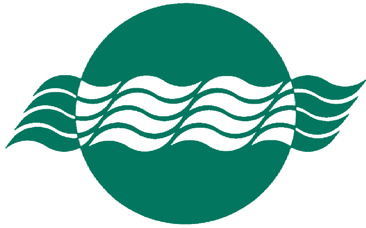

INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

THIRD INTERSESSIONAL
WORKING GROUP
Second meeting
Agenda item 3

92FUND/WGR.3/6
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REPORT ON THE SECOND MEETING OF THE THIRD INTERSESSIONAL WORKING GROUP

REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

Note by the Director

Summary:	The Working Group continued the 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. It considered issues identified as important for the purpose of improving the compensation regime. The Working Group discussed in particular the maximum levels of compensation, the shipowner's right to limit his liability and environmental damage. It also discussed time bar, alternative dispute settlement procedures, non-submission of oil reports, the need for more precise provisions on the submission and handling of claims, the system for levying contributions to the 1992 Fund and the uniform application of the Conventions.

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 system of the 1992 Civil Liability Convention

and the 1992 Fund Convention. The Group held its first meeting on 6 July 2000 and its second meeting on 12 and 13 March 2001, both 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 second meeting:

Algeria
Australia
Belgium
Canada
Cyprus
Denmark
Fiji
Finland
France
Germany
Greece
Grenada
Ireland
Italy
Japan
Latvia
Liberia
Malta
Marshall Islands
Mexico
Netherlands
Norway
Panama
Philippines
Poland
Republic of Korea
Singapore
Spain
Sweden
United Kingdom
Vanuatu
Venezuela

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

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

Georgia
Russian Federation

Other States

Côte d'Ivoire
Ecuador
Egypt
Iran, Islamic Republic of
United States of America

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

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

International non-governmental organisations:
Comité Maritime International (CMI)
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 First meeting of the Working Group

3.1 Mandate given by the Assembly at its 4th session

At its 4th session, the Assembly had given 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 Documents submitted to the first meeting of the Working Group

Documents containing proposals of issues to be included in the list referred to in paragraph (b) of the original mandate (paragraph 3.1 above) had been submitted by the following delegations to the first meeting:

(i) Germany, Ireland and the observer delegation of INTERTANKO (document 92FUND/WGR.3/2);

(ii) France (document 92FUND/WGR.3/2/1);

(iii) Spain (document 92FUND/WGR.3/2/2);

(iv) the United Kingdom (document 92FUND/WGR.3/2/3).

3.3 Chairman's introduction at the Working Group's first meeting

In taking up his office at the first meeting, the Chairman reminded the Working Group that the international compensation regime established under the Civil Liability and Fund Conventions was one of the most successful compensation schemes in existence and that over the years most compensation claims covered by this regime had been settled amicably as a result of negotiations. He stated that the Working Group should not be distracted by the few major cases that had gone to court. He pointed out that as a living scheme, the regime required to be revisited for modifications in the light of experience so as to be able to adapt to the changing needs of society and to ensure the regime's survival by remaining attractive to States.

3.4 Conclusions of the Working Group's first meeting

3.4.1 At the end of the Working Group's first meeting the Chairman emphasised that it would be necessary to examine carefully which issues should be retained for inclusion in a possible revision of the 1992 Conventions, in particular in order to make it possible to carry out such a revision within a reasonable period of time. The point was made that it would be appropriate to distinguish between issues which could be dealt with within the framework of the texts of the 1992 Conventions (eg by agreements between Contracting States, Fund Assembly Resolutions, clarification in national law) and issues where improvements could be brought about only by formal amendments to the Conventions through a Diplomatic Conference followed by ratification by States.

3.4.2 At the Working Group's first meeting it had been agreed that the following subjects should be included in the list of issues which could merit further consideration:

1 Ranking of claims/priority treatment (including prescription periods)

2 Uniform application of the Conventions

3 Sanctions for failure to submit oil reports

4 Dissolution and liquidation of the Fund

5 Maximum compensation levels

6 Weighting of contributions according to the quality of ships used for the transport of oil

7 Environmental damage

3.4.3 It was noted that the following issues had also been proposed for consideration but due to lack of time were not discussed by the Working Group at its first meeting:

Can co-operation with shipowners be improved?

Are preventive measures inhibited by the Conventions?

Should the shipowner's limitation amount be increased for ships carrying cargoes which could cause particularly serious pollution damage?

Channelling of liability (Article III.4 of the 1992 Civil Liability Convention)

Possibility of mediation before legal actions are taken

Restricting the conditions for the shipowner's right to limit his liability

Clarification of the definition of 'ship', eg in respect of the application of the Conventions to offshore craft

Geographical scope of application of the Conventions in areas where no exclusive economic zone has been established

More precise provisions on the submission and handling of claims

Steps to reduce delays in the payment of compensation

Admissibility of claims for fixed costs

Admissibility of claims relating to the cost of salvage operations

4 Revised mandate for the Working Group's second meeting

After the Assembly had examined at its 5th session the Working Group's report on its first meeting (documents 92FUND/WGR.3/3 and 92FUND/A.5/4), it determined the following revised mandate of the Working Group (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.

5 Documents submitted to the Working Group's second meeting

The following delegations had submitted documents to the Working Group's second meeting:

(i) OCIMF (document 92FUND/WGR.3/5);

(ii) Australia, Canada, Denmark, the Netherlands, Norway, Sweden and the United Kingdom (document 92FUND/WGR.3/5/1);

(iii) ITOPF (document 92FUND/WGR.3/5/2);

(iv) Italy (documents 92FUND/WGR.3/5/3, 92FUND/WGR.3/5/3/Corr.1 and 92FUND/WGR.3/5/9);

(v) Republic of Korea (document 92FUND/WGR.3/5/4);

(vi) France (documents 92FUND/WGR.3/5/5, 92FUND/WGR.3/5/6 and 92FUND/WGR.3/5/7);

(vii) Ireland (document 92FUND/WGR.3/5/8).

6 Discussions at the Working Group's second meeting

6.1 Maximum compensation levels

General discussion

6.1.1 The Working Group considered the issue of the maximum amount available for compensation on the basis of documents presented to the second meeting by the delegations of France, Ireland, Italy, the Republic of Korea and OCIMF and a document submitted by the delegations of Australia, Canada, Denmark, the Netherlands, Norway, Sweden and the United Kingdom (hereinafter referred to as 'Australia *et al*').

