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WORKING GROUP

92FUND/WGR.3/12

REPORT ON THE FOURTH 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 to revise the text of the 1992 Fund's Claims Manual relating to the admissibility of claims for the costs of post-spill studies and of claims for the costs of reinstatement of the environment;
	(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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ANNEX

Proposal by the Working Group for amendment to the 1992 Fund's Claims Manual

EXECUTIVE SUMMARY

Mandate

The Working Group set up by the 1992 Fund Assembly in April 2000 held a meeting in April/May 2002 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 April/May 2002

At the meeting in April/May 2002 the Working Group considered a number of issues, in particular environmental damage and the shipowners' liability. It also discussed *inter alia* alternative dispute settlement procedures and uniform application of the Conventions.

Environmental damage: post spill environmental studies and reinstatement measures (Section 6)
The Working Group considered the criteria to be applied as regards the admissibility of claims for costs of post-spill environmental studies and for costs of measures of reinstatement of the polluted environment.

The Working Group approved a revised text of the relevant section of the Claims Manual for submission to the Assembly for consideration at its October 2002 session. The purpose of the revised text is to clarify the criteria to be applied in respect of such claims, within the legal framework of the definition of "pollution damage" in the 1992 Conventions.

Shipowners' liability and related issues (Section 7)
The discussions of whether amendments should be made to the provisions in the 1992 Civil Liability Convention regarding shipowners' liability and related issues highlighted a great divergence of opinion.

The observer delegations representing shipowners and P & I Clubs took the view that the present regime 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 (£18 million) would preserve this balance and that the matter should be re-examined in the light of experience three to five years after the entry into force of the proposed Protocol establishing a Supplementary Fund. These delegations argued that the compensation regime was not intended to ensure quality of shipping.

The observer delegation representing the oil industry maintained that the adoption of the Supplementary Fund Protocol would distort the balance between shipping and cargo interests, since that Fund was intended to be financed only by cargo interests. In the view of that delegation the preservation of the balance could be achieved either by an increase in the shipowner's limitation amount or by shipowners' participation in the third tier compensation provided by the Supplementary Fund.

Several government delegations considered that after the increases in the limits of the shipowners' liability adopted by the IMO Legal Committee in October 2000 there was no need to amend the provisions in the 1992 Civil Liability Convention relating to shipowners' liability. A number of other delegations expressed the view that it was premature to consider any amendments relating to shipowners' liability and that it would therefore be appropriate to defer consideration of this issue until experience had been gained from the effects of the increased limits adopted by the IMO Legal Committee and the operation of the proposed Supplementary Fund.

A number of other delegations took the view that it was necessary to examine at an early stage issues relating to shipowners' liability. The point was made that the international compensation regime was over 30 years old and that it was imperative to adapt the regime to today's needs. Several delegations stated that voluntary increases in the limits of liability were not sufficient.

It was recognised that amendments to the provisions in the 1992 Civil Liability Convention relating to shipowners' liability would give rise to difficult treaty law issues. The point was made, however, that those difficulties should not prevent in-depth consideration of the issues relating to shipowners' liability. It was stated that if there was a need to amend these provisions, solutions had to be found to any treaty law problems that might arise.

Alternative dispute settlement procedures (Section 8)

There was general agreement on the importance of claims being settled out of court. It was noted that the 1992 Fund already made strenuous efforts to this effect and that the Fund should continue its policy of endeavouring to settle claims out of court to the extent possible. It was suggested that the Funds' obligations to give equal treatment to all claimants and to respect the principles for admissibility of claims laid down by the Assemblies restricted the scope for alternative dispute settlement procedures. It was agreed that this issue should be retained for further consideration.

Uniform application of the Conventions (Section 9)

The Working Group recalled a document presented by the Director to a previous meeting in which he dealt with certain provisions in the 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.

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 were sovereign in their 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. 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.

A number of delegations suggested 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.

The Working Group concluded that the issue of uniform application of the Conventions should be retained for further study.

Next meeting

The Working Group decided to hold its next meeting late in 2002 or early in 2003. It also decided that consideration of any issues should be based on written concrete proposals, preferably in the form of draft treaty texts.

