispute only related to the issue of quantum as opposed to issues of principle.

11.10 One delegation raised the question as to whether an arbitration award would be void, if the award or part thereof was inconsistent with the policies, practices, decisions and precedents of the Fund. That delegation also asked how claimants could know these practices etc when they entered into an arbitration agreement and whether it would be possible for the Fund to disclose fully their policies, practices, decisions and precedents in a manner understandable to claimants. Other delegations drew attention to the problem of the enforceability of arbitration awards and the cost of arbitration.

11.11 As regards the question of the enforceability, the Director responded that national legislation usually provided for the enforceability of arbitration awards. He expressed the view that there was no general answer to the question whether arbitration was cheaper than court proceedings. The Director pointed out that it would not be easy to use arbitration when the number of claimants was large. He also suggested that whilst arbitration may be appropriate in the case of claims for clean-up costs where the two parties (eg a government authority and the 1992 Fund) had similar weight, it might be intimidating for an individual claimant to submit his claim against the Fund to arbitration.

11.12 The Director considered that in view of the constraints that the Conventions and the principles laid down by the governing bodies imposed on the Fund, other methods for alternative dispute resolution than arbitration, such as mediation and conciliation, might be more suitable.

11.13 The Chairman mentioned that in Canada court rules often required ADR to be explored as part of case management and that similar practices were followed in other countries.

11.14 In summing up the discussion the Chairman stated that whilst most delegations supported the proposal of the United Kingdom delegation, he suggested that the following issues should be considered: how claimants could be informed of the Funds' policies, practices, decisions and precedents; the consequences if an arbitration award were at variance with the Funds' policies, practices, decisions and precedents: problems relating to enforcement of arbitration awards; the

fact that arbitration could sometimes be very protracted and expensive. He suggested that the delegation of the United Kingdom should pursue its proposal further, possibly through correspondence with other interested delegations that had made observations on these points.

12 Admissibility of claims for fixed costs

Previous consideration

12.1 At its second meeting the Working Group had noted that the IOPC Funds' policy in respect of the admissibility of claims for fixed costs could be summarised as follows (document FUND/A.17/23, paragraph 7.2.17):

> Authorities may claim compensation for so-called 'fixed costs', ie costs which would have arisen for the authorities concerned even if the incident had not occurred, such as normal salaries for permanently employed personnel and capital costs of vessels owned by the authorities. The IOPC Funds accept a reasonable proportion of 'fixed costs', provided that these costs correspond closely to the clean-up period in question and do not include remote overhead charges. The proportion of fixed costs payable by the Funds has to be assessed in the light of the circumstances of the particular incident.

12.2 In a document submitted to the Working Group's first meeting, the United Kingdom delegation had addressed the IOPC Funds' policy in respect of the admissibility of fixed costs (document 92FUND/WGR.3/2/3, paragraph 2.1.5). At its third meeting the Working Group had given further consideration to the question of a mark-up on claims for the use of certain fixed facilities on the basis of the information contained in document 92FUND/WGR.3/8/10 presented by the delegations of Spain and the United Kingdom. Those delegations had expressed concern that the Fund's restrictive policy in respect of fixed costs could discourage States from maintaining effective pollution response capabilities, particularly those involving high capital costs and/or annual expenditure such as at-sea recovery vessels, aerial spraying capacity and emergency towing vessels. Most delegations had supported the proposal by the delegations of Spain and the United Kingdom and considered that the inclusion of a mark-up on such fixed costs could be incorporated into the Funds' Claims Manuals without modification of the Conventions.

12.3 At the Working Group's third meeting one delegation had expressed its doubts as to whether the proposed uplift would encourage States to maintain an efficient response capability and considered that there were alternative ways of enhancing a State's capability, such as requiring the private sector to fund the necessary resources. Another delegation pointed out that commercial resources were often more exprensive than those provided by the public sector and not always as effective.

12.4 During the discussions at the previous meetings, the point had been made that it would not be possible to extend the IOPC Funds' cover of fixed costs beyond costs that arose as a result of a particular incident.

12.5 In summing up the discussions at the third meeting, the Chairman had concluded that there had been significant support for the proposal by the delegations of Spain and the United Kingdom, but that more details of the proposal were needed, in particular in respect of the conditions for awarding an uplift (document 92FUND/A.6/4, paragraph 15.13).

Discussion at the fifth meeting

12.6 At its fifth meeting, the Working Group considered a document presented by the delegations of Italy, the Netherlands, Poland, Spain and the United Kingdom (document 92FUND/WGR.3/14/9) containing a proposal for the payment of a mark-up on claims for fixed costs of equipment used to control and prevent oil pollution.