6.1.2 A number of delegations expressed the view that recent incidents (in particular the *Nakhodka* and the *Erika*) had shown that the present maximum compensation levels laid down in the 1992 Conventions were inadequate and would remain so even when the IMO Legal Committee's decisions to increase the limits took effect on 1 November 2003. It was maintained that in order for the international system to retain its credibility the maximum compensation levels should be sufficiently high to ensure full compensation to all victims even in the most serious oil spill incidents. It was stated that this matter was the most important and urgent one to be considered by the Working Group.

6.1.3 Nevertheless, a number of other delegations considered that there was no need for further increases in the maximum compensation levels at this stage, bearing in mind the recent decision of the IMO Legal Committee to increase the limits of liability and compensation in the 1992 Conventions by some 50.37% with effect from 1 November 2003.

6.1.4 Several delegations stated that if increases were to be considered, it was important to preserve the balance between the liabilities of shipping and cargo interests.

6.1.5 A number of delegations drew attention to the fact that the level of economic development varied widely from State to State within the global regime. They considered that developing countries felt no need for further increases in the limitation amounts and that any such increases could make it impossible for these countries to ratify any new instruments which would be prejudicial to the global character of the present compensation regime.

6.1.6 Several delegations considered that it might be sufficient to revise the tacit amendment procedure laid down in Article 15 of the 1992 Civil Liability Convention and Article 33 of the 1992 Fund Convention so as to make it possible to revise the limits at more frequent intervals and to ensure the more rapid entry into force of any revised limits.

6.1.7 The OCIMF observer delegation supported increases in the limitation amounts laid down in the 1992 Conventions so as to provide realistic cover for any incident in the foreseeable future. That delegation stated that any solutions must be constructed in such a way as not to distort the balance between shipowners' and oil receivers' interests.

6.1.8 The ICS observer delegation agreed that the limitation amounts should be sufficient to cover the most serious oil pollution incidents. That delegation expressed its strong support for a global compensation regime.

6.1.9 During the discussion reference was made to the proposal presented in December 2000 by the Commission of the European Union for the establishment of a third tier of compensation, intended to supplement the regime created by the 1992 Conventions, by means of a European Union compensation fund (COPE Fund) which would ensure that a total amount of 1 000 million Euros (£628 million) would be available for each oil spill incident in European Union Member States (document 92FUND/A/ES.5/2). Reference was also made to the fact that the United States Oil Pollution Act 1990 (OPA 90) made available US$1 000 million (£700 million) and that the P & I Clubs offered cover for oil pollution damage for US$1 000 million.

6.1.10 Many delegations emphasised the importance of preserving the global character of the system, recognising that, while a number of States felt the need for significantly higher maximum compensation levels, others did not. It was suggested that the maximum amount should be increased only if there was a strong majority in favour.

Optional third tier of compensation

6.1.11 In the light of the above discussion, the Working Group considered a proposal by the delegations of Australia *et al* to establish a third tier of compensation on top of the 1992 Conventions which could be summarised as follows (document 92FUND/WGR.3/5/1, paragraphs 2.18 – 2.23):

> Participation in the third tier would be optional for States Parties to the 1992 Fund Convention. The third tier would consist of two layers: layer 1 would establish higher limits of compensation to be paid by shipowners whereas layer 2 would establish a supplementary fund financed by oil receivers. The third tier would be established by a new Protocol to both the 1992 Civil Liability Convention and the 1992 Fund Convention and would be open for ratification or accession by all Parties to the 1992 Civil Liability Convention and the 1992 Fund Convention. The third tier of compensation would be operative only in respect of pollution damage in the States Parties to the Protocol creating the third tier, and only in cases where the established claims exceeded the 1992 Fund limits. This tier should be set at a relatively high level to cover the type and scale of incidents that were likely to occur in any of the States that would adopt the third tier. In establishing the third tier, the balance between the obligations of the shipowners and the receivers of contributing oil should be kept in mind. The proposed approach would effectively provide a four-layer system, which would

be similar to the arrangement that applied during the transitional phase as States moved from the 1969/71 regime into the regime under the 1992 Protocols, as set out below:

3rd tier: **Supra 2001**	2nd layer	Oil receivers
	1st layer	Shipowners
2nd tier: **1992 Fund**		Oil receivers
1st tier: **1992 CLC**		Shipowners

6.1.12 One of the delegations which had presented the proposal stated that the advantage of such a new Protocol establishing the third tier would be that it would create an additional level of protection without the need for denunciation of the 1992 Civil Liability Convention and the 1992 Fund Convention. It was suggested that this would allow States to participate either in both the 1992 system and the system set up by the new Protocol, or only in the 1992 system and could possibly, in the long term, achieve similar levels of compensation under the 1992 Conventions through the tacit amendment procedure. It was mentioned that consideration should also be given to the inclusion of a tacit amendment provision for the third tier to prevent erosion of the additional cover over time.

6.1.13 A number of delegations expressed interest in the proposed optional third tier. Many delegations stated, however, that they needed more time to study the proposal and that more details of the proposed third tier, both from a practical point of view and as regards the treaty law aspects, were necessary before they could take a position on the proposal.

6.1.14 Several delegations, however, questioned whether it would be appropriate to include a layer of further shipowner liability in the third tier. They pointed out that such additional liability could not be invoked *vis-à-vis* ships flying the flag of States which were Parties to the 1992 Civil Liability Convention but not to the new Protocol. It was suggested that this could result in shipowners choosing to have their ships registered in such States and act as a disincentive for many States to ratify the new Protocol. Several delegations expressed the view that for these reasons a third tier should be financed entirely by oil receivers in the same way as the 1992 Fund.

6.1.15 Some delegations supported the proposal for an optional third tier of compensation as a short-term solution but indicated their preference for general increases in the amounts laid down in the 1992 Conventions as a long-term objective.

6.1.16 The ICS observer delegation stated that it could in principle support the proposal for a third tier. It pointed out that if a third tier included a layer of shipowner liability, this would result in a fundamental change of the system. That delegation suggested that the question would then arise whether shipowners would have to insure the extra cover envisaged by the third tier. Attention was drawn to the complex treaty law issues that could arise if the third tier included a layer of shipowner liability. For this reason the ICS delegation favoured a third tier consisting of one layer only. The ICS delegation also emphasised the importance of preserving the present balance between shipping interests and oil interests. It was pointed out that shipping interests had paid 70% of all claims arising from oil spills and that this would remain the case irrespective of whether or not a third tier were introduced.

Liability of the individual cargo owner

6.1.17 The Italian delegation introduced a proposal whereby there would be a third tier of liability (over and above the present layers of liability of the shipowner under the 1992 Civil Liability Convention and collectively of all cargo receivers under the 1992 Fund Convention) which would fall on the individual owner of the cargo which actually caused the pollution (document 92FUND/WGR.3/5/9). That delegation stated that the objective of the proposal was to make cargo owners extremely attentive to the quality of the ship used for the transport of their oil.

