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THIRD INTERSESSIONAL
WORKING GROUP

92FUND/WGR.3/9

REPORT ON THE SECOND AND THIRD MEETINGS 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 a draft Protocol establishing a Supplementary Compensation Fund and, if approved, to request the Secretary-General of IMO to convene a Diplomatic Conference to consider the draft Protocol;
	(3)	to consider whether to modify the 1992 Fund's position in respect of the admissibility of claims for the costs of reinstatement of the environment and of claims for the costs of environmental impact studies;
	(4)	to consider whether to extend the scope of admissibility of fixed costs;
	(5)	to consider whether to recommend States to ratify the Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC Convention); and
	(6)	to decide whether to extend the Working Group's mandate so as to enable it to examine issues which have been retained for further consideration in the longer term.

EXECUTIVE SUMMARY

Mandate

The Working Group set up by the 1992 Fund Assembly in April 2000 has held three meetings (in July 2000 and in March and June 2001) under the Chairmanship of Mr A Popp QC (Canada). The meetings in 2001 were held on the basis of the following mandate given by the Assembly at its October 2000 session:

(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; and

(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.

Discussions at the two meetings in 2001

At the meetings in 2001 the Working Group considered a number of issues, in particular the maximum levels of compensation, the shipowner's liability and environmental damage. It also discussed *inter alia* the admissibility of claims for fixed costs, time bar, alternative dispute settlement procedures, problems caused by States not fulfilling their obligations to submit reports on oil receipts and the uniform application of the Conventions.

At its third meeting the Working Group distinguished between three groups of issues:

(a) issues in respect of which there was an urgent need for improvement of the compensation regime which could not be achieved within the present text of the 1992 Conventions;

(b) issues in respect of which solutions could be found in the short term within the scope of the present Conventions, eg by Assembly Resolutions or changes of Fund policy;

(c) issues which needed further consideration in the longer term.

Maximum level of compensation (Section 7)

A number of States maintained that in order for the international compensation system to retain credibility the maximum compensation levels should be sufficiently high to ensure full compensation to victims even in the most serious oil spill incidents. Other delegations, however, did not see the need to increase the maximum level of compensation over and above the increases adopted within the International Maritime Organization (IMO) in October 2000 which would bring the total amount available to 203 million SDR (£180 million) from 1 November 2003.

In light of this difference in views, the Working Group considered a proposal to establish an optional third tier of compensation by means of a Supplementary Compensation Fund, which would provide additional compensation over and above the compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention (ie 135 million SDR or from 1 November 2003 203 million SDR). The Supplementary Fund would be established by a Protocol to the 1992 Fund Convention. The Supplementary Fund would only pay compensation for pollution damage in States Parties to the proposed Protocol. It was suggested that, in view of the difficulties from a treaty law point of view which would arise if the third tier were to contain a layer financed by the shipowners, the third tier should be financed only by the oil receivers. The Supplementary Fund would be financed by contributions from oil receivers in the States which became Parties to the Protocol. To ensure its optional and distinct character, the Supplementary Fund would be a separate legal entity.

A draft Protocol on the establishment of such a Supplementary Fund had been prepared by a number of delegations. This draft is at Annex I.

A number of delegations expressed their support for the proposed Supplementary Fund. It was emphasised that such a supplementary scheme should preferably be set up on a global rather than a regional basis. Several delegations stated that, although their States were not interested in joining the proposed supplementary scheme, they supported the proposed scheme or did not oppose its creation.

The observer delegations representing shipping, insurance and oil interests supported the Supplementary Fund scheme in principle. It was emphasised, however, that it was important to preserve the sharing of the burden of compensating oil spills between shipping and oil interests.

The International Group of P & I Clubs informed the Working Group that the P & I Clubs, with the support of shipowners, were developing a proposal for a voluntary increase in the limit of liability for small ships under the 1992 Civil Liability Convention which would apply only in the States which ratified the proposed Supplementary Fund Protocol. It was stated that the precise level of the increase had not yet been decided.

As a result of the discussions, the Director prepared a revised draft Protocol on the establishment of a Supplementary Fund. This draft is at Annex II.

The Working Group decided to submit the revised draft Protocol to the Assembly for consideration at its October 2001 session.

The Director was invited to refine the text of the draft further and submit a new revised text to the Assembly. Delegations were invited to submit comments to the Director to assist him in this work.

Shipowner's liability (Section 9)

The Working Group examined the provisions in the 1992 Civil Liability Convention governing the shipowner's liability. It was considered that any attempt at this stage to include shipowners in the funding of the proposed third tier of compensation would create complications and could result in an unacceptable delay in the setting up of the Supplementary Fund. Several options for the shipowner's involvement in the supplementary compensation tier were presented, namely: voluntary increase of the shipowner's/insurer's liability at the lower end of the scale of liability under the 1992 Civil Liability Convention; a four layer system with an additional layer of shipowner's liability forming the third layer and a tier funded by oil receivers forming the fourth layer; a third tier of compensation which would be financed both by shipowners and oil receivers; and a future revision of the 1992 Civil Liability Convention.

It was agreed that the issue of whether to revise the 1992 Civil Liability Convention in respect of the shipowner's liability would have to be considered in the longer term.

Environmental damage and environmental studies (Section 11)

The Working Group considered a proposal to introduce the concept of compensation for environmental damage as a violation of collective property whereby compensation would be available to the State on the basis of international rights under other Conventions to which it was a Party, the amount of compensation to be based on the conclusions of environmental impact studies conducted in accordance with procedures adopted by the 1992 Fund. The Working Group also examined a proposal to change the 1992 Fund's policy as regards environmental damage to the effect that compensation for environmental damage would no longer be limited to cases where the claimant had suffered economic loss and to allow compensation to be calculated through theoretical models.

These proposals were not accepted since it was considered that they went beyond the present definition of 'pollution damage' in the 1992 Conventions.

It was agreed that an examination should be made of what could be achieved within the present definition of 'pollution damage' as regards the admissibility of claims for reinstatement of the environment and for cost of environmental impact studies. A proposal to address these issues in an Assembly Resolution received considerable support.

There was also support for considering the issue of environmental damage in depth in the longer term.

Alternative dispute settlement procedures (Section 13)

It was generally felt that the 1992 Fund should make strenuous efforts to avoid court proceedings and that the Fund should continue its policy of endeavouring 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 Fund of using alternative dispute settlement procedures. The Working Group considered that there was only very limited scope for arbitration and that therefore future discussions should focus on mediation and less formal methods. It was agreed that this issue should be studied further.

Non-submission of oil reports (Section 14)

A number of Fund Member States do not fulfil their obligation to submit reports on oil receipts, and this has caused significant difficulties in the operation of the compensation system. The Working Group recognised that this was an important issue and that further consideration was required to find a solution which ensured that States fulfilled their obligation to submit these reports.

This issue has been addressed to some extent in the draft Protocol which would establish the Supplementary Fund.