12.7 The sponsoring delegations drew attention to the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (OPRC) which stated that each Party, within its capabilities, should establish a minimum level of pre-positioned oil spill combating equipment, commensurate with the risks involved, and programmes for its use. Attention was also drawn to the fact that the 1992 Fund Assembly had already adopted a Resolution, in 2001, urging all Contracting States to the 1992 Fund Protocol to become party to the 1990 OPRC, in order to benefit potential victims of oil spills and the 1992 Fund in helping to minimise the environmental and financial impact of oil spills. The co-sponsoring delegations expressed the view, therefore, that the fixed costs proposal was a logical extension to the adoption of the OPRC Resolution as it would have a similar effect as that Resolution in helping to minimise the environmental and financial impact of oil spills through the application of some incentive to maintain such specialised equipment. It was stated that the proposal of the sponsoring delegations would allow for an increase of an agreed percentage on top of a claim for the costs of the reasonable and beneficial deployment of specialised response equipment owned or contracted to a State (whereas simply deploying the capability would not be sufficient to justify the additional payment).

12.8 The sponsoring delegations mentioned that many States did not own all their response equipment but contracted equipment from commercial owners, that such contracts typically ran over several years and at considerable expense to the public authorities and that some countries maintained specialised, high cost, response equipment in this way to be ready to respond in the event of an oil spill. It was mentioned that the 1992 Fund's Claims Manual (page 21, November 2002 edition) already allowed States to claim a reasonable part of the price of equipment purchased so that it was available in the event of an incident, as well as the rate of hire of equipment.

12.9 The sponsoring delegations expressed the view that it would be consistent with the notion of the current 1992 Fund policy on fixed costs to allow States to claim for part of the contract costs of equipment used in response to an incident and contracted by those States to be available in the event of an incident, costs which in some cases run to millions of pounds per year. These delegations therefore proposed that the text on page 21 of the Claims Manual referring to fixed costs be widened to include a percentage of the annual costs of specialised response equipment owned by, or contracted to, authorities as follows (proposed amendment underlined):

> Authorities may claim compensation for so-called *fixed costs*, i.e. costs which would have arisen for the authorities concerned even if the incident had not occurred, such as normal salaries for permanently employed personnel, ~~and~~ capital costs of vessels owned by the authorities and [%] of the annual costs of specialised response equipment owned or contracted by Authorities.

12.10 The sponsoring delegations suggested that the mark-up [a % to be discussed] would be dealt with in a new paragraph in the Claims Manual that could read:

> Where it is demonstrated that the deployment of specialised response equipment was technically reasonable, and where it is shown that the equipment proved to have been beneficial in preventing and/or minimising major pollution, authorities claiming compensation for the actual use of the equipment may include a mark up of [a % to be discussed by the Working Group and recommended to the Assembly].

12.11 The sponsoring delegations emphasised that the admissibility of claims would, of course, be determined in accordance with the general criteria laid down in the Claims Manual and proposed that the following criteria should also be fulfilled in order for a claim for mark-up to be considered admissible:

- the equipment used must be for the purpose of avoiding or minimising persistent oil pollution from tankers;

- it must be demonstrated that the equipment used had a significant, beneficial effect in reducing or minimising pollution (simply deploying the capability would not be sufficient to justify the additional payment);

- the equipment used was reasonable and appropriate, i.e. not out of proportion to the extent and duration of the damage and the benefits likely to be achieved;

- the cost of the equipment used was reasonable and not disproportionate to costs that would reasonably be expected for such equipment elsewhere;

- the claim for response costs, which included the fixed costs mark-up, did not include a claim for profit.

12.12 The Working Group took note of Annex I of document 92FUND/WGR.3/14/9 which demonstrated how these criteria would be incorporated into the text of the Claims Manual.

12.13 The sponsoring delegations stated that it was not their intention to list the types of equipment that would qualify for a mark-up since the technology applied to combat and prevent spills was constantly evolving so it would be difficult to provide a definitive list and that it was also necessary to take into account the differing capabilities of Member States: what may seem relatively basic to one State will be considered specialised to another. The sponsoring delegations proposed that it should be for the Fund's on-site experts, and ultimately the Executive Committee (and Assembly, if need be), to determine whether the equipment used qualified for the proposed mark-up and whether its use was reasonable and appropriate.

12.14 The sponsoring delegations drew attention to the provisions of Article 14 of the International Convention on Salvage, 1989, on special compensation if the salvage prevented or minimised damage to the environment which, in their view, set a precedent for this type of mark-up.

12.15 The sponsoring delegations expressed the view that their proposal related to a policy issue which could be solved by a decision by the Assembly and did not require any amendment to the 1992 Conventions.