6.1.18 It was agreed that more details of the Italian proposal were needed in order to enable delegations to assess it.

Tacit amendment procedure

6.1.19 As regards the tacit amendment procedure laid down in the 1992 Conventions, a number of delegations considered that it was not sufficiently flexible and dynamic. It was mentioned that after the increases adopted by the IMO Legal Committee in October 2000, no further increases could come into force for over 11 years. It was suggested therefore to shorten or abolish the interval during which no further increases to the limits could be considered by the Legal Committee. Further it was suggested that the period from the date of the Legal Committee's decision to increase the limits to the date when the increases enter into force should be shortened.

6.1.20 Several delegations considered that the issue of a revision of the tacit amendment procedure needed to be considered further. It was suggested that if an optional third tier were to be created, a tacit amendment procedure should be included for the revision of the limit or limits under the third tier.

6.1.21 Some delegations drew attention to potential treaty law conflicts between the 1992 Conventions and any new Conventions which contained modified tacit amendment procedures. Concerns were expressed as to how any such conflicting tacit amendment procedures would be handled in the IMO Legal Committee.

Cushion Fund and Supplementary Compensation Fund

6.1.22 The Working Group examined proposals by the delegation of the Republic of Korea to establish a Cushion Fund to maintain a stable level of contributions and to create a new Supplementary Compensation Fund on top of the maximum amount available under the 1992 Fund Convention, as set out in document 92FUND/WGR.3/5/4.

6.1.23 The Korean delegation proposed that each Member State should have its own Cushion Fund to operate in addition to and in parallel with the present system under the 1992 Conventions, which would be used so as to maintain a stable level of contributions, resulting in contributors having to pay at a usually fixed, but sometimes slightly variable rate each year. The Korean delegation indicated that the amount to be paid by contributors would almost always be predictable and the amount of the contributions would be easy for the Fund to calculate. The Korean delegation stated that under the proposal a Cushion Fund would be constituted for each State through the funds actually accumulated. It was explained that the Cushion Fund would be primarily used to pay contributions levied under the current system and contributions to be levied under the proposed new Supplementary Fund. That delegation proposed that when an incident occurred in a given State, the funds accumulated for that State would be used to make advance payments to victims whose claims were assessed or agreed but who would only be partially paid due to the equal treatment rule. It was mentioned that the proposed Supplementary Fund would operate in the same way as the COPE Fund proposed by the European Commission, but on a global rather than a regional basis.

6.1.24 It was considered that more clarification on the functioning of the proposed Cushion Fund and Supplementary Compensation Fund was needed so as to enable delegations to examine the proposals.

Amount available to be increased by interest

6.1.25 The Working Group considered a proposal by the French and Italian delegations that the maximum amount of compensation available under the 1992 Fund Convention could be raised by making available for compensation the interest accrued on the investment of the amount received

in contributions by the 1992 Fund (documents 92FUND/WGR.3/5/3, paragraph 2.4 and 92FUND/WGR.3/5/5, section 7).

6.1.26 It was agreed that these proposals should be considered further at a later stage.

Chairman's conclusions

6.1.27 In his summing up the Chairman noted that there was no consensus as regards the actual need to increase the present limitation amounts beyond the increases adopted by the IMO Legal Committee in October 2000. He observed that a number of delegations did not see any need for further increases or took the view that it would be sufficient to revise the tacit amendment procedure so as to make it possible to increase the limits more frequently. He also noted that on the other hand a number of other delegations considered that there was an urgent need for further substantial increases in these limits. He stated that it had been suggested that it was important not to hamper the endeavours of some States to establish higher limits, whilst at the same time leaving the existing global system intact. The Chairman also noted that although a number of delegations supported the idea of revising the tacit amendment procedure, this could create major treaty law problems as a result of some States remaining in the old regime. He concluded that it had been agreed that the proposals to create an optional third tier and to revise the tacit amendment procedure required further study and that more details of the proposals were needed in order to enable delegations to examine them further. He mentioned that particular attention would have to be paid to the question of whether a third tier should consist of one layer or two.

6.2 Shipowner's right of limitation

6.2.1 The Working Group considered whether the criterion governing the shipowner's right to limit his liability should be tightened.

6.2.2 The Working Group recalled that the shipowner's right to limit his liability was a traditional concept in maritime law. It was noted that prior to 1976 the shipowner could lose his right to limit his liability if the incident was caused by his personal fault or privity and that this was the test set out in the 1924 and 1957 Limitation Conventions and the 1969 Civil Liability Convention. It was also recalled that under the 1976 Convention on Limitation of Liability for Maritime Claims the criterion had been amended to the effect that the shipowner was deprived of his limitation right if the damage resulted from his personal act or omission committed with the intent to cause the damage or recklessly and with knowledge that such damage would probably result. It was further recalled that the later criterion had been included in the 1984 and 1992 Protocols to the 1969 Civil Liability Convention as well as in a number of other recent treaties, eg the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention).

6.2.3 The Working Group took note of the views expressed by the French delegation in document 92FUND/WGR.3/5/5 on the liability of the shipowner.

6.2.4 The French delegation expressed the view that the present system regarding the shipowner's right to limit liability was unsatisfactory since it did not promote the safety of navigation. That delegation criticised the criterion for breaking the shipowner's right to limitation of liability in the 1992 Civil Liability Convention which made this possible only in cases of intentional or inexcusable fault.

6.2.5 The French delegation stated that under the present system the victim had no interest in trying to break the shipowner's right to limitation since, if he succeeded, the insurer would be able to revoke insurance cover on the same ground that the victim had invoked against the shipowner. It was pointed out that, although the P & I Clubs offered cover for oil pollution of US$1 000 million, in reality a Club's risk was restricted to the shipowner's limitation amount and

that there was thus a wide divergence between the P & I Clubs' theoretical commitments and their actual obligations.

6.2.6 A number of delegations expressed the view that the present provision concerning the shipowner's right to limit his liability should be retained. Attention was drawn to the fact that when the 1984 Protocol to the Civil Liability Convention was adopted, the shipowner's limitation amount was increased significantly and as a *quid pro quo* it was made much more difficult to break the right to limitation. It was stated that the test set out in the 1992 Civil Liability Convention was contained in a number of treaties in the field of transport law and that it would not be possible to return to the old criterion. It was suggested that if it became easier to break the shipowner's right to limitation, this could lead to protracted litigation in a number of cases which would delay the payment of claims. The point was made that in cases where the 1992 Fund Convention applied, it would normally not be in the interest of the victims to try to break the shipowner's right to limitation since the claims for compensation would be paid by the 1992 Fund to the extent they exceeded the limitation amount.