1 Introduction

1.1 The 3rd intersessional Working Group was established by the Assembly at its 4th extraordinary session 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 and its fourth meeting on 30 April, 1 and 2 May 2002, 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 fourth meeting:

Algeria	Ireland	Philippines
Antigua and Barbuda	Italy	Poland
Argentina	Japan	Republic of Korea
Australia	Kenya	Russian Federation
Belgium	Latvia	Singapore
Canada	Liberia	Spain
China (Hong Kong Special Administrative Region)	Malta	Sweden
	Marshall Islands	United Arab Emirates
Cyprus	Mexico	United Kingdom
Denmark	Morocco	Uruguay
Finland	Netherlands	Vanuatu
France	Norway	Venezuela
Germany	Oman	
Greece	Panama	

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

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

Cameroon	Colombia	Turkey

Other States:

Congo	Iran, Islamic Republic of	United States
Côte d'Ivoire	Malaysia	
Ecuador	Nigeria	

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
International Maritime Organization (IMO)
European Community

International non-governmental organisations:
Comité Maritime International (CMI)
Cristal Limited

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)
International Union for the Conservation of Nature and Natural Resources (IUCN)
Oil Companies International Marine Forum (OCIMF)

3 The Working Group's mandate

3.1 Mandate given by the Assembly at its 4th extraordinary session

At its 4th extraordinary session, held in April 2000, the Assembly gave the Working Group the following mandate:

a) to hold a general preliminary exchange of views, without drawing any conclusions, concerning the need to improve the compensation regime provided by the 1992 Civil Liability Convention and the 1992 Fund Convention;

b) to draw up a list of issues which could merit further consideration in order to ensure that the compensation system meets the needs of society.

3.2 Revised mandate given by the Assembly at its 5th session

At its 5th session, held in October 2000, the Assembly examined the Working Group's report on its first meeting (document 92FUND/WGR.3/3 and 92FUND/A.5/4) and gave the Working Group the following revised mandate (document 92FUND/A.5/28, paragraph 7.13):

(a) to hold an exchange of views concerning the need for and possibilities of improving the compensation regime established by the 1992 Civil Liability Convention and the 1992 Fund Convention;

(b) to continue the consideration of issues identified by the Working Group as important for the purpose of improving the compensation regime and to make appropriate recommendations in respect of these issues; and

(c) to report to the next regular session of the Assembly on the progress of its work and make recommendations as to the continuation of the work.

3.3 Revised mandate given at the Assembly's 6th session

3.3.1 After having considered at its 6th session, held in October 2001, the Working Group's report on its second and third sessions (document 92FUND/A.6/4 and 92FUND/WGR.3/9), 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.

3.3.2 The issues referred to in the Assembly's decision were as follows[1]:

(a) shipowners' liability (section 9)

(b) environmental damage (section 11)

(c) alternative dispute settlement procedures (section 13)

(d) non-submission of oil reports (section 14)

(e) clarification of the definition of 'ship' (section 18)

(f) application of the contribution system in respect of entities providing storage services (section 21.2)

(g) uniformity of application of the Conventions (section 25)

(h) various issues of a treaty law nature (section 26).

4 Documents considered by the Working Group at its fourth meeting

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

92FUND/WGR.3/11	Director (Revised mandate)
92FUND/WGR.3/11/1	International Group of P & I Clubs (Matters of general concern regarding the revision of the Conventions and voluntary increase of small ships' limit)
92FUND/WGR.3/11/2	OCIMF (Proposal that shipowners should participate with oil receivers in the financing of the Supplementary Fund)
92FUND/WGR.3/11/3	Australia, Canada, France, Ireland, Netherlands, New Zealand, Norway, Sweden and the United Kingdom (Post-spill studies and reinstatement of the environment)
92FUND/WGR.3/11/4	Japan and the Republic of Korea (Environmental damage)
92FUND/WGR.3/11/4/Add.1	Japan and the Republic of Korea (Environmental damage)
92FUND/WGR.3/11/5	INTERTANKO and ICS (Funding of Supplementary Fund and environmental damage)

4.2 During the discussions reference was made to the Working Group's Report on its second and third meetings (document 92FUND/A.6/4 and 92FUND/WGR.3/9). As regards the documents submitted to the Working Group's second and third meetings, reference is made to paragraphs 5.1 and 5.2 of that report.

5 Issues considered at the Working Group's fourth meeting

The Working Group agreed with the Chairman's proposal to focus its considerations at the fourth meeting primarily on environmental damage and shipowners' liability and related issues and thereafter deal with the other issues listed in paragraph 3.3.2.

6 Environmental damage: post-spill environmental studies and reinstatement measures

6.1 Environmental damage

6.1.1 The Working Group recalled that previous discussions on environmental damage had addressed several elements, as reflected in section 11 of the report on its second and third meetings, namely:

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[1] References to sections relate to the Report on the Working Group's second and third meetings (document 92FUND/A.6/4 and 92FUND/WGR.3/9).