12.16 A number of delegations expressed their hesitation as regards the proposal by the five delegations. They drew attention to the fact that compensation under the 1992 Conventions could only be paid in respect of actual damage. In the view of these delegations, fixed costs associated with the annual maintenance of resources were already admissible, but those associated with capital costs could not be included. Those delegations expressed doubts as to whether any further uplift on fixed costs was possible without revising the Conventions.

12.17 Other delegations agreed, however, with the sponsoring delegations that it was important to encourage States to maintain a good oil combating capability. Several delegations also agreed with the sponsoring delegations that their proposal could be accommodated without amendments to the Conventions.

12.18 The point was made that, if the proposal were to be accepted, it would be necessary to lay down very precise criteria for the admissibility of claims for such a mark-up and give clear indications as to which types of equipment would qualify for such mark-ups.

12.19 One delegation supported the proposal in principle but suggested that the mark-up should not result in the total compensation exceeding the costs which would have been incurred if the equipment had been provided by private contractors.

12.20 Another delegation expressed doubts about the possibility of demonstrating that the deployment of equipment had been beneficial in preventing and/or minimising major pollution.

12.21 In summing up the Chairman stated that there was insufficient support for the proposal as currently drafted and that it could not be implemented without amendments to the Conventions. He further stated that the discussion had drawn attention to possible misunderstandings over terminology and interpretation of the concept of 'fixed costs' and that these needed to be resolved before making any amendment to the Claims Manual.

12.22 The Working Group agreed that the matter should be considered further on the basis of a revised proposal by interested delegations.

13 Application of the 1992 Conventions to the EEZ or an area designated under Article II(a)(ii) of the 1992 Civil Liability Convention and Article 3(a)(ii) of the 1992 Fund Convention

13.1 The Algerian delegation introduced document 92FUND/WGR.3/14/6 dealing with the practical problems raised by Article II (a) (ii) of the 1992 Civil Liability Convention and Article 3 (a) (ii) of the 1992 Fund Convention, particularly as regards countries bordering enclosed or semi-enclosed seas such as those bordering the Mediterranean.

13.2 It was noted that the above-mentioned Articles read:

> This Convention shall apply exclusively:
>
> (a) to pollution damage caused:
>
> (i) in the territory, including the territorial sea, of a Contracting State, and
>
> (ii) in the exclusive economic zone of a Contracting State, established in accordance with international law, or, if a Contracting State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;
>
> (b) to preventive measures, wherever taken, to prevent or minimize such damage.

13.3 The Algerian delegation stated that, under these Articles, a State which had not delimited its exclusive economic zone was entitled to make a declaration for the purposes of claiming rights to compensation in respect of oil pollution damage occurring within a maritime area of 200 miles from the baselines of the territorial sea of that State. It was pointed out, however, that practical problems arose for a number of 1992 Fund Member States, particularly for States bordering the Mediterranean, including Algeria, because of its particular configuration and limited breadth, which in some places was less than 200 miles, thus rendering inapplicable the provisions of the 1992 Conventions. That delegation suggested that a strict application of the provisions in question to the Mediterranean called into question the basic principles of the 1992 Fund Convention and gave rise to harmful consequences for certain Member States.

13.4 The Algerian delegation suggested that to recognise a right to compensation, in the Mediterranean, within an area of 200 nautical miles from the baselines from which the breadth of the territorial sea was measured, irrespective of the name used to refer to that area, would involve raising at least the following problems:

(1) if a State were to claim a right to compensation in such an area, this would be tantamount to establishing unilaterally an area under national jurisdiction and to ignoring the law of the other coastal States concerned, given that this claim consequently would be based on

articles relating to the scope of application of the 1992 Conventions within an area located under the jurisdiction of the State in question;

(2) if the States bordering on the Mediterranean were to claim the right to compensation simultaneously, this would inevitably lead to overlapping of the areas in question and hence to insoluble problems of compensation in the event of oil pollution;

(3) this situation constituted a potential source of inter-State contention and disputes which could have serious consequences, particularly as there was no provision in the 1992 Conventions for any dispute settlement procedure in such a case.

13.5 The Algerian delegation considered that, in order to resolve the problems, the optimum solution would for the time being be to adopt on a provisional basis the Search and Rescue division in the Mediterranean, which would give the following advantages:

(a) it would be provisional in the sense that it would not prejudice maritime delimitations that might be undertaken by the coastal States, as is provided for in Article 2.1.7 of the Annex to the 1979 International Convention on Maritime Search and Rescue (SAR Convention);

(b) it may be of a consensual nature, since the SAR division was the result of an agreement between the coastal States party to the SAR Convention (Article 2.1.4 of the Annex to that Convention);

(c) certain delegations had stated that they were prepared to examine the issues in concert with the coastal States bordering the Mediterranean.