6.2.7 The Working Group noted that there was no support for changing the test for the right of limitation by returning to the criterion laid down in the 1969 Civil Liability Convention. It was also noted that since the 1992 Fund would stand behind the shipowner in States Parties to the Fund Convention, there would in most cases be no advantage for victims if the shipowner lost his right to limit his liability.

Increases in the limitation amount for ships of low quality or carrying cargoes representing a risk of causing serious pollution damage

6.2.8 The French delegation also suggested that consideration should be given to increasing the limitation amount for ships of low quality and for ships carrying cargoes representing a high risk of causing serious pollution damage. It was noted that a similar proposal had also been made in the document presented by the delegations of Australia *et al*.

6.2.9 A number of delegations agreed with the French delegation that all steps should be taken to promote the use of high quality ships and to eliminate substandard ships. However, it was pointed out that promotion of the safety of shipping and the prevention of pollution was the responsibility of IMO and that several Conventions had been adopted by IMO dealing with these matters (eg SOLAS and MARPOL). In the view of some delegations, the Civil Liability Convention was not an appropriate instrument for dealing with these issues.

6.2.10 Several delegations considered that it would be very difficult to lay down precise criteria which could be used for varying the limitation amount on the basis of the type of oil carried or the quality of the ship used. It was suggested that one of the reasons why the international compensation regime had functioned well was that it was relatively simple and that varying the limitation amount on such a basis would complicate matters.

6.2.11 Some delegations supported the French proposal in principle, but considered that it would be difficult to implement in practice.

6.2.12 The Working Group concluded that all efforts should be made to promote quality shipping but that this was primarily a matter to be addressed within IMO in the field of public law rather than in the context of civil liability and compensation. It was also considered that it would be difficult to vary the shipowner's limitation amount on the basis of the quality of the ship and the type of oil carried. However, it was agreed that this issue could be reconsidered at a later stage on the basis of more detailed proposals.

Recourse actions

6.2.13 The Working Group also considered the possibilities of taking recourse action against the shipowner and other persons who had caused pollution damage.

6.2.14 The Working Group recalled that the IOPC Funds' policy in respect of recourse actions could be summarised as follows (cf document 71FUND/EXC.62/14, paragraph 3.6.11):

> The policy of the Funds is to take recourse action whenever appropriate. The Funds should in each case consider whether it would be possible to recover any amounts paid by them to victims from the shipowner or from other parties on the basis of the applicable national law. If matters of principle are involved, the question of costs should not be the decisive factor for the Funds when considering whether to take legal action. The Funds' decision as to whether or not to take such action should be made on a case-by-case basis, in the light of the prospect of success within the legal system in question.

6.2.15 In this context it was suggested that, given the channelling provisions in Article III.4 of the 1992 Civil Liability Convention, a distinction should be made between the lack of rights of victims to claim compensation from the persons referred to in that provision (eg charterers) and the 1992 Fund’s right to take recourse action against those persons.

6.2.16 It was noted that, under the 1992 Fund Convention, the 1992 Fund would have to base any recourse action on national law. It was suggested that it might be possible to strengthen the Fund’s position by including a provision explicitly giving the Fund the right to take recourse action, probably based on fault.

6.2.17 It was generally considered that the 1992 Fund should take recourse action whenever appropriate, and that a firm policy by the Fund in this regard could be used against persons operating substandard ships.

6.3 Environmental damage and environmental studies

6.3.1 The Working Group recalled that the IOPC Funds’ position in respect of the admissibility of claims relating to damage to the marine environment as laid down by the Assemblies could be summarised as follows (cf Report of the 7th Intersessional Working Group established by the 1971 Fund Assembly, document FUND/A.17/23, paragraph 7.3.5):

(a) The IOPC Funds accept claims that relate to "quantifiable elements"<1> of damage to the marine environment, for example:

(i) reasonable costs of reinstatement of the damaged environment; and

(ii) loss of profit (income, revenue) resulting from damage to the marine environment suffered by persons who depend directly on earnings from coastal or sea-related activities, eg loss of earnings suffered by fishermen or by hoteliers and restaurateurs at seaside resorts.

(b) (i) The IOPC Funds have consistently taken the position that claims relating to unquantifiable elements of damage to the marine environment cannot be admitted.

<1> The expression "quantifiable elements" means damage to the environment in respect of which the value of the damage can be assessed in terms of market prices; the expression "non-quantifiable elements" means damage in respect of which the quantum of the damage cannot be assessed according to market prices.

(ii) The 1971 Fund Assembly has rejected claims for compensation for damage to the marine environment calculated on the basis of theoretical models.

(iii) Compensation can be granted only if a claimant has suffered quantifiable economic loss.

(c) (i) Damages of a punitive character, calculated on the basis of the degree of the fault of the wrong-doer and/or the profit earned by the wrong-doer, are not admissible.

(ii) Criminal and civil penalties for oil pollution from ships do not constitute compensation and do not therefore fall within the scope of the Civil Liability Conventions and the Fund Conventions.

6.3.2 It was also recalled that the admissibility of claims for measures to reinstate the environment was considered by the 7th Intersessional Working Group of the 1971 Fund as follows (document FUND/A.17/23, paragraphs 7.3.13, 7.3.16 and 7.3.17):

> The Working Group recognised the importance of environmental issues in general and of the need for measures to be taken to reinstate the environment after certain oil spills. It was generally accepted that the question as to whether the IOPC Fund should pay compensation for the costs of measures to reinstate the marine environment would have to be decided on the basis of the definition of "pollution damage" laid down in the 1992 Protocol to the Civil Liability Convention, *viz* that the compensation should be limited to the costs of reasonable measures of reinstatement actually undertaken or to be undertaken. It was agreed that the test of reasonableness should be an objective one, ie that the measures should be reasonable from an objective point of view in the light of the information available when the specific measures were taken. It was also noted that the word "actually" in the text of the Protocol referred not only to "undertaken" but also to the expression "to be undertaken". It was considered that payment for reinstatement measures not yet undertaken should be made by the IOPC Fund only if the claimant was unable to finance them and that the claimant would have to present detailed plans of the measures to be undertaken before any payments could be made.
>
> The Working Group agreed that in order to be admissible for compensation measures for reinstatement of the environment would have to fulfil the following criteria:
>
> - the cost of the measures should be reasonable;
> - the cost of the measures should not be disproportionate to the results achieved or the results which could reasonably be expected; and
> - the measures should be appropriate and offer a reasonable prospect of success.
>
> The Working Group considered that it would normally be necessary to carry out an in-depth study before any measures for reinstatement were undertaken.