(a) damage to the environment *per se*;

(b) cost of measures to reinstate the environment; and

(c) cost of environmental studies.

6.1.2 The Working Group also recalled that the 1992 Fund Assembly had, at its October 2001 session, considered a proposal set out in a document submitted by the delegations of Australia, Canada, Sweden and the United Kingdom (document 92/FUND/A.6/4/5) for new criteria for the admissibility of measures for reinstatement of impaired components of the environment and for post-spill studies.

6.1.3 The Working Group further recalled that, although there had been a clear majority in favour of the proposals set out in the document, a significant number of delegations had expressed serious doubts about the wording of the proposed criteria in respect of reinstatement measures and that the Assembly had decided therefore to refer the matter back to the Working Group for further consideration (document 92FUND/A.6/28, paragraphs 6.35 – 6.43).

6.1.4 The Working Group noted the information contained in document 92FUND/WGR.3/11/3 submitted to the Group's fourth meeting by the delegations of Australia, Canada, France, Ireland, Netherlands, New Zealand, Norway, Sweden and the United Kingdom (hereinafter referred to as 'Australia *et al*'), which sought to address the concerns expressed during the Assembly's October 2001 session by clarifying the Fund's policy on compensation for post-spill studies and reinstatement measures.

6.2 Post-spill environmental studies

6.2.1 It was noted that the delegations of Australia *et al* had expressed the view that the Fund should encourage scientifically relevant studies that assist in determining whether or not reinstatement measures were necessary and feasible, and which measures were likely to have the greatest chance of success, thereby minimising the possibility of claims resulting from unnecessary and ineffective reinstatement measures.

6.2.2 It was also noted that the delegations of Australia *et al* had considered that post-spill studies would not be necessary after all spills, but would normally be most appropriate after major incidents where there was evidence of significant environmental damage, although the justification for any study should be assessed on a case-by-case basis, preferably through the early participation of the 1992 Fund. It was further noted, however, that the sponsoring delegations were of the opinion that if a post-spill study demonstrated no significant long-term effects, or that no reinstatement measures were feasible, this should not exclude compensation for the costs of the study.

6.2.3 The Working Group recalled that the Assembly had given consideration at its October 2001 session as to whether claims for post-spill studies and reinstatement measures should only be considered by the Fund if they were generated by a person or organisation with direct ownership, control or management responsibility for the damaged components of the environment. It was further recalled that a number of delegations had expressed the view that such a restriction would be contrary to the terms of the 1992 Civil Liability Convention and the 1992 Fund Convention. The Working Group noted that the delegations of Australia *et al* had taken the views of the Assembly into account and had proposed that, following a spill that might warrant post-spill environmental studies or measures of reinstatement, the Fund should encourage the establishment, within the affected Member State, of a Committee or other mechanism to design and co-ordinate an agreed study programme.

6.3 Measures of reinstatement

6.3.1 The Working Group recalled that the relevant legal framework regarding measures of reinstatement was contained in Article 1.6(a) of the 1992 Civil Liability Convention, which is incorporated into the 1992 Fund Convention by reference in Article 1.2, which defined 'pollution damage' as:

> *'loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken'*

6.3.2 The Working Group noted that neither of the two Conventions contained any definition of 'reasonable measures of reinstatement', and that the delegations of Australia *et al* had proposed that a reasonable measure of reinstatement should aim to bring the damaged site back to the same ecological state that would have existed had the oil spill not occurred, or at least as close to it as possible (ie to re-establish a healthy biological community in which the organisms characteristic of that community prior to the spill are present and are functioning normally).

6.3.3 It was further noted that the sponsoring delegations had also proposed that innovative approaches to reinstatement should be encouraged, including measures taken within the general vicinity of the damaged area provided that it could be demonstrated that such measures would actually enhance the recovery of the damaged components of the environment. It was also noted that the sponsoring delegations had considered it necessary to preserve the link between the measures of reinstatement and the damaged components to avoid remote and speculative claims that were inconsistent with the definition of 'pollution damage' in the Conventions.

6.3.4 The Working Group noted that the delegations of Australia *et al* had proposed in the document that in addition to meeting the 1992 Fund's existing general criteria, measures of reinstatement would also have to fulfil the following additional specific criteria in order to qualify for compensation:

(i) the measures should be likely to accelerate significantly the natural process of recovery of the damaged area;
(ii) the measures should, as far as possible, seek to prevent further injury as a result of the incident;
(iii) the measures should, as far as possible, not result in the degradation of other habitats or in adverse consequence for other natural or economic resources;
(iv) the measures should be technically feasible; and
(v) the costs of the measures should not be out of proportion to the extent and duration of the damage and the benefits likely to be achieved.