Admissibility of claims for fixed costs (Section 15)

The Working Group considered a proposal under which States which had invested in craft and equipment so as to be able to control oil spills, such as sea recovery vessels, aerial spraying capacity and emergency towing vessels, should be granted additional compensation in the form of an uplift of say 10% on their annual contract costs and/or daily costs of maintaining and deploying such craft and equipment on condition that it could be demonstrated that their use had a beneficial effect in reducing the cost of the incident. The proposal received significant support. It was considered, however, that more details of the proposal were needed, in particular in respect of the conditions for awarding an uplift.

Resolution concerning the OPRC Convention (Section 16)

There was support for a proposal to the Assembly for the adoption of a Resolution urging all States to become Parties to the Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (OPRC Convention).

Clarification of the definition of 'ship' in the 1992 Conventions (Section 18)

The Working Group decided to retain for examination at a later stage the issue of clarification of the definition of 'ship' in the 1992 Conventions as regards offshore craft and unladen tankers.

The contribution system (Section 21)

A proposal was made to refine the contribution system with the objective of finding an equitable solution in respect of the obligation to pay contributions to the 1992 Fund of certain oil receivers who did not have any interest in the oil received other than providing oil storage services. The Working Group considered that this issue would have to be examined at a later stage.

Uniform application of the Conventions (Section 25)

The Working Group considered that uniformity of implementation and application of the Conventions was crucial to the equitable functioning of the international compensation regime. The Working Group took note of a document presented by the Director 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 concluded that the issue should be retained for further study.

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, its second meeting on 12 and 13 March 2001 and its third meeting from 26 to 29 June 2001, 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 second and third meetings:

Algeria [1]	India [2]	Poland
Australia	Ireland	Republic of Korea
Belgium	Italy	Russian Federation
Canada	Japan	Singapore
Cyprus	Latvia	Spain
Denmark	Liberia [1]	Sweden
Fiji [1]	Malta	Tunisia [2]
Finland	Marshall Islands	United Arab Emirates [2]
France	Mexico	United Kingdom
Georgia [1]	Netherlands	Vanuatu
Germany	Norway	Venezuela
Greece	Panama	
Grenada [1]	Philippines [1]	

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

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

Argentina

Other States:

Cameroon [2]	Ecuador [1]	Malaysia [2]
Colombia [2]	Egypt [1]	United States
Côte d'Ivoire	Iran, Islamic Republic of [1]	

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

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

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[1] Attended only second meeting
[2] Attended only third meeting

International non-governmental organisations:
Baltic and International Maritime Council[<2>]
Comité Maritime International (CMI)
Cristal Ltd[<2>]
European Chemical Industry Council[<2>]
International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)
International Group of P & I Clubs
International Salvage Union[<2>]
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 extraordinary session

At its 4th extraordinary session, held in April 2000, 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 Conclusions of the Working Group's first meeting

3.2.1 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.

3.2.2 At the Working Group's first meeting it was 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

3.2.3 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 of the Working Group

After the Assembly had examined at its 5th session, held in October 2000, 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 and third meetings

5.1 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).

5.2 Third meeting

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

(i) OCIMF (document 92FUND/WGR.3/8/2);

Optional third tier

(ii) International Group of P & I Clubs (document 92FUND/WGR.3/8/3);

Sharing of financial burden

(iii) Australia, Canada, Denmark, Finland, France, Germany, Ireland, the Netherlands, Norway, Sweden, the United Kingdom (document 92FUND/WGR.3/8/4);

Protocol for optional third tier

(iv) Australia, Canada, France and the United Kingdom (document 92FUND/WGR.3/8/5);

Shipowner's liability

(v) Netherlands (document 92FUND/WGR.3/8/6);

Refinement of contribution system

(vi) United States (document 92FUND/WGR.3/8/7);

Natural resource damage assessment and restoration planning

(vii) France (document 92FUND/WGR.3/8/8);

Ecological damage

(vii) International Group of P & I Clubs (document 92FUND/WGR.3/8/9);

Increase in limitation amount for small ships

(viii) Spain and the United Kingdom (document 92FUND/WGR.3/8/10);

'Mark-up' for fixed costs

(ix) International Chamber of Shipping (document 92FUND/WGR.3/8/11);

Support for document presented by Australia et al

(x) United Kingdom (document 92FUND/WGR.3/8/12);

OPRC Convention

(xi) France (document 92FUND/WGR.3/8/13);

Claims Manual

(xii) Sweden (document 92FUND/WGR.3/8/14);

Environmental studies

(xiii) Italy and the Republic of Korea (document 92FUND/WGR.3/8/15);

Payments against guarantee

(xiv) INTERTANKO (document 92FUND/WGR.3/8/16).

Third tier and voluntary increase in shipowner's limitation amount

5.2.2 The Director had submitted the following documents:

92FUND/WGR.3/8	Uniform application of the Conventions
92FUND/WGR.3/8/1	Various issues of a treaty law nature

6 Discussions at the Working Group's second and third meetings

6.1 At the Working Group's second and third meetings discussions were held on the basis of the various documents listed in sections 5.1 and 5.2, respectively. The discussions are summarised below, subject by subject, together with the conclusions drawn.

6.2 At the end of the Working Group's second meeting the Chairman proposed that the Working Group should at its next meeting 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 on concrete proposals, preferably in the form of draft provisions for insertion in the relevant treaty instruments, if any.

6.3 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.

6.4 The report on the Working Group's second meeting is contained in document 92FUND/WGR.3/6.

6.5 At its third meeting the Working Group agreed with a proposal by the Chairman that the issues under discussion should be divided into the following groups:

(a) issues in respect of which there was an urgent need for improvement of the compensation regime which could not be achieved within the framework of the present text of the 1992 Conventions;

(b) issues in respect of which solutions could be found in the short term within the scope of the present Conventions, eg by the adoption of Assembly Resolution or by change of 1992 Fund policy;

(c) issues which needed further consideration in the longer term.

6.6 The Working Group agreed at its third meeting with a proposal by the Director that he would prepare a consolidated report to the Assembly's October 2001 session of the discussions which took place at the Working Group's second and third meetings. The present Report has been structured accordingly. As regards those issues which were not discussed at the Working Group's third meeting, this has been indicated in the report.

7 Maximum compensation levels

7.1 Second meeting

General discussion

7.1.1 At its second meeting the Working Group considered the issue of the maximum amount available for compensation on the basis of documents presented to that 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* I').

7.1.2 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 in October 2000 to increase the limits by 50.37% 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 to be considered by the Working Group.

7.1.3 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 decisions of the IMO Legal Committee to increase the limits of liability and compensation in the 1992 Conventions.

7.1.4 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.

7.1.5 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.

7.1.6 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.

7.1.7 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.

7.1.8 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.

7.1.9 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 of US$1 000 million.

7.1.10 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

7.1.11 In the light of the above discussion, the Working Group considered at its second meeting a proposal by the delegations of Australia *et al* I, 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

7.1.12 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.

7.1.13 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.

7.1.14 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.

7.1.15 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.

7.1.16 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.