6.3.3 It was also recalled that the report of the 7th Intersessional Working Group had been endorsed by the 1971 Fund Assembly at its 17th session (document FUND/A.17/35, paragraph 26.8) and that these principles had been endorsed by the 1992 Fund Assembly at its 1st session (document 92FUND/A.1/34, paragraph 19.2) and 1992 Fund Resolution N°3.

6.3.4 The Working Group recalled that the IOPC Funds' policy as regards environmental studies can be summarised as follows (cf document FUND/A.17/23, paragraphs 4.1 – 4.3):

> Expenses for research studies are compensated only if these studies are carried out as a direct consequence of a particular spill and as a part of the oil spill response. The IOPC Funds have refused to pay for studies of a purely scientific nature.
>
> Post-spill environmental studies are sometimes carried out to establish the precise nature and extent of the pollution damage caused by an oil spill and/or the need for reinstatement measures. The IOPC Funds may contribute to the cost of such studies, provided that the studies concern damage that falls within the definition of 'pollution damage' laid down in the Conventions as interpreted by the IOPC Funds, including reasonable measures to reinstate the environment. In such cases, the IOPC Funds should be given the possibility of becoming involved at an early stage in the selection of the experts who will carry out the studies, and in the determination of the mandate of these experts. The studies should be practical and likely to deliver the required data. Their scale should not be out of proportion to the extent of the contamination and the predictable effects. The extent of the studies and associated costs should also be reasonable from an objective point of view and the costs incurred should be reasonable.

6.3.5 The Working Group noted that the document by the delegations of Australia *et al* had drawn attention to the need for the 1992 Fund to establish a clearer policy on environmental remedial measures and post-spill environmental studies. As regards such studies it was mentioned in the document that some States had argued that the 1992 Fund’s current policy of admitting costs of studies only to the extent that the studies contributed to the settlement of claims for pollution damage was too restrictive, whilst others had expressed concern that the payment of such claims might distort the overall claims settlement by denying full payment to individual claimants.

6.3.6 It was noted that the delegations of Australia *et al* had proposed that the Fund's current policy on the admissibility of claims for damage to the environment could be widened so as to include at least costs for assessing the environmental damage caused as a result of an incident through Environmental Impact Assessments (EIAs), which might lead to reinstatement measures. It was further noted that those delegations had proposed that any undertaking by the Fund on the funding of an EIA should be made on the basis that the EIA would provide useful lessons and would ensure that the likely benefits (or disadvantages) of any specific reinstatement projects were identified and costed for consideration by the Fund. It was also noted that those delegations had suggested in the document that consideration might need to be given to setting an overall cap on the costs of reinstatement measures payable by the Fund, including EIAs, and to whether the associated claims should be allocated a lower priority than other claims, for example by Member States choosing to take responsibility for all costs relating to EIAs and reinstatement so that priority might be given to the settlement of claims for economic losses and property damage.

6.3.7 The Working Group noted that the French delegation had drawn attention to the two elements of environmental damage, namely economic loss and damage to flora and fauna (document 92FUND/WGR.3/5/6). As regards the latter it was noted that it was mentioned in the French document that several international conventions were gradually widening the scope of damage covered so as to include related interests, amenity values etc, and that the United Nations Convention on the Law of the Sea (UNCLOS) recognised the right of a State to claim compensation in the event of damage to a marine environment containing its biological and marine resources. It was further noted that the European Commission's White Paper on environmental liability (cf document 92FUND/A/ES.4/4) had identified the need to supplement the 1993 Convention on Civil Liability for Damage resulting from Activities Dangerous to the

Environment (Lugano Convention) so as to clarify the liability for environmental damage, which in the White Paper was defined as damage to biodiversity and damage reflected in the contamination of habitats. The Working Group noted a statement in the French delegation's document that the national laws of several countries provided for the possibility of compensation for ecological damage on the basis of the notion of maritime public property.

6.3.8 The French delegation stated that the 1992 Fund needed to keep up with developments in the field of environmental liability. That delegation expressed the view that the potential conflict between the need to compensate for environmental damage and the importance of compensating victims suffering economic losses could be overcome by ensuring that the amount of compensation available under the 1992 Conventions was maintained at a sufficiently high level.

6.3.9 The Working Group noted that in its document (document 92FUND/WGR.3/5/2), ITOPF had focused on the technical aspects of environmental damage resulting from oil spills in the marine environment and in particular the natural fluctuations that occur in the composition, abundance and distribution of populations of marine animals and plants, the ability of marine species to withstand and to recover from both natural events and marine oil spills and man's limited ability to speed up natural recovery.

6.3.10 The Working Group also noted the conclusion in the document presented by ITOPF that it was premature to regard the existing provisions in the 1992 Conventions relating to reinstatement of damaged natural resources as inadequate, since the admissibility of claims for the costs of such measures, as well as the costs of associated environmental studies and monitoring programmes had yet to be fully explored. It was further noted that it was ITOPF's view that steps should be taken by the 1992 Fund, perhaps through a revision of the criteria for the admissibility of claims, to encourage innovative reinstatement measures and properly designed and managed studies after major oil spills in order to assess the impact on natural resources and the need for such reinstatement measures.

6.3.11 A number of delegations considered that a new and wider definition of 'pollution damage' to cover environmental damage was necessary. Those delegations considered that the emphasis on reinstatement should be retained but that the definition could be extended to bring it into line with the Lugano Convention, which covered any reasonable measures aiming to reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of these components into the environment.

6.3.12 Other delegations did not support any expansion of the definition of 'pollution damage' to cover environmental damage that embraced abstract concepts and introduced doubts as to who would be eligible for compensation. Some delegations considered that expanding the definition could lead to floods of claims and result in payments for other more legitimate claims being reduced, and that if the definition were to be expanded it would be necessary to introduce a cap on the amounts payable for such claims. Concern was expressed at the proposal to include costs for the introduction of components equivalent to those damaged in costs of reinstatement measures. Some delegations expressed the view that a wider definition of 'pollution damage' should form part of a different Convention or should be covered by other funds. In this regard ITOPF drew attention to the Canadian Environmental Damages Fund, suggesting that this might be a model to follow.

6.3.13 The Italian delegation proposed that Article III.4 and Article VI.1(a) of the 1992 Civil Liability Convention should be amended in order to entitle the courts of Member States to consider - according to national law - claims for environmental damage not admissible in accordance with the 1992 Civil Liability Convention and the 1992 Fund Convention.