6.3.5 It was noted that the sponsors had stated in their document that the specific criteria set out in paragraph 6.3.4 were intended to clarify the existing criteria in the Fund's Claims Manual and that, subject to the Assembly endorsing the specific criteria, they should be communicated to the international community through a revision of the relevant section of the 1992 Fund's Claims Manual.

6.3.6 The Working Group took note of the proposed revised text attached as an annex to the document submitted by the delegations of Australia *et al*.

6.3.7 The Working Group also noted the views set out in documents 92FUND/WGR.3/11/4 and 92FUND/WGR.3/11/4Add.1 submitted by the delegations of Japan and the Republic of Korea.

6.3.8 In introducing these documents the Japanese delegation stated that both Japan and the Republic of Korea agreed that measures of reinstatement needed to be more clearly defined, but that it was essential that any revision to the Claims Manual was consistent with the underlying Conventions. That delegation expressed concern that if the criteria included abstract or ambiguous terms such as 'innovative approaches' and 'alternative proximate sites', this would be confusing to claimants and lead to speculative claims being submitted.

6.3.9 The delegations of Japan and the Republic of Korea pointed out that in the revised text of the Claims Manual proposed in the Annex to document 92FUND/WGR.3/11/3 submitted by Australia *et al* the following paragraph of the present version of the Manual had been omitted:

> *'In most cases a major oil spill will not cause permanent damage to the environment, as the marine environment has a great potential for natural recovery. There are also limits to what man can actually do in taking measures to improve on the natural process.'*

6.3.10 Those delegations expressed the view that the text referred to in paragraph 6.3.9 should be retained, since it had been an established and widely accepted concept among Member States.

6.3.11 The Korean delegation expressed concerns regarding the proposed aims of reinstatement measures as set out in the document presented by Australia *et al*, in particular the objective of bringing a damaged site back to the same ecological state that would have existed had the spill not occurred. That delegation pointed out that such a goal was over-ambitious and could take hundreds of years to achieve in practice.

6.3.12 One delegation, whilst generally supporting the proposals put forward by Australia *et al*, also expressed concern that the additional criteria could give rise to large and speculative claims for environmental damage, which would receive equal treatment with other more pressing claims.

6.3.13 The observer delegations representing the oil, shipping and insurance industries as well as the observer delegations of IUCN and ITOPF expressed support for the proposed criteria put forward by Australia *et al*, which in their view allowed sufficient flexibility for what was a relatively new scientific area without modifying the definition of 'pollution damage'. Those delegations reaffirmed their opposition to speculative claims and argued that the reference to 'alternative proximate sites' had been deliberately worded so as to avoid such claims.

6.3.14 The majority of government delegations also expressed strong support for the proposals put forward by Australia *et al*, which in their view remained within the legal framework of the Conventions. Some delegations pointed out that the existing criteria had not prevented speculative claims and that the proposed additional criteria were unlikely to open the floodgates in respect of such claims. Those delegations also drew attention to the fact that although the Claims Manual was an important document, it was not legally binding, and that decisions on the admissibility of claims for reinstatement measures would be matters for the governing bodies of the 1992 Fund to consider.

6.3.15 A number of delegations pointed out that the views expressed by the delegations of Japan and the Republic of Korea on the one hand, and Australia *et al* on the other, were not so far apart and that it should be possible to resolve the differences through an appropriate wording of the revised Claims Manual.

6.4 Revised text of Claims Manual

At the Chairman's proposal, a small drafting group met during the week of the meeting to develop a revised text for the Claims Manual. The proposal of the drafting group as set out in document 92FUND/WGR.3/WP.1 was considered by the Working Group. The Working Group subsequently approved the revised text of the relevant sections of the Claims Manual as set out in

the Annex to the present document for submission to the 1992 Fund Assembly for consideration at its October 2002 session.

7 Shipowners' liability and related issues

7.1 The Working Group noted that, as shown by the discussions at its previous meetings, there were several sub-issues relating to shipowners' liability to be discussed (cf Section 9 of the Working Group's report on its second and third meetings), *viz*:

(a) criterion governing the shipowner's right to limitation;

(b) level of shipowner's limitation amount;

(c) basis of calculation of the limitation amount, ie should the limitation amount be increased for ships of low quality or cargoes representing a risk of causing serious pollution damage;

(d) channelling of liability to the shipowner; and

(e) relationship between shipowners' liability and the liability funded by oil receivers.