Chairman's conclusions

7.1.17 In his summing up of the discussions at the second meeting 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.

7.2 Third meeting

Third tier of compensation in the form of a Supplementary Fund

7.2.1 The discussions at the Working Group's third meeting were based on a document submitted by Australia, Canada, Denmark, Finland, France, Germany, Ireland, the Netherlands, Norway, Sweden and the United Kingdom, hereinafter referred to as 'Australia *et al* II' (document 92FUND/WGR.3/8/4). This document contained a detailed proposal for the establishment of a third tier of compensation on top of the 1992 Conventions consisting of only one layer and funded by cargo interests, together with a draft Protocol to Supplement the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992. The text of the draft Protocol presented by those delegations is reproduced in Annex I to this report.

7.2.2 The Working Group also considered documents submitted by OCIMF, the International Group of P & I Clubs, ICS and INTERTANKO.

7.2.3 The proposal set out in the document presented by the Australia *et al* II could be summarised as follows:

The third tier, which would be optional for States Parties to the 1992 Fund Convention, would provide additional compensation over and above the maximum amount available under the 1992 Fund Convention, ie 135 million SDR or from 1 November 2003 203 million SDR. The third tier would only cover pollution damage in States Parties to the Protocol. In view of the difficulties from a treaty law point of view which would arise if the third tier were to contain a layer financed by shipowners, the proposal was based on a third tier with only one layer financed entirely by oil receivers.

The draft Protocol had been modelled on the 1992 Fund Convention. The 1992 Fund Convention would form the basis of the new instrument which would not amend the 1992 Fund Convention as such, but would be an optional supplement only. This solution would allow those States Parties to the 1992 Fund Convention which wished to join the supplementary system to do so and thereby obtain additional compensation for pollution damage caused in those States where the compensation provided under the 1992 Civil Liability Convention and the 1992 Fund Convention was inadequate. Likewise, it would allow those States which did not wish to become members of the Supplementary Fund to remain in the present 1992 Fund system without any changes. The Supplementary Fund would be entirely optional and would not have any effect on the 1992 Fund Convention for those States Parties to that Convention which would not wish to become members of the Supplementary Fund.

Contributions to the Supplementary Fund would only be paid by entities which received contributing oil after sea transport in States which became Members of the Supplementary Fund.

The proposed Supplementary Fund would be a separate legal entity with its own Assembly. The Assembly would not need to meet every year if there were no incidents to be considered within the supplementary system. It would be possible for the Supplementary Fund to have the same Secretariat and the same Director as the 1992 Fund if it so wished and the 1992 Fund Assembly agreed thereto. The administrative costs of the Supplementary Fund would be borne by the new entity.

The Supplementary Fund would follow the decisions taken by the 1992 Fund concerning the admissibility of claims. The Supplementary Fund would take its own decisions with regard to the level of compensation. A claim against the Supplementary Fund would be time-barred if time-barred against the 1992 Fund. Unlike the 1992 Protocol to the 1971 Fund Convention the proposed Supplementary Fund Protocol would not require States to denounce the 1992 Fund Convention which would remain intact.

General discussion

7.2.4 A number of delegations expressed their support in principle for the proposed Supplementary Fund. Many delegations considered that it was urgent for the credibility of the international compensation regime that there was a possibility for those States which so wished to obtain a higher maximum amount of compensation than that offered by the 1992 Fund Convention to ensure full compensation to all victims even in the most serious oil spill incidents. Many

delegations stated that such a supplementary scheme should preferably be set up on a global rather than on a regional basis. It was suggested that, although the Supplementary Fund would be called upon to make payments only very rarely, the existence of a supplementary scheme of the proposed type would make it possible to avoid pro-rating of the 1992 Fund's payments. It was stated that the fact that the 1971 Fund and the 1992 Fund had been frequently obliged to pro-rate payments had proved to be a major weakness of the compensation regime under the Fund Conventions.

7.2.5 Several delegations stated that although their States were not interested in joining the proposed supplementary scheme, they supported the proposed scheme in principle or did not oppose its creation. It was suggested that some States which at present were not interested in joining such a scheme might wish to do so in the future. It was emphasised that it was in any event important to maintain the global character of the international compensation regime.

7.2.6 The point was made that it was important that any supplementary scheme did not discriminate against ships flying the flag of a State which did not become a Party to the proposed Protocol.

7.2.7 One delegation was sceptical about the proposal, since that delegation did not see the need for increasing the maximum amount available over and above the amount of 203 million SDR which would apply from 1 November 2003.

7.2.8 The observer delegations of the International Group of P & I Clubs, ICS, INTERTANKO and OCIMF supported the proposed Supplementary Fund in principle.

7.2.9 The delegation of the International Group of P & I Clubs stated that the Clubs and the shipowners remained committed to the notion of sharing the burden of compensating the victims of oil spills. That delegation mentioned that such sharing had been achieved in practice under the existing regime and referred to the figures on payments by ship interests and oil interests given in document 92FUND/WGR.3/8/3. It was mentioned that the P & I Clubs with the support of the shipowners were developing a proposal for a voluntary increase in the limits of liability for small ships under the 1992 Civil Liability Convention which would apply only in those States which ratified the proposed Supplementary Fund Protocol. That delegation set out the key elements of the proposal as follows:

- The proposal would involve an undertaking to the 1992 Fund to pay voluntarily the difference between the minimum limit provided in Article V.I of the 1992 Civil Liability Convention (as increased with effect from 1 November 2003) and the voluntarily agreed new minimum.

- The level of voluntary increase had yet to be agreed but it was envisaged that the increase would only apply to the limit for ships not exceeding 5 000 GT provided in Article V.I which was fixed at 3 million SDR under the 1992 Protocols (4.51 million SDR in 2003). The Club Boards had yet to approve the precise level of the increase but if, for the purpose of illustration only, a three-fold voluntary increase were applied the limit would be increased from 4.51 million SDR to 13.53 million SDR and that figure would apply to all vessels up to 19 247 GT. There would be no increase for larger vessels.

- There would be no corresponding increase therefore in the overall limit under the 1992 Civil Liability Convention of 59.7 million SDR (89.77 million SDR with effect from 2003).

- There would be no corresponding increase in the limit of the second tier Fund.

7.2.10 The International Group of P & I Clubs' delegation expressed the view that if such a voluntary increase in the limitation amount for small ships were to be established, agreement had to be reached with the 1992 Fund on the practical and technical aspects of the application of this voluntary increase.

7.2.11 The ICS observer delegation stated that shipowners were prepared to co-operate with the International Group of P & I Clubs in the development of a voluntary increase in the limits of liability for small ships in States which became Parties to the Supplementary Fund Protocol. That delegation emphasised, however, that shipowners saw no reason for agreeing to such a voluntary increase if amendments were to be made to the 1992 Civil Liability Convention to the effect that shipowners should contribute to the proposed third tier of compensation. The ICS delegation also referred to the figures given in document 92FUND/WGR.3/8/3 which illustrated how effective the international compensation system had been in striking an overall balance between shipping and oil interests. In that delegation's view a contribution by shipowners to the proposed third tier would undermine that balance.