6.3.14 Several delegations supported the idea of the 1992 Fund focusing its efforts on short-term solutions by introducing policy changes within the present framework and suggested that

consideration of radical changes to the definition of 'pollution damage' should be left to a later stage. These delegations expressed the view that the existing policy could be widened to include the cost of assessing environmental damage through EIAs. It was suggested that a decision on such a change in Fund policy could be taken by the Assembly at its October 2001 session.

6.3.15 In summing up the discussion the Chairman noted that a number of delegations had favoured the 1992 Fund changing its policy and becoming less restrictive in respect of the costs of reinstatement measures and environmental studies. He mentioned that in the view of several delegations caution was necessary so as not to encourage a proliferation of claims for such costs to the detriment of individual claimants and that it might be necessary to introduce a cap on the payment of such costs. He also emphasised that it was necessary to distinguish between penalties and compensation. The Chairman stressed the need for those delegations wishing to pursue the issues relating to environmental damage and environmental studies to present detailed proposals for the Working Group to consider at its next meeting in June 2001.

6.4 Time bar

6.4.1 It was recalled that in order to prevent a claimant's right to compensation becoming extinguished under the 1992 Conventions, the claimant had to take legal action against the shipowner, his insurer and the 1992 Fund within three years of the date on which the damage occurred and in any event not later than six years from the date of the incident.

6.4.2 The Working Group noted that in a document presented by the Italian delegation (document 92FUND/WGR.3/5/3, paragraph 2) it was proposed that the time bar period should be shortened to one year from the date when the damage occurred and to a period of two (or a maximum of three) years in respect of damage which had not yet occurred, was not yet known or was not quantifiable soon after the incident. It was also proposed that a simple formal request (instead of legal action) should be sufficient to interrupt the time bar period.

6.4.3 The Italian delegation explained that the reason for its proposals was to enable the 1992 Fund to assess at an early stage the total amount of the claims arising out of the particular incident so as to reduce the need for pro-rating payments.

6.4.4 Several delegations considered that the present time bar provisions should be retained. It was stated that the proposed one-year period for presentation of claims was too short and would force a number of claimants to take court action to protect their rights. It was pointed out that if the Italian proposal that the time bar period could be interrupted by a single request was adopted, the result would be a fundamental change to the system, since there would in reality be no time bar period at all.

6.4.5 There was no support for retaining this issue in the list of items which could merit further consideration.

6.5 Alternative dispute settlement procedures

6.5.1 The Working Group recalled that the 1st Intersessional Working Group set up by the 1992 Fund Assembly had in 1997 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. It was also recalled that the Assembly had considered that Working Group's Report at its 2nd session and that the Assembly had drawn 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.

6.5.2 The Working Group also recalled the following statement in the Record of Decisions of the Assembly's 3rd session (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.

6.5.3 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.

6.5.4 The Working Group recalled that the question of whether the 1992 Fund should agree with a claimant to submit a claim to binding arbitration had been considered at the Executive Committee's 11th session in respect of the *Slops* incident. It was also recalled that 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. It was further recalled that the Committee had 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).

6.5.5 During the Working Group's discussion 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.

6.6 Non-submission of oil reports

6.6.1 It was recalled that 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. It was further recalled that the non-submission of oil reports was also becoming a problem for the 1992 Fund. It was noted that this issue had previously been considered at various sessions of the 1992 Fund Assembly.

6.6.2 The Working Group recalled that 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. It was recalled, however, that this sanction could not 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.

6.6.3 The Working Group also recalled that the issue was dealt with in 1992 Fund Resolution N°5 on Establishment of the Executive Committee. It was noted that paragraph (d) of the Resolution provided that the Assembly might, 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).

6.6.4 It was recalled that at its 3rd session the 1992 Fund 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 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.

6.6.5 The Working Group noted the discussions in the Assembly as 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 it 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).

6.6.6 The Working Group recalled that 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. It was also recalled that 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).

6.6.7 The Working Group 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) Firstly, 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) Secondly, 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.

6.6.8 A number of delegations 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. It was stated that 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. Another delegation reminded the Working Group that the system was intended to be a global one and 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.

6.6.9 One of the delegations that had presented the proposal set out in paragraph 6.6.7(a) 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.

6.6.10 As regards non-reporting States, one delegation 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.

6.6.11 A number of delegations 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 was 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 was also 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.

6.6.12 In summing up the discussion the Chairman 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 stated that there

had not been much support for the proposal to introduce a fee of the kind referred to in paragraph 6.6.7(a) above. The Chairman concluded that other solutions had to be explored.

6.7 Geographical scope of application in areas where no exclusive economic zone has been established

6.7.1 It was recalled that the Spanish delegation had, in a document presented to the Working Group's first meeting, proposed that consideration should be given to the need for clarification of the geographical scope of application of the 1992 Conventions in areas beyond the territorial sea where no exclusive economic zone had been declared (document 92FUND/WGR.3/2/2).

6.7.2 The Spanish delegation stated that it would, after consultations with the French and Italian delegations, submit a document dealing with this issue and requested that it should be retained for discussion at a later stage.

6.8 Clarification of the definition of 'ship' in the 1992 Conventions

6.8.1 The Working Group noted that it had been suggested that the definition of 'ship' should be revised in the context of the revision of the 1992 Conventions.

6.8.2 It was recalled that the second Intersessional Working Group established by the 1992 Fund Assembly had in 1999 and 2000 studied certain issues relating to the definition of 'ship' laid down in the 1992 Conventions namely;

(a) the circumstances in which an unladen tanker would fall within the definition of 'ship'; and

(b) whether, and if so to what extent, the 1992 Conventions applied to offshore craft, namely floating storage units (FSUs) and floating production, storage and offloading units (FPSOs).

6.8.3 It was also recalled that the Assembly had at its 4th session endorsed the conclusions reached by the second Intersessional Working Group in respect of offshore craft (document 92FUND/A.4/32, paragraphs 24.3 and 24.10) as follows:

(i) Offshore craft should be regarded as 'ships' under the 1992 Conventions only when they carry oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operate.

(ii) Offshore craft would fall outside the scope of the 1992 Conventions when they leave an offshore oil field for operational reasons or simply to avoid bad weather.