7.2 The Working Group took note of the documents submitted by the International Group of P & I Clubs (document 92FUND/WGR.3/11/1), by OCIMF (document 92FUND/WGR.3/11/2) and by INTERTANKO and ICS (document 92FUND/WGR.3/11/5).

7.3 Introducing document 92FUND/WGR.3/11/1, the observer delegation of the International Group of P & I Clubs expressed the view that the issues relating to shipowners' liability should not be reopened since to do so would be detrimental to the position of victims of oil pollution. It was suggested that the 1992 Conventions were intended to create an efficient compensation regime and had not been intended to ensure the quality of shipping or to punish the guilty party. In the view of that delegation, any amendments to the provisions relating to shipowners' liability would give rise to serious treaty law problems. It was emphasised that it was of paramount importance to maintain the equitable balance between the burdens imposed on the two industries involved, ie those of the shipping and cargo interests. In that delegation's view, an analysis of oil spills which had occurred in the period 1990 - 1999 showed that the present regime had resulted in an equitable sharing of burden between these two interests. The point was made 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 (£18 million) would preserve that balance. That delegation expressed the view that the matter should be re-examined in the light of experience three to five years after the entry into force of the proposed Supplementary Fund Protocol.

7.4 The observer delegation of OCIMF introduced document 92FUND/WGR.3/11/2 and stated that the oil industry supported the proposed Supplementary Fund Protocol funded initially entirely by oil receivers. However, that delegation emphasised the importance of maintaining a proper balance between the burdens imposed on the respective industries concerned, since this was a fundamental concept of the international compensation regime. The OCIMF delegation expressed the view that the international compensation regime should ensure that persons suffering oil pollution damage were compensated promptly but also be consistent with the general objective to improve maritime safety and reduce the number of oil spills. It was emphasised that it was the sole responsibility of the shipowner to maintain a safe and seaworthy ship. It was suggested that the latter objective might be compromised by the establishment of the Supplementary Fund, in so far as it was funded only by oil receivers. In addition, the point was made that a Supplementary Fund financed permanently by oil receivers would only distort the balance between the shipowners' and oil receivers' contributions to the regime. It was the view of that delegation that such a Supplementary Fund would also shield low quality shipowners from the consequences of their actions and would therefore not provide any incentive to improve the quality of their ships or the standards of their operations. In the view of that delegation, the preservation of that balance

could be achieved either by an increase in the shipowner's limitation amount or by shipowners' participation in the funding of the third tier of compensation.

7.5 Introducing document 92FUND/WGR.3/11/5, the observer delegation of INTERTANKO, speaking also on behalf of the ICS, emphasised that the present regime had ensured prompt and adequate compensation to victims of pollution, with approximately 95% of all claims in the last ten years having been paid entirely by shipowners within the current 1992 Civil Liability Convention limit. It was recognised, however, that even after the entry into force on 1 November 2003 of the increases in the compensation limits adopted by the IMO Legal Committee, the amount available for compensation might not be sufficient to ensure full compensation in major incidents, and that for this reason the shipping industry supported the proposed Supplementary Protocol. The point was made that the Supplementary Fund Protocol could only be funded by oil receivers. That delegation stated that in order to maintain a proper balance between the burdens imposed on the respective industries concerned, shipowners would agree to a voluntary increase in the limitation amount for small ships. It was suggested that if shipowners were to contribute to the funding of the third tier of compensation, this would go against the principle of limitation of liability. It was also suggested that before considering any amendments in relation to shipowners' liability, it would be appropriate to wait for the experience gained from three to five years' operation of the Supplementary Fund. Attention was drawn to the fact that amendments to the provisions on shipowners' liability would cause serious treaty law problems and would result in difference in treatment of ships from different flag States.

7.6 The Chairman suggested that the Working Group should consider items a), b) and c) in paragraph 7.1 and revert to items d) and e) at a later stage as required.

7.7 Several government delegations considered that after the increases in the limits of the shipowners' liability adopted by the IMO Legal Committee there was no need to amend the provisions in the 1992 Civil Liability Convention relating to shipowners' liability. A number of other delegations expressed the view that it was premature to consider any amendments relating to shipowners' liability and that it would be appropriate to defer consideration of this issue until experience had been gained from the effects of the increased limits adopted by the IMO Legal Committee and the operation of the proposed Supplementary Fund. It was suggested, therefore, that this issue should be considered only in the longer term.