7.2.12 The INTERTANKO observer delegation also supported the proposal by the International Group of P & I Clubs for a voluntary increase in the limits for small ships, provided however that shipowners were not called upon to contribute to the financing of the proposed third tier of compensation.

7.2.13 The OCIMF observer delegation stated that it supported the proposed Supplementary Fund scheme funded entirely by oil receivers as an interim solution, subject to a coincident introduction by shipowners and their insurers of a voluntary increase of the minimum limit laid down in the 1992 Civil Liability Convention to 30 million SDR for all ships in respect of oil spills in States Parties to the proposed Supplementary Fund Protocol and assurance by means of a 1992 Fund Assembly Resolution that the Fund would continue to work as a matter of urgency towards a solution which would impose on shipowners and their insurers a significant share of the cost of the additional compensation.

Detailed discussion of the main issues

7.2.14 The Working Group considered the main issues relating to the proposed Supplementary Fund Protocol, namely:

(1) how the Supplementary Fund would be established

(2) who would be the Parties to the Supplementary Fund Protocol

(3) who would be able to claim compensation from the Supplementary Fund

(4) how the Supplementary Fund would be financed and the contributions would be calculated

(5) the organisational structure of the Supplementary Fund (Assembly, Secretariat, Director) and frequency of meetings of the Assembly

(6) tacit amendment procedure

(7) how amendments to the 1992 Fund Convention would affect the Supplementary Fund Protocol

(8) what would be the relationship between the Supplementary Fund and the 1992 Fund.

7.2.15 After an examination of the various provisions of the draft Protocol it was considered by a number of delegations that in general all the issues referred to in paragraph 7.2.14 had been addressed, subject to the observations and reservations set out below.

Method for incorporation of the relevant provisions of the 1992 Fund Conventions

7.2.16 The Working Group considered whether the proposed Protocol should repeat the relevant provisions of the 1992 Fund Convention or incorporate these provisions in the Protocol by reference. It was generally considered that the latter method was preferable. It was nevertheless suggested that the draft Protocol was very difficult to read and that it might be possible to find a

more reader-friendly presentation. It was suggested that the reference in Article 1.3 in the proposed Protocol to various provisions in the 1992 Fund Convention should be restructured so that references were made subject by subject.

7.2.17 The Working Group took the view that the incorporation of the relevant provisions in the proposed Supplementary Fund Protocol should be made by reference.

Form of instrument

7.2.18 As for the form of the proposed instrument, one delegation suggested that the Supplementary Fund should be constituted by means of a new Convention rather than by a Protocol, since the establishment of the Supplementary Fund would result in a fundamental change in the system which had not been contemplated when the 1971 and 1992 Funds were created.

7.2.19 Another delegation considered that a Protocol would be preferable, since it was intended that only Parties to the 1992 Fund Convention could become Parties to the instrument creating the third tier fund and the use of a Protocol would indicate that the Supplementary Fund would be a new part of an existing system rather than constitute a separate system.

Time bar

7.2.20 As for the issue of time bar, it was considered that a claim against the proposed Supplementary Fund should be time-barred if, and only if, it had become time-barred against the 1992 Fund. It was suggested that a provision to this effect should be included in the Protocol.

Contribution system

7.2.21 As regards the contribution system, it was noted that under the draft Protocol the levy of contributions and the reports on oil receipts would be governed by the relevant provisions of the 1992 Fund Convention.

7.2.22 It was agreed that the provisions in the proposed Protocol should be sufficiently clear to create an obligation on the part of the oil receivers to pay contributions.

7.2.23 One delegation drew attention to the fact that unlike the 1992 Fund Convention (Article 36 ter), the draft Protocol did not contain any capping provisions limiting the aggregate amount of the contributions payable in respect of contributing oil received in a single Contracting State. That delegation suggested that the inclusion of such a provision in the Protocol could serve as an incentive for certain States to ratify the Protocol.

7.2.24 Another delegation expressed the view that the fact that the proposed Supplementary Fund Protocol would provide improved protection for victims of oil pollution would serve as the best incentive for States to become Parties to the Protocol.

7.2.25 One delegation considered that it was a fallacy to suggest that the Supplementary Fund was in reality voluntary, since the funding of the third tier would ultimately be passed on to consumers of refined products worldwide. That delegation made the point that if an oil receiving country exported refined oil products to a State which did not become Party to the Protocol, the consumers in the latter State would have no choice but to pay a higher price for their refined products although that State was not a Party to the Protocol.

7.2.26 The Working Group took note of the proposal contained in Article 6, paragraph 1 of the draft Protocol that there should be deemed to be a receipt of at least 1 million tonnes of contributing oil in each Contracting State in each calendar year. It was noted that the purpose of this provision was to ensure that the financial burden of the payments of compensation by the Supplementary

Fund would be spread between all Contracting States so that contributions to that Fund were made in respect of all such States.

7.2.27 A number of delegations supported the inclusion of a provision to the effect that contributions should be paid in respect of each Contracting State for a minimum quantity of oil.

7.2.28 The Working Group considered Article 7 in the draft Protocol which addressed the problem encountered by the 1971 and 1992 Funds as a result of many Member States not submitting reports on oil receipts which made it impossible for the Secretariat to issue invoices to the contributors in these States. It was noted that under the proposed Article citizens or residents suffering pollution damage in States which did not fulfil their obligation to submit oil reports would not be entitled to compensation until the missing reports had been submitted and that the State itself would forfeit its right to compensation if it did not submit its reports within one year of the Director having notified the State of its failure to fulfil its obligation.

7.2.29 There was general support in principle for the proposals contained in draft Articles 7.2 and 7.4. It was suggested, however, that the provisions should be clarified as to what constituted a failure to report, ie whether only a total failure to submit oil reports or also minor deficiencies in the reports should result in compensation being refused.

7.2.30 As for draft Article 7.3 which would give the 1992 Fund the right to set off unpaid contributions to the 1992 Fund or the Supplementary Fund against compensation for pollution damage to which the contributor in arrears was entitled, it was considered that it would not be possible to provide in the Supplementary Fund Protocol for such a set off *vis-à-vis* the 1992 Fund. The Director drew attention to the 1992 Fund Internal Regulation 7.12 which dealt with this issue.

7.2.31 The question was raised as to what point and in which circumstances the proposed Supplementary Fund should start making payments. It was noted that the draft Protocol did not address this issue. The question was also raised whether the 1992 Fund should take into account the existence of the Supplementary Fund when taking decisions on whether to pro-rate payments.

7.2.32 Some delegations made the point that there would normally be no need for the 1992 Fund to pro-rate payments in respect of pollution damage in Supplementary Fund Member States and that this would in most cases be the major benefit of the Supplementary Fund.

7.2.33 In this connection the Working Group considered a proposal by the delegation of the Netherlands to modify the contribution system in order to take into account the problems encountered by certain receivers of oil which were contributors to the 1992 Fund under the 1992 Fund Convention although they did not have any interest in the oil received other than providing oil storage services (document 92FUND/WGR.3/8/6). The Working Group took the view that this issue would have to be considered in the longer term since it was necessary to maintain the concept of "oil receipt" in the proposed Supplementary Fund Protocol identical to that in the 1992 Fund Convention. On this point reference is made to the discussion in section 21 below.