6.8.4 It was further recalled that the Assembly had at its 5th session endorsed the conclusions of the second Intersessional Working Group in respect of unladen tankers as follows (document 92FUND/A.5/28, paragraphs 23.2 and 23.6):

(i) the word 'oil' in the proviso in Article I.2 of the 1992 Civil Liability Convention means persistent hydrocarbon mineral oil, as defined in Article I.5 of the Convention;

(ii) the expression 'other cargoes' in the proviso should be interpreted to mean non-persistent oils as well as bulk solid cargoes;

(iii) as a consequence the proviso in Article I.2 should apply to all tankers and not only to ore/bulk/oil ships (OBOs);

(iv) the expression 'any voyage' should be interpreted literally and not be restricted to the first ballast voyage after the carriage of a cargo of persistent oil;

(v) a tanker which had carried a cargo of persistent oil would fall outside the definition if it was proven that it had no residues of such carriage on board; and

(vi) the burden of proof that there were no residues of a previous carriage of a persistent oil cargo should normally fall on the shipowner.

6.8.5 It was also recalled that the second Intersessional Working Group had considered that any remaining ambiguity in the definition of 'ship' in the 1992 Conventions could be considered by the Working Group established to examine the adequacy of the international compensation regime.

6.8.6 One delegation stated that, in its view, the conclusions drawn by the second Intersessional Working Group as regards unladen tankers were not satisfactory and undertook to present a document on this issue.

6.8.7 The Working Group noted that a number of issues relating to offshore craft, including that of civil liability, were being considered by CMI and the IMO Legal Committee.

6.8.8 The Working Group decided to retain this issue on the list for further consideration at a later stage in the light of the result of the work being carried out within CMI and the IMO Legal Committee and of the outcome of the Diplomatic Conference on Liability and Compensation for Bunker Oil Pollution Damage, to be held under the auspices of IMO from 19 to 23 March 2001.

6.9 <u>More precise provisions on the submission and handling of claims</u>

6.9.1 One delegation suggested that more precise provisions on the submission and handling of claims should be included in the Conventions, in particular as regards the establishment and role of local Claims Offices, and that the submission of claims to such an office should interrupt the time bar period.

6.9.2 The Director expressed the view that it had been a great advantage that the 1971 and 1992 Fund Conventions did not contain detailed provisions concerning the submission and handling of claims, since this had enabled the governing bodies of the IOPC Funds and the Secretariat to develop the appropriate procedures in the light of experience and to take into account the particular aspects of each incident. He suggested that it would not be appropriate to deal with the establishment and role of local Claims Offices in the Conventions, since each Claims Office had to operate in the light of the particular circumstances of the incident in question.

6.9.3 A number of delegations supported the views expressed by the Director.

6.9.4 The Working Group concluded that it would not be beneficial to include detailed provisions on submission and handling of claims in the Fund Convention, since it was important to retain flexibility in these matters. It was also considered that detailed provisions in this regard could hamper ratifications. The Group decided therefore that this item should not be retained on the list of issues which merited further consideration.

6.10 <u>Admissibility of claims for fixed costs</u>

6.10.1 The Working Group 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.

6.10.2 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).

6.10.3 The United Kingdom delegation stated that it was to the benefit of society, the industries concerned, insurers and the IOPC Funds that States had adequate resources available to control oil spills and that it would be appropriate therefore if States which had adequate resources in this regard were granted an uplift of say 10% of their actual clean-up costs arising from a particular incident, as had been proposed in the report of the inquiry carried out after the *Braer* incident (the Lord Donaldson Report). Reference was made to the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC Convention). It was suggested by that delegation that this issue could be dealt with as a policy issue, which would not require amendments to the Conventions. That delegation stated that it did not intend to pursue the matter at this stage but would be prepared to present a document on this issue if other States were interested in this matter.

6.10.4 One delegation stated that it was not possible to extend the IOPC Funds' cover of fixed costs beyond costs that arose as a result of a particular incident.

6.10.5 Another delegation indicated that it would be prepared to co-operate with the United Kingdom delegation in the preparation of a document on this matter.

6.10.6 The Chairman noted that some sympathy had been expressed for the concerns of the United Kingdom delegation but that it would probably be difficult to draft treaty provisions to accommodate these concerns.

6.11 Salvage operations; review of policy and consideration of whether special provisions should be included in the Conventions

6.11.1 The Working Group noted that the IOPC Funds' policy in respect of the admissibility of claims for the cost of salvage operations could be summarised as follows:

> Salvage operations may in some cases include an element of preventive measures. Such operations can be considered as 'preventive measures' only if the primary purpose is to prevent 'pollution damage'. If the operations have another purpose, such as salving hull and cargo, the costs incurred are not admissible under the Civil Liability Conventions and Fund Conventions. If the activities are undertaken for the purpose of both preventing pollution and salving the ship and cargo, but it is not possible to establish with any certainty the primary purpose of the operations, the costs are apportioned between pollution prevention and other activities. The assessment of compensation for activities which are considered to be 'preventive measures' is not made on the basis of the criteria applied for assessing salvage awards; the compensation is limited to costs, including a reasonable element of profit.

6.11.2 In a document presented to the Working Group's first meeting (document 92FUND/WGR.3/2/3, paragraph 2.1.6) the United Kingdom delegation had suggested that the 1992 Fund should reassess its policy in respect of the admissibility of costs in connection with salvage operations

and consider whether amendments to the 1992 Conventions would be appropriate. That delegation expressed the view that as long as a purpose of the operations was pollution prevention, the operations were preventive measures and that there was therefore a case for compensation. It was argued that there was also a need to consider how the 1992 Fund's policy would apply if a Member State intervened in salvage operations in order to secure the overriding public interest in minimising the risk of pollution rather than the salvage of property. It was suggested by that delegation that in such cases the associated costs should be treated wholly as costs of preventive measures provided that they met the general criteria of reasonableness.

6.11.3 The United Kingdom delegation stated that this issue was linked to that of the admissibility of fixed costs.

6.12 <u>The contribution system</u>

Weighting of contributions to the IOPC Funds according to the quality of the ships used for the transport of oil and/or the type of oil transported

6.12.1 The Working Group considered proposals by the French delegation and the delegations of Australia *et al* that the system for the levying of contributions should be modified to the effect that there should be an increase in the level of contributions for oil quantities carried by ships of lower standards and/or for particularly persistent oil which could cause very serious pollution (documents 92FUND/WGR.3/5/5 and 92FUND/WGR.3/5/1).

6.12.2 The Working Group agreed to consider this issue further if any delegation presented a concrete proposal in this respect.

Storage services

6.12.3 The Working Group considered a proposal made by the delegations of Australia *et al* concerning a refinement of the contribution system, as set out in document 92FUND/WGR.3/5/1, paragraphs 2.53 and 2.54. 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 present text of the 1992 Fund Convention although they did not have any interest in the oil received other than providing oil storage services.