7.8 A number of other delegations took the view that it was necessary to examine at this stage also issues relating to shipowners' liability. The point was made that the international compensation regime was over 30 years old and that it was imperative to adapt the regime to today's needs. It was suggested that recent incidents (in particular the *Nakhodka* and the *Erika*) had shown that the present situation as regards shipowners' liability was unsatisfactory. Several delegations stated that voluntary increases in the limits of liability were not sufficient. A large number of delegations took the view that it was imperative not to shut the door to amendments relating to shipowners' liability.

7.9 A number of delegations expressed the view that the international compensation regime should be amended so as to contribute to increased safety in shipping. Other delegations took the view that the compensation Conventions were not intended to deal with that issue and that the promotion of the safety of shipping was dealt with more efficiently by other IMO Conventions, such as MARPOL and SOLAS.

7.10 It was recognised that amendments to the provisions in the 1992 Civil Liability Convention on shipowners' liability would give rise to difficult treaty law issues. The point was made, however, that those difficulties should not prevent the issues relating to shipowners' liability being considered in depth. It was stated that if there was a need to amend the provisions relating to shipowners' liability, solutions had to be found to the treaty law problems.

7.11 One delegation drew attention to IMO Resolution 577 under which new Conventions should not be adopted or amendments made to existing Conventions unless a compelling need had been demonstrated. That delegation also queried whether the Working Group was competent to deal with issues relating to amendments to the 1992 Civil Liability Convention.

7.12 In response several delegations made the point that it was difficult to conceive that IMO would not consider there being a compelling need to revise the 1992 Conventions if the 1992 Fund Assembly, the body having the experience of the functioning of the international compensation regime, took the view that there was such a compelling need.

7.13 Attention was drawn to the fact that the 1992 Fund Assembly had given the Working Group the mandate to consider the issues set out in paragraph 3.3.2, including those relating to the 1992 Civil Liability Convention.

7.14 In summing up the discussions the Chairman stated that the Working Group was competent to deal with issues relating to the 1992 Civil Liability Convention. He pointed out that nothing prevented States from discussing in any forum they chose the development of new treaties or the revision of existing treaties. He drew attention to the fact that any proposal for amendments to the 1992 Conventions would have to be submitted to IMO, the depositary of these instruments, for consideration. He made the point that if the 1992 Fund Assembly considered that there was a need to revise the 1992 Fund Conventions, it was extremely unlikely that the IMO Assembly and Council would take a different view. He did not see any need to request the 1992 Fund Assembly to amend the Working Group's mandate. He suggested that delegations might not be ready to consider the issues relating to shipowners' liability and that it might therefore be appropriate not to hold the Working Group's next meeting in July 2002 as envisaged, but to postpone that meeting to late 2002 or early 2003. He insisted that in order to make it possible to make progress on the complex issues relating to shipowners' liability, delegations wishing to pursue these issues should submit written proposals, preferably in the form of draft treaty texts, well in advance of the next meeting.

7.15 The Working Group agreed with the Chairman's summing up.

8 Alternative dispute settlement procedures

8.1 The Working Group recalled the previous considerations of this issue by the Assembly and by the Working Group at its second meeting (document 92FUND/A.6/4, paragraphs 13.1 - 13.5). The Director mentioned that the Assembly had expressed the view that in many cases it would be difficult to use arbitration to settle disputes between the 1992 Fund and claimants, in particular where the need for speedy procedures was 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. He also referred to the fact that since a claim was admissible only if it fell within the definitions of 'pollution damage' and 'preventive measures' laid down in the Conventions and as interpreted by the 1992 Fund bodies, the scope for arbitration was limited. He also stated that many of the techniques used in the context of mediation and arbitration were already used by the IOPC Funds in their efforts to reach out-of-court settlements where the issue was one of quantifying admissible damage, but that such procedures should not be used in relation to questions of principle regarding the admissibility of claims.

8.2 The Director drew attention to the fact that during the Working Group's discussion at its second meeting it had generally been felt that the 1992 Fund should make strenuous efforts to avoid court proceedings, that the Fund should continue its policy to endeavour to settle claims out of court to the extent possible and that further consideration should be given to the possibilities for the 1992 Fund of using alternative dispute settlement procedures. He mentioned that in many countries there had been an increase in the use of such procedures in recent years but that in other countries such procedures were not widely used. The Director suggested 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. He referred to the fact that the Working Group had 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 but that it had been agreed that this issue should be studied further.