Organisational structure

7.2.34 It was agreed that the Supplementary Fund should have its own organisational structure, ie an Assembly and a Secretariat headed by a Director. It was noted that under Article 11.2 of the draft Protocol the Secretary-General of the International Maritime Organization (IMO) should convene the first Assembly of the Supplementary Fund only when an incident had occurred in respect of which the total amount of the established claims might exceed the maximum amount available under the 1992 Fund Convention. The Director stated that in his view it would be necessary to convene the Assembly immediately after the Protocol had come into force in order to enable the Assembly to appoint a Director and adopt the necessary Rules of Procedure and Internal and

Financial Regulations, but that the Assembly would thereafter only meet when required. A number of delegations supported the Director's view on this point.

Tacit amendment procedure as regards the maximum amount of compensation available

7.2.35 The Working Group noted that Article 13 of the draft Protocol contained provisions relating to increases in the maximum amount available for compensation by means of a tacit amendment procedure corresponding to Article 33 of the Final Clauses to the 1992 Protocol to the 1971 Fund Convention.

7.2.36 Some delegations questioned whether it was necessary to provide for increase of the maximum amount of compensation to be laid down in the Protocol by such a procedure. Many other delegations considered, however, that such a tacit amendment procedure was required.

7.2.37 A number of delegations expressed the view that the various time periods laid down in the 1992 Protocol in respect of the tacit amendment procedure were too long, resulting in the procedure for increasing the amounts being too slow. It was pointed out that once an increase had been made, it would take over eleven years before the next increase could take effect. Those delegations argued that for this reason the time periods for the tacit amendment procedure in the draft Protocol should be shortened considerably.

7.2.38 Attention was drawn to a question of interpretation of a provision in the tacit amendment procedure laid down in Article 15 of the 1992 Fund Protocol which had been discussed in connection with the use of this procedure by the IMO Legal Committee in October 2000, namely whether the calculation of compound interest in accordance with paragraph 6.b) should cover the period up to the time when the Legal Committee took its decision or the whole period up to the entry into force of that decision. It was suggested that the provision should be clarified on this point in the draft Protocol.

Amendments to the 1992 Fund Convention

7.2.39 Consideration was given to Article 14 in the draft Protocol which dealt with the issue of how amendments to the 1992 Fund Convention should be reflected in the draft Protocol.

7.2.40 As regards Article 14.1, which dealt with the case when the limits laid down in the 1992 Fund Convention had been increased by means of a new Protocol to that Convention, it was considered that the text as drafted was difficult to understand and should be improved.

7.2.41 The Working Group noted that Article 14.2 dealt with the effects of amendments to the 1992 Fund Convention on matters other than the maximum amount available and that under the proposed text such amendments could be incorporated in the proposed Protocol by means of a tacit amendment procedure.

7.2.42 It was generally considered that many States would have difficulty in accepting such a wide use of the tacit amendment procedure. It was suggested that if the 1992 Fund Convention was amended on substantive points, eg the definition of 'ship' or the definition of 'pollution damage', the corresponding amendments to the Supplementary Fund Protocol should be made by means of a new Protocol thereto. It was also pointed out that serious treaty law problems could arise if the tacit amendment procedure was used in the situation where the amendments to the 1992 Fund Convention were ratified by some of the States Parties to the Supplementary Fund Protocol, but not by all of them. It was considered therefore that Article 14.2 should be deleted.

7.2.43 The proposed Article 14.3 was considered unnecessary.

Revised draft Protocol prepared by the Director

7.2.44 As a result of the observations made during the consideration of the text of the draft Protocol set out in the Annex to document 92FUND/WGR.3/8/4, the Director had prepared a revised text in which he had attempted to take into account these observations (document 92FUND/WGR.3/WP.1). The text of the Director's proposal (with some editorial corrections) is set out in Annex II to this report.

7.2.45 In introducing the revised text of the draft Protocol, the Director emphasised that the presentation of this text did not mean that he took a position as to whether a Supplementary Fund should be established, nor on the substantive points which had been under discussion, but only intended to show how the text could be made more reader-friendly. He stated that he had tried to amend the previous draft in the light of discussions which had taken place. The Director indicated that in view of the very short time which had been available he had not been able to consider all the issues in detail and that a number of issues had to be examined in more depth.

7.2.46 A number of delegations stated that the text proposed by the Director took into account a number of observations made during the discussions and was more reader-friendly.

7.2.47 The Working Group invited the Director to consider the draft text further and to prepare a revised text for consideration by the Assembly at its October 2001 session.

7.2.48 The Working Group invited delegations to assist the Director by communicating their observations in writing to him.

7.3 Cushion Fund and Supplementary Compensation Fund

7.3.1 The Working Group examined at its second meeting 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.

7.3.2 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.

7.3.3 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.

7.3.4 There was no discussion on these proposals at the Working Group's third meeting.

7.4 Amount available to be increased by interest

7.4.1 At its second meeting 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).

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

7.4.3 This issue was not discussed at the Working Group's third meeting.

7.5 Tacit amendment procedure

7.5.1 The tacit amendment procedure laid down in the 1992 Conventions was discussed at the Working Group's second meeting. 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. It was also 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.

7.5.2 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.

7.5.3 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.

7.5.4 This issue was not discussed in any detail at the Working Group's third meeting. It was suggested that a revision of the tacit amendment procedure should be considered in the context of a general revision of the 1992 Convention at a later stage (as regards the draft Supplementary Fund Protocol see paragraph 7.2.35 – 7.2.38 above).

8 Liability of the individual cargo owner

8.1 At the Working Group's second meeting 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.

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

8.3 At the Working Group's third meeting, the Italian delegation reiterated its view that the application of the "polluter pays" principle made it necessary to impose liability on those who could prevent pollution incidents, ie the individual shipowner, the individual charterer and the individual cargo owner. In its view, the present 1992 Fund system did not contribute to enhanced

safety of navigation since it placed the economic consequences of an incident on the oil industry as a whole through oil receivers.

9 Shipowner's liability

9.1 Criterion governing the shipowner's right to limitation

9.1.1 The Working Group considered at its second meeting whether the criterion governing the shipowner's right to limit his liability should be tightened.

9.1.2 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).

9.1.3 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.

9.1.4 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.

9.1.5 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 grounds 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.

9.1.6 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.

9.1.7 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.