6.12.4 The Working Group noted that 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 was considered by the 1971 Fund Assembly at its 1st extraordinary session (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.

6.12.5 It was recalled that this interpretation had been confirmed by the 1971 Fund Assembly at its 15th session in relation to the application of Article 10 to certain storage companies in the Netherlands (document FUND/A.15/28, paragraph 21.2). It was also recalled that 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). It was further noted that 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).

6.12.6 It was further recalled that this issue had been considered by the 1971 Fund Assembly 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 that the Assembly had not granted this request (document FUND/A.16/32, paragraph 27).

6.12.7 It was noted that in the document presented by the delegations of Australia *et al* it had been stated that it was necessary to maintain a proper balance between the contributions paid by different interests. It was also noted that it was pointed out in the document 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 was further noted that it was 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.

6.12.8 It was noted 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 set out in paragraph 6.12.3.

6.12.9 The Working Group decided to retain this item in the list of issues meriting further consideration and to consider the issue further on the basis of concrete proposals.

6.13 Ranking of claims

6.13.1 The Working Group recalled that at its first meeting it had considered proposals to the effect that it might be appropriate to introduce a system of ranking claims under which certain groups of claimants would be given priority over others if the total amount available were to be insufficient for all claimants to receive full compensation. It was also recalled that reference was made to the fact that ranking of claims existed in a number of other liability regimes (document 92FUND/A.5/4, paragraph 7.1.1).

6.13.2 It was recalled that at the Working Group's first meeting there had been a considerable divergence of views expressed in this regard, some delegations supporting the proposal in principle whereas others had opposed it. It was also recalled that among those delegations which had supported in principle the proposal to introduce a system of ranking claims, different views had been expressed as to which claims should be given preferential treatment, some delegations proposing that priority should be given to personal injury claims and claims relating to private property whereas claims by public bodies should rank last, and other delegations taking the view that they could not accept that public claims were given the lowest priority.

6.13.3 One delegation stated that if an optional third tier of compensation were introduced, this item could be deleted from the list of issues that merited further consideration.

6.13.4 Another delegation expressed the view that this item should be retained in the list and stated that it would submit a document containing concrete proposals on this issue.

6.13.5 The Working Group agreed that it would consider this issue at a later stage on the basis of concrete proposals and in the light of the position taken by the Group on other issues.

6.14 Can co-operation with shipowners be improved and are preventive measures inhibited by the Conventions?

6.14.1 It was recalled that it had been proposed in a document presented at the Working Group's first meeting (document 92FUND/WGR.3/2, paragraph 3) that consideration should be given to whether co-operation with shipowners could be improved and whether preventive measures were inhibited by the Conventions.

6.14.2 The Working Group took the view that these issues could be dealt with as a matter of internal policy of the 1992 Fund and should not be included in the list of issues which merited further consideration within the framework of the revision of the Conventions.

6.15 Steps to reduce delays in the payment of compensation

The Working Group considered whether steps should be taken to reduce delays in the payment of compensation. It was noted that there were seldom delays in the 1992 Fund's payment of compensation but that delays could occur in the assessment or settlement of claims. The Working Group took the view that this item should not be retained on the list of issues which merited further consideration in the context of the revision of the Conventions, but could be dealt with as a matter of internal policy of the 1992 Fund.

6.16 Uniform application of the Conventions

6.16.1 The Working Group considered the issue of the need for a uniform implementation of the Conventions and took note of the proposals set out in the document presented by the delegation of Australia *et al* (document 92FUND/WGR.3/5/1, paragraphs 2.30 – 2.32).

6.16.2 The Working Group recalled that the Group had at its first meeting concluded that there was a consensus that the uniform application of the Conventions was of prime importance, but that it might be difficult to find an effective solution to the problem. It was recalled that it had been further suggested that the uniform application could be enhanced by inserting in the Conventions a clause to the effect that certain matters should be referred to an international body and that national courts should take into account decisions of bodies such as those of the IOPC Funds (document 92FUND/A.5/4, paragraph 7.2.7).

6.16.3 It was noted that it was suggested in the document presented by the delegations of Australia *et al* that a provision might be inserted in the 1992 Fund Convention to the effect that States Parties to the Convention should implement the Civil Liability Convention and the Fund Convention *in verbatim*, without modifications, to ensure that their terms had the same force and effect in all jurisdictions and leading to equal treatment of all claims. It was further noted that it was proposed by those delegations that consideration might also be given to the insertion of a provision to the effect that States Parties should in their national implementing legislation require their courts to take into account that the Conventions formed part of an international regime, the purpose of which was to establish uniform rules and procedures and that the courts should, in deciding actions arising under the Conventions, take into account the criteria for the admissibility of claims which had been adopted by the Assemblies and Executive Committees of the IOPC Funds.

6.16.4 Several delegations emphasised the importance of a uniform application of the Conventions in all States Parties. It was recognised, however, that it would be difficult to achieve this end fully.

6.16.5 The Working Group agreed to consider this issue further at its next meeting.

7 Future work of the Working Group

7.1 The Chairman proposed that the Working Group should at its next meeting, to be held during the week commencing 25 June 2001, continue its consideration of the issues which had been retained as meriting further consideration. He indicated that it would not be fruitful to continue general discussions. He suggested that, in order to enable the Working Group to make rapid progress, it was crucial that the Group based its considerations in June 2001 on concrete proposals, preferably in the form of draft provisions for insertion in the relevant treaty instruments, if any. In his view one of the issues to be considered was that of the establishment of an optional third tier but, in order to enable progress to be made, the delegations which had proposed the establishment of such a third tier should submit precise, detailed proposals. He also suggested that in order to give sufficient time for delegations to consider any proposals, such proposals should be submitted to the Director as early as possible and by mid-May 2001 at the latest. He suggested that if proposals which delegations wished to present related to treaty law issues, delegations might wish to approach the Director and invite him to assist in the drafting of the proposal. The Chairman added that delegations also had the possibility of submitting proposals on matters not included in the list of issues retained for further consideration.

7.2 The Chairman suggested that the Working Group should distinguish between those issues where solutions could be found in the short term and other issues which could only be solved at a later stage. He expressed the view that it was essential to reach an agreement on the issues for which solutions could be achieved within the framework of the 1992 Conventions by policy decisions of the 1992 Fund Assembly and Executive Committee and those issues which could be solved only by amendments to the texts of the Conventions.

7.3 The Chairman stated that it was his intention that the Working Group should submit concrete proposals for consideration by the Assembly at its 6th session, to be held during the week commencing 15 October 2001.