8.3 The Director also mentioned that at the Assembly's 3rd session it had been 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.

8.4 The Working Group noted that under Internal Regulation 7.3 the Director was authorised to agree with any claimant to submit a claim to binding arbitration.

8.5 A number of delegations agreed with the Director's analysis of the situation.

8.6 Some delegations referred to the above-mentioned possibility of using a person to facilitate a dialogue between the claimant and the IOPC Funds. One delegation considered that such a procedure could have been useful in relation to the *Braer* incident and could have reduced the number of claims being brought to court.

8.7 The Chairman stated that there was a general agreement on the importance of claims being settled out of court. He expressed the view that the Funds already made strenuous efforts to this effect. He suggested that the Funds' obligation to give equal treatment to all claimants and to respect the principles for admissibility of claims laid down by the Assemblies restricted the scope for alternative settlement procedures. He concluded, however, that this issue should be retained for further consideration provided that concrete written proposals were submitted to the Working Group.

9 Uniform application of the Conventions

9.1 The Working Group recalled that the issue of uniform implementation of the Conventions had been considered at its second and third meetings (document 92FUND/A.6/4, section 25). It was also recalled that at its third meeting the Working Group had considered a document submitted by the Director (document 92FUND/WGR.3/8) in which he dealt with certain provisions in the 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 and jurisdiction.

9.2 The Working Group recalled that at its third meeting it had considered 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 was recognised that States used different methods for implementing international treaties in their national legal system. It was 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.

9.3 During the discussions at the Working Group's fourth 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 were sovereign in their 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 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.

9.4 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.

9.5 One delegation mentioned that IMO had elaborated an explanatory document entitled "Unified Interpretation" which had been published together with the MARPOL 73/78 Convention and which had proven effective in achieving a high level of consistency in the application of that Convention by national administrations and courts. That delegation suggested that the 1992 Fund should develop along the same lines a formal explanatory document on the 1992 Conventions which would be published by the Fund together with the Conventions.

9.6 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.

9.7 In summing up the discussions the Chairman stated that there was general agreement that uniform interpretation and application of the 1992 Conventions was crucial for the functioning of the international compensation regime. He suggested that the IOPC Funds might consider including on their website information on decisions by national courts on the interpretation and application of the Conventions as well as on important decisions by the IOPC Funds' governing bodies in this regard. He also stated that the proposal to adopt a suitably-worded Assembly Resolution on this issue had received considerable support and should be considered further.

10 Various issues of a treaty law nature

10.1 It was recalled that at its third meeting the Working Group had taken note of a document presented by the Director which dealt with various issues of a treaty law nature (document 92FUND/WGR.3/8/1) which he had suggested the Working Group might wish to examine in the context of the revision of the international compensation regime, namely the position of the Executive Committee, the difficulties in achieving a quorum in the Assembly and the termination of the 1992 Fund Convention and of a revised version thereof.

10.2 It was further recalled that at its 6th session, the Assembly had been invited to consider a document prepared by the Director drawing attention to the risk that the 1992 Fund Assembly may in the future not be able to achieve a quorum (document 92FUND/A.6/26). It was also recalled that the Assembly had decided to postpone consideration of this issue to its next session and that it had been agreed that the issue could be referred to the Working Group for further discussion (document 92FUND/A.6/28, paragraph 29).

10.3 The Working Group agreed that the issues referred to in paragraphs 10.1 and 10.2 should be retained for consideration at a later stage on the basis of written proposals.

11 Other issues

11.1 The delegation of the United Kingdom drew attention to the issue of the admissibility of fixed costs which had been considered by the Working Group at its second and third meetings (document 92FUND/A.6/4, section 15).

11.2 The delegation of the Netherlands 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.

11.3 The Working Group decided that the issues referred to in paragraphs 11.1 and 11.2 would be retained on the list of issues to be examined but that the issues would only be considered on the basis of concrete written proposals.

12 Conclusions of the Working Group

12.1 The Working Group decided to submit to the Assembly for consideration the proposal for a revised text of the section of the Claims Manuals headed "Environmental damage" set out in the Annex.

12.2 The Working Group noted that the delegations were not yet ready to consider the complex issues of shipowners' liability at a meeting which had been scheduled for July 2002, and decided therefore to postpone its next meeting to late 2002 or early 2003.

12.3 The Working Group decided that consideration of any issues, including those relating to shipowners' liability, fixed costs and the contribution system, should be based on written concrete proposals, preferably in the form of draft treaty texts.