9.1.8 This issue was not discussed at the Working Group's third meeting.

9.2 Shipowner's liability in the longer term

9.2.1 The Working Group considered at its third meeting a document on shipowner's liability submitted by the delegation of Australia, Canada, France and the United Kingdom (document 92FUND/WGR.3/8/5), which was intended to present ideas as to the possible direction of the second phase of the work. It was recognised in the document that any attempt to develop at this stage a shipowner's component in the third tier would create complications and could result in an unacceptable delay in the adoption of an interim solution meeting the needs of those States which required an early increase in the overall compensation level. The Working Group noted that the following options were set out in the document:

> **Option 1:** A 'voluntary' increase of the limit of liability for shipowners/insurers at the lower end of the scale of liability under the 1992 Civil Liability Convention, as proposed by the International Group of P & I Clubs. This 'voluntary' limit would apply to those States parties to the third tier only. Although the International Group of P & I Clubs did not propose a figure for this limit, OCIMF stated in its document that the limit of liability for "small ships" should not be less than 20 million SDR.
>
> This proposal would provide a more balanced approach to the sharing of liability for incidents occurring in third tier States between receivers and shipowners for smaller incidents and provide a more equitable distribution of liability between shipowner and cargo owner interests for all incidents in such States. This option might provide a short-term solution for those States which prefer the idea of 'shared' liability under the proposed third tier. In the long term, however, a 'voluntary' regime might not be a complete solution.
>
> **Option 2**: This approach would provide a four-layer system, with a 3rd tier split between receivers and shipowners, similar to the 1992 regime. For those States party to the 3rd tier, this would increase the limits of liability for both Civil Liability Convention and Fund regimes. Whilst the overall maximum amount would not differ from that presently envisaged, the initial burden of any limit set above the 1992 Fund limit for those States parties to the third tier would be met by the shipowner, up to a limit. Above the 3rd tier limit the 4th layer, funded by the oil receivers, would meet the remaining compensation costs. This proposal would not work any differently than the present regime under the 1992 Protocols.
>
> **Option 3**: An alternative means of meeting the shipowner's liability which would apply in tandem with the receivers' liability as part of a 3rd tier above the 1992 Fund limit. If any additional compensation were required above the 1992 Fund limit in States party to the 3rd tier, such compensation would be met by both the shipowner and from the contributions payable by the oil receivers at the same time, rather than any extra burden being placed, initially, on one single party. Although this would deviate from the premise of staged liability behind the 1992 regimes it would maintain the principle that the shipowner and the oil receivers were both liable for any compensation costs in excess of the 1992 Fund limit, although not necessarily for the same amount.

The percentages of the sharing between the shipowner and receivers were left open.

Option 4: The development of a third tier of compensation, with or without a shipowner's layer, should not prevent any future revision of the 1992 CLC regime. The co-sponsors recognised that the increases adopted by the IMO Legal Committee in 2000 addressed a significant concern about the cover under the current 1992 CLC/Fund regime. However, the Working Group had yet to consider in detail several issues which, if taken forward, would themselves require a revision of the 1992 CLC/Fund regime, and this would provide the opportunity to also update the limits of liability.

9.2.2 The OCIMF observer delegation supported the proposal referred to in paragraph 9.2.1 and emphasised that a third compensation tier should be composed of two layers.

9.2.3 The observer delegations of the International Group of P & I Clubs, ICS and INTERTANKO reiterated their position on the sharing of the economic burden of compensation for oil spills set out in paragraphs 7.2.9 – 7.2.12 above. It was emphasised that it would be inappropriate to reconsider the basic principles of liability laid down in the 1992 Civil Liability Convention, eg the channelling of liability and the criterion for depriving the shipowner of his right to limitation.

9.2.4 Several delegations considered that the issues raised in document 92FUND/WGR.3/8/5 should be considered further. It was suggested that the establishment of the proposed Supplementary Fund should not inhibit further consideration being given to a revision of the 1992 Civil Liability Convention.

9.2.5 Some delegations expressed the view, however, that they were not convinced of the need for a revision of the 1992 Civil Liability Convention in the near future. It was suggested that it would be better to wait and see how the voluntary increase in the limitation amount for small ships worked in practice.

9.2.6 The Chairman concluded that the issue of whether to revise the 1992 Civil Liability Convention in respect of the shipowner's liability would have to be considered in the longer term.

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

9.3.1 At the Working Group's second meeting 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* I.

9.3.2 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.

9.3.3 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.

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

9.3.5 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.

9.3.6 This issue was not discussed at the Working Group's third meeting.

10 Recourse actions

10.1 At its second meeting the Working Group also considered the possibilities of taking recourse action against the shipowner and other persons who had caused pollution damage.

10.2 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.

10.3 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.

10.4 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.

10.5 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.

10.6 This issue was not considered at the Working Group's third meeting.

11 Environmental damage and environmental studies

11.1 Consideration at the second meeting

11.1.1 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; June 1994):

(a) The IOPC Funds accept claims that relate to "quantifiable elements"[3] 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.

(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.

11.1.2 It was also recalled that the admissibility of claims for measures to reinstate the environment was considered in 1994 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:

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[3] 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.

- 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.

11.1.3 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, held in October 1994 (document FUND/A.17/35, paragraph 26.8) and that these principles had been endorsed by the 1992 Fund Assembly at its 1st session held in June 1996 (document 92FUND/A.1/34, paragraph 19.2 and 1992 Fund Resolution N°3).

11.1.4 The Working Group recalled that the IOPC Funds' policy as regards environmental studies can be summarised as follows (cf document FUND/A.17/23, Annex I, 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 to become 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.

11.1.5 At its second meeting the Working Group noted that the document by the delegations of Australia *et al* I 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.

11.1.6 It was noted that the delegations of Australia *et al* I 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.

11.1.7 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.

11.1.8 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.

11.1.9 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.

11.1.10 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.

11.1.11 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.

11.1.12 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.

11.1.13 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.

11.1.14 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.

11.1.15 In summing up the discussion at the Working Group's second meeting 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.

11.2 Consideration at the third meeting

11.2.1 At its third meeting the Working Group noted the information contained in a document presented by the United States observer delegation (document 92FUND/WGR.3/8/7) on the natural resource damage assessment process in the United States under the Oil Pollution Act 1990. The Working Group noted in particular the criteria against which restoration alternatives were evaluated, which included:

(1) the cost of carrying out the restoration alternative;

(2) the extent to which each alternative was expected to meet the trustees' goals and objectives in returning the injured natural resources and services to baseline and/or compensating for interim losses;

(3) the likelihood of success of each alternative;

(4) the extent to which each alternative would prevent future injury as a result of the incident, and avoid collateral injury as a result of implementing the alternative;

(5) the extent to which each alternative benefited more than one natural resource and/or service; and

(6) the effect of each alternative on public health and safety.

11.2.2 The Working Group noted that under the criteria set out in paragraph 11.2.1 the most cost-effective of two or more equally preferable alternatives must be selected and that a draft restoration plan had to be made available for review and comment by the public, including appropriate members of the scientific community where possible, following which a final restoration plan was developed which would become the basis of a claim for damages.