13.6 The Algerian delegation also proposed that consideration be given to an amendment to Articles 2(a)(ii) of the 1992 Civil Liability Convention and 3(a)(ii) of the 1992 Fund Convention that would take account of the particular nature of enclosed and semi-enclosed seas and would thus have the obvious advantage for the whole community of avoiding conflicts which might call into question the credibility of the instruments establishing the Fund. The Algerian delegation suggested that the present text of the relevant articles would result in difficulties as regards the jurisdiction of national courts in respect of claims for compensation.

13.7 The Director stated that in his view the overlapping of EEZs or equivalent areas would not in most cases give rise to problems in respect of claims for compensation for clean-up and economic loss unless the claims became subject to litigation where questions of jurisdiction might arise. He suggested that, since jurisdiction belonged to the courts of the State in the territory, territorial sea, EEZ or designated area where the pollution damage occurred or the preventive measures were taken, there would always be a competent court and that, if the courts of two States were competent, the claimant had a choice to take action in the courts of either State.

13.8 Several delegations agreed with the Algerian delegation that the issue under consideration did not only concern the Mediterranean but also other enclosed and semi-enclosed areas. They expressed the view that the Fund should adopt a clear policy on the issue, for example by means of an Assembly Resolution.

13.9 Some delegations expressed the view that the issue raised by the Algerian delegation was different from other questions considered by the Working Group, since the issue was basically of a political nature. It was suggested that this issue would best be resolved by agreement between the States concerned in respect of a particular area.

13.10 During the discussion reference was made to the tripartite declaration made on 27 September 2000 by France, Italy and Spain in respect of the Mediterranean (document 92FUND/A.5/18/1, Annex). It was noted that except for Algeria the other States bordering the Mediterranean had not made corresponding declarations.

13.11 The Algerian delegation stated that the declaration made by Algeria on 16 May 2001 (document 92FUND/A.6/20, Annex) was in full conformity with the 1992 Conventions.

13.12 The Chairman suggested that the initiative to resolve this issue must come from governments, perhaps through appropriate declarations. He expressed the view that this issue had nothing to do with the 1992 Fund Convention but related to questions of public international law in general.

14 Future work

14.1 It was agreed that interested delegations would pursue informal discussions on various issues in order to facilitate progress.

14.2 The Working Group decided to hold a short meeting during the week of 20 October 2003, in connection with the Assembly's 8th session, to consider the progress made during informal discussions.

* * *

ANNEX

DRAFT RESOLUTION
ON THE INTERPRETATION AND APPLICATION OF THE 1992 CIVIL LIABILITY CONVENTION AND THE 1992 FUND CONVENTION

THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND 1992 set up under the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (1992 Fund Convention),

NOTING that the States Parties to the 1992 Fund Convention are also parties to the International Convention on Civil Liability for Oil Pollution Damage, 1992 (1992 Civil Liability Convention),

RECALLING that the 1992 Conventions were adopted in order to create uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases,

CONSIDERING that it is crucial for the proper and equitable functioning of the regime established by these Conventions that they are implemented and applied uniformly in all States Parties,

CONVINCED of the importance that claimants for oil pollution damage are given equal treatment as regards compensation in all States Parties,

MINDFUL that, under Article 235, paragraph 3, of the United Nations Convention on the Law of the Sea 1982, States shall co-operate in the implementation of existing international law and the further development of international law relating to the liability for and assessment of damage caused by pollution of the marine environment,

RECOGNISING that, under Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties 1969, for the purpose of the interpretation of treaties there shall be taken into account any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions and any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,

DRAWING ATTENTION to the fact that the Assembly and the Executive Committee of the International Oil Pollution Compensation Fund 1992 (1992 Fund) and the governing bodies of its predecessor, the International Oil Pollution Compensation Fund 1971 (1971 Fund), composed of representatives of Governments of the States Parties to the respective Conventions, have taken a number of important decisions on the interpretation of the 1992 Conventions and the preceding 1969 and 1971 Conventions and their application, which are published in the Records of Decisions of the sessions of these bodies [<2>], for the purpose of ensuring equal treatment of all those who claim compensation for oil pollution damage in States Parties,

EMPHASISING that it is vital that these decisions are given due consideration when the national courts in the States Parties take decisions in the interpretation and application of the 1992 Conventions,

CONSIDERS that the courts of the States Parties to the 1992 Conventions should take into account the decisions by the governing bodies of the 1992 Fund and the 1971 Fund relating to the interpretation and application of these Conventions.

[<2>] IOPC Funds' website: www.iopcfund.org