12.4 The Working Group noted that if it were to be decided to amend the provisions of the 1992 Civil Liability Convention in respect of shipowners' liability, it would be appropriate to consider amendments to provisions dealing with other issues, whereas if it were to be decided not to amend the provisions dealing with shipowners' liability, it would be necessary to consider whether the amendment of provisions dealing with other issues justified a revision of the Convention in view of the treaty law problems which would arise.

12.5 The Director undertook to review the documents submitted to the Working Group's first, second and third meetings and prepare a list of references to these documents by subject matter.

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ANNEX

Proposal by the Working Group for amendment to the 1992 Fund's Claims Manual

The Section "Environmental damage" on pages 31 and 32 of the June 2000 edition of the Claims Manual should be replaced by the following text:

Environmental damage

In most cases a major oil spill will not cause permanent damage to the environment as the marine environment has a great potential for natural recovery. Whilst there are limits to what man can do in taking measures to improve on natural processes, in some circumstances it is possible to enhance the speed of natural recovery after an oil spill through reasonable reinstatement measures. The costs of such measures will be accepted by the 1992 Fund under certain conditions.

The aim of any reasonable measures of reinstatement should be to bring the damaged site back to the same ecological state that would have existed had the oil spill not occurred, or at least as close to it as possible (that is to re-establish a biological community in which the organisms characteristic of that community at the time of the incident are present and are functioning normally). Reinstatement measures taken at some distance from, but still within the general vicinity of, the damaged area may be acceptable, so long as it can be demonstrated that they would actually enhance the recovery of the damaged components of the environment. This link between the measures and the damaged components is essential for consistency with the definition of *pollution damage* in the 1992 Civil Liability and Fund Conventions (see page 9 of the current version).

In addition to satisfying the general criteria applied to the admissibility of claims for compensation under the 1992 Fund Convention (see page 19 of the current version), claims for the costs of measures of reinstatement of the environment will only be considered admissible if the following criteria are fulfilled:

- the measures should be likely to accelerate significantly the natural process of recovery
- the measures should seek to prevent further damage as a result of the incident
- the measures should, as far as possible, not result in the degradation of other habitats or in adverse consequences for other natural or economic resources
- the measures should be technically feasible
- the costs of the measures should not be out of proportion to the extent and duration of the damage and the benefits likely to be achieved.

The assessment should be made on the basis of the information available when the specific reinstatement measures are to be undertaken.

Compensation is paid only for reasonable measures of reinstatement actually undertaken or to be undertaken, and if the claimant has sustained an economic loss that can be quantified in monetary terms. The Fund will not entertain claims for environmental damage based on an abstract quantification calculated in accordance with theoretical models. It will also not pay damages of a punitive nature on the basis of the degree of fault of the wrong-doer.

Studies are sometimes required to establish the precise nature and extent of environmental damage caused by an oil spill and to determine whether or not reinstatement measures are necessary and feasible. Such studies will not be necessary after all spills and will normally be most appropriate in the case of major incidents where there is evidence of significant environmental damage.

The Fund may contribute to the cost of such studies provided that they concern damage which falls within the definition of *pollution damage* in the Conventions, including reasonable measures to reinstate a damaged environment. In order to be admissible for compensation it is essential that any such post-spill studies are likely to provide reliable and usable information. For this reason the studies must be carried out with professionalism, scientific rigour, objectivity and balance. This is most likely to be achieved if a committee or other mechanism is established within the affected Member State to design and co-ordinate any such studies, as well as reinstatement measures.

The scale of the studies should be in proportion to the extent of the contamination and the predictable effects. On the other hand, the mere fact that a post-spill study demonstrates that no significant long-term environmental damage has occurred or that no reinstatement measures are necessary, does not by itself exclude compensation for the costs of the study.

The Fund should be invited at an early stage to participate in the determination of whether or not a particular incident should be subject to a post-spill environmental study. If it is agreed that such a study is justified the Fund should then be given the opportunity of becoming involved in the planning and in establishing the terms of reference for the study. In this context the Fund can play an important role in helping to ensure any post-spill environmental study does not unnecessarily repeat what has been done elsewhere. The Fund can also assist in ensuring that appropriate techniques and experts are employed. It is essential that progress with the studies is monitored, and that the results are clearly and impartially documented. This is not only important for the particular incident but also for the compilation of relevant data by the Fund for future cases.

It is also important to emphasise that participation of the Fund in the planning of environmental studies does not necessarily mean that any measures of reinstatement later proposed or undertaken will be considered admissible.