11.2.3 The Working Group took note of a study annexed to a document presented by the French delegation on several aspects of environmental damage (document 92FUND/WGR.3/8/8). The study could be summarised as follows:

> Damage to the environment was often described as damage suffered by the natural environment and its components constituting a collective asset independent from damage to persons or property. However, this definition did not imply a clear separation between damage relating to non-appropriable elements of the environment and pollution damage to property.
>
> It had been argued that environmental damage was beyond compensation for technical and economic reasons. Although this argument was valid several years ago, this was no longer true in the light of the developments in national, international and European Community law recognising this kind of damage and related claims for compensation.
>
> Reference was made to a number of international treaties, in particular the Lugano Convention (see paragraph 11.1.7 above). The development in the European Community law was examined, and reference was made in the White Paper on environmental liability presented by the European Commission on 9 February 2001[<4>]. Reference was also made to national legislation and jurisprudence in a number of States, in particular those of Brazil, France, Italy and the United States.
>
> Various methods for assessing the quantum of environmental damage were discussed as well as the possibilities of using environmental impact studies.
>
> When environmental damage affected marine areas under the sovereignty of or falling within the sovereign rights of coastal States, collective interests were affected that were represented by the State as the holder of the right to assets over all biological resources found there. Reference was made to the United Nations Convention on the Law of the Sea in respect of the rights of coastal States over their territorial waters and exclusive economic zone (Article 5.6.1(a)).
>
> In the short term the State appeared to be best suited to receive compensation for environmental damage. The interpretation of 'reasonable measures' should make it possible for the 1992 Fund to determine realistically the field of application of the international system of compensation through the adaptation of the Claims Manual to allow the use of environmental impact studies.

11.2.4 The Working Group also noted a proposal in document 92FUND/WGR.3/8/13, presented by the French delegation, in light of the study referred to in paragraph 11.2.3, to amend the Claims Manual by deleting references linking compensation for environmental damage to economic loss and the paragraph excluding the use of theoretical models. It was also noted that the French delegation proposed introducing in the Claims Manual the concept of compensation for

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[<4>] Document Com (2000) 66 final; a summary of the White Paper is contained in document 92FUND/A/ES.4/3.

environmental damage as a violation of collective property whereby compensation would be awarded to the State, on the basis of international rights under other Conventions to which it was a Party. That delegation suggested that the amount of compensation should be based on the conclusions of environmental impact studies conducted in accordance with procedures accepted by the 1992 Fund.

11.2.5 A number of delegations considered that the proposals by the French delegation deserved further consideration.

11.2.6 Many delegations expressed the view, however, that the notion of pure environmental damage fell outside the scope of the present Conventions and that this issue would therefore have to be included as part of a longer term review of the Conventions. Those delegations considered that such radical changes could not simply be brought about through amendments to the Fund's Claims Manual.

11.2.7 Some delegations considered that the proposals by the French delegation could lead to States rather than the environment benefiting from the compensation, which was contrary to the principles of the Conventions and the decision of the Funds' governing bodies to exclude damages calculated on the basis of theoretical models.

11.2.8 Some delegations opposed any change to the effect that claims for pure environmental damage would be admissible under the Conventions. It was suggested that environmental studies could be admissible if they were carried out for the purpose of establishing actual economic loss or the need for reinstatement measures, but not if they were focusing on pure environmental damage.

11.2.9 It was pointed out that the developments under national and international law referred to in the document presented by the French delegation, such as those proposed in the European Commission's White Paper on environmental liability, were still at an early stage and that it would be several years before they would become part of the national legal systems.

11.2.10 The Working Group noted that in a document presented by the Swedish delegation (document 92FUND/WGR.3/8/14) it was proposed that the criteria agreed by the 7th Intersessional Working Group of the 1971 Fund (cf paragraph 11.1.2 above) and the criteria proposed by Australia *et al* I and endorsed in principle by the 1992 Fund Assembly (cf paragraph 11.1.6 above) needed further development before any formal recommendation could be made to the Assembly. That delegation expressed the view that the information and ideas contained in the submission by ITOPF at the second meeting of the Working Group (cf paragraphs 11.1.9 and 11.1.10 above) would provide valuable input. That delegation proposed to develop a more detailed document on environmental damage for consideration by the Assembly at its October 2001 session.

11.2.11 Many delegations supported the proposal by Sweden to examine further the 1992 Fund's policy as regards the admissibility of claims for reinstatement of the environment and the cost of environmental impact studies. It was suggested that the document presented by ITOPF to the Working Group's second meeting (document 92FUND/WGR.3/5/2) would provide valuable input for that examination.

11.2.12 The Working Group noted the criteria set out in the document presented by Australia *et al* I to the second meeting of the Working Group which should be taken into account, namely;

- agreement to the funding of an environment impact study should be given on the basis that such a study would provide 'useful' lessons, ie tangible environmental restoration benefits;

- the possibility of setting an overall cap on the costs of reinstatement measures and environment impact studies and whether such claims should be allocated lower priority;

- a suitable definition of 'measures of reinstatement';

- the extent to which reinstatement measures would apply to restoration or introduction of *'identical'* or *'equivalent'* components, and the possibility of reinstatement measures in an adjacent area; and

- the possible need for the responsibility for all costs relating to an environment impact study and any specific environmental remedial measures falling on the relevant Member State.

11.2.13 Several delegations opposed the proposal to cover the cost of the introduction of 'identical' or 'equivalent' components, since in their view such costs should not be included in the international compensation regime.

11.2.14 One delegation stated that the IOPC Funds had already developed subtle criteria for the admissibility of claims for pure economic loss and that the Funds could do the same in respect of environmental damage, within the scope of the present definition of 'pollution damage'.

11.2.15 The observer delegation of ITOPF expressed the view that reinstatement measures should, in order to be admissible for compensation, enhance the natural recovery of the environment. In the view of that delegation introduction of 'identical' or 'equivalent' components did not normally fulfil that criterion.

11.2.16 In summing up the discussion at the third meeting, the Chairman stated that the issues relating to environmental damage were important and that many delegations had stated that they needed more time for consideration of the various proposals. The Chairman concluded that the proposal by the French delegation to amend the Claims Manual had not been accepted, since the proposal went beyond the present definition of pollution damage. He considered that there had been support for an examination of what could be achieved within the present definition as a short term solution and that the Swedish proposal for the Assembly to adopt a Resolution had received considerable support. He had also found support for considering the issues of environmental damage in depth in the longer term.

12 Time bar

12.1 It was recalled at the Working Group's second meeting that in order to prevent his 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.

12.2 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.

12.3 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.

12.4 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.

12.5 At the second meeting there was no support for retaining this issue in the list of items which could merit further consideration.

12.6 This issue was not discussed at the Working Group's third meeting.

13 Alternative dispute settlement procedures

13.1 At its second meeting the Working Group recalled that in 1997 the first Intersessional Working Group set up by the 1992 Fund Assembly had 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, held in October 1997, 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.

13.2 The Working Group also recalled the following statement in the Record of Decisions of the Assembly's third session, held in October 1998 (document 92FUND/A.3/27, paragraph 18.4):

> It was suggested that the 1992 Fund could in appropriate cases engage a person with a legal background who would be outside the Fund's structure and whose

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

13.3 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.

13.4 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).

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

13.6 This issue was not discussed at the Working Group's third meeting.

14 Non-submission of oil reports

14.1 It was recalled at the Working Group's second meeting 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.

14.2 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.

14.3 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).

14.4 It was recalled that at its third session, held in October 1998, 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.

14.5 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 its 1st extraordinary session on the basis of a study carried out by the Director which concluded that, since the issue was not dealt with in the 1992 Fund Convention, the Assembly would be acting outside the powers invested in it under the Conventions if it were to decide to restrict the voting rights of Member States (document 92FUND/A/ES.1/4, paragraph 3.2.2).

14.6 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).

14.7 The Working Group considered the following proposals set out in the document submitted by the delegations of Australia *et al* I (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.

14.8 At the Working Group's second meeting 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.

14.9 One of the delegations that had presented the proposal set out in paragraph 14.7 stated that it was not the intention to set the fee at a high level but to require the payment of a nominal fee in order for the States in question to enjoy the benefits of protection by the Fund.

14.10 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.

14.11 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.

14.12 In summing up the discussion at the second meeting 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 14.7 (a) above. The Chairman concluded that other solutions had to be explored.

14.13 At the Working Group's third meeting, this issue was discussed in the context of the proposed draft Supplementary Fund Protocol (cf paragraphs 7.2.28 – 7.2.29 above).

15 Admissibility of claims for fixed costs

Consideration at the second meeting

15.1 At its second meeting 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.

15.2 It was recalled that 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).

15.3 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.

15.4 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.

15.5 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.

15.6 Summing up the discussions at the Working Group's second meeting, 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.

Consideration at the third meeting

15.7 At its third meeting the Working Group gave further consideration to the question of a mark-up on claims for the use of certain fixed facilities on the basis of the information contained in document 92FUND/WGR.3/8/10 presented by the delegations of Spain and the United Kingdom. Those delegations expressed concern that the Fund's restrictive policy in respect of fixed costs could discourage States from maintaining effective pollution response capabilities, particularly those involving high capital costs and/or annual expenditure such as at-sea recovery vessels, aerial spraying capacity and emergency towing vessels. Those delegations pointed out that such resources, if deployed effectively, could have a significant effect on reducing the costs to insurers and contributors to the Fund. They proposed that a 10% mark-up on annual contract costs and/or daily costs of maintaining and deploying such resources should be awarded in compensation, on condition that it could be demonstrated that the use of the resources had had a beneficial effect in reducing the costs of an incident. Those delegations also expressed the view that the proposed mark-up should not apply to commercial resources, the costs of which normally included an element of profit, and resources provided by neighbouring States, since the requesting State would not have incurred any capital or overhead costs.

15.8 Most delegations supported the proposal by the delegations of Spain and the United Kingdom and considered that the inclusion of a mark-up on such fixed costs could be incorporated into the Funds' Claims Manuals without modification of the Conventions.

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

15.10 Those delegations supporting the proposal by the delegations of Spain and the United Kingdom agreed that the mark-up on the costs of major resources should be linked in some way to benefits derived from their deployment, but considered that it would be difficult to measure such benefits beyond the criteria set out in the present version of the Claims Manual requiring the response measures themselves to be reasonable.

15.11 It was mentioned that some States could not afford to provide the necessary resources on a national level but had to rely on regional co-operation to fund such resources.

15.12 The United Kingdom delegation pointed out that the document proposing a 10% mark-up was intended for discussion purposes only and stated that, in view of the support given to the proposal, that delegation intended to present a more detailed proposal for consideration at the Assembly in October 2001.

15.13 In his summing up of the discussions at the third meeting the Chairman concluded that there had been significant support for the proposal by the delegations of Spain and the United Kingdom, but that it had been considered that more details of the proposal were needed, in particular in respect of the conditions for awarding an uplift.

16 Resolution concerning the OPRC Convention

16.1 The Working Group took note of the information contained in document 92FUND/WGR.3/8/12 presented by the delegation of the United Kingdom on the Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (OPRC Convention), which required States Parties to ensure that ships, ports and oil handling facilities had oil pollution emergency and contingency plans, including the provision and placement of response equipment in strategic positions. It was noted that the Convention also provided a framework for international co-operation for combating major oil pollution incidents. The Working Group recalled that discussions had taken place in the past at Fund Assemblies and Working Groups on the responsibilities of individual Contracting States to implement fully the OPRC Convention.

16.2 The Working Group noted that the delegation of the United Kingdom had expressed the view that having regard to the increase in the limits of liability under the 1992 Conventions, Contracting States should consider measures that might be taken to try to minimise any unnecessary impact on the environment, on victims and on the industries responsible for funding the compensation under these Conventions. It was further noted that the United Kingdom delegation had suggested that one way of achieving this might be for all Contracting States to the 1992 Fund Convention to become parties to the OPRC Convention and to implement fully its provisions, and had proposed that a suitable draft Resolution to that effect should be prepared for consideration by the 1992 Fund Assembly.

16.3 Most delegations supported the proposal by the United Kingdom. One delegation made the point that any draft Resolution presented to the Assembly should refer to existing national, regional and other response arrangements that had been put in place by States which had not ratified the OPRC Convention.

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

17.1 It was recalled at the Working Group's second meeting 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).

17.2 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.

17.3 This issue was not discussed at the Working Group's third meeting.

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

18.1 The Working Group noted at its second meeting that it had been suggested that the definition of 'ship' should be revised in the context of the revision of the 1992 Conventions.

18.2 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).

18.3 It was also recalled that the Assembly had at its 4th session, held in October 1999, 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.

18.4 It was further recalled that the Assembly had at its 5th session, held in October 2000, 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.1 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.1 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.

18.5 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.

18.6 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.

18.7 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.

18.8 At its second meeting 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.

18.9 This issue was not discussed at the Working Group's third meeting.

19 More precise provisions on the submission and handling of claims

19.1 At the Working Group's second meeting 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.

19.2 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.

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

19.4 The Working Group concluded at its second meeting 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.

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

20.1 At its second meeting 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.

20.2 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.

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

20.4 This issue was not discussed at the Working Group's third meeting.

21 The contribution system

21.1 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

21.1.1 At its second meeting 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).

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

21.1.3 This issue was not discussed at the Working Group's third meeting.

21.2 Storage services

21.2.1 At its second meeting 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.

21.2.2 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, held in October 1980, (document FUND/A/ES.1/13, paragraph 10). The Working Group noted the position taken by the 1971 Fund Assembly which was as follows:

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

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

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

21.2.5 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.

21.2.6 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 21.2.5.

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

21.2.8 At its third meeting the Working Group considered the matter further and noted a proposal by the Netherlands delegation to incorporate into the 1992 Fund Convention or by means of a new instrument the relevant provisions of the 1996 HNS Convention on the concepts of 'receiver' and 'contributing cargo', thereby giving storage companies, under certain conditions, the possibility of passing levies on to their principals, provided these were located in a State Party to the 1992 Fund Convention (document 92FUND/WGR.3/8/6). It was noted that the Netherlands delegation proposed that the issue should be considered by the Working Group, either as part of the discussion relating to the proposed Supplementary Fund or in the context of the review of the 1992 Conventions.

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

21.2.10 The Working Group considered that the issue raised by the Netherlands delegations would have to be examined at a later stage.

22 Ranking of claims

22.1 At its second meeting 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).

22.2 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.

22.3 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.

22.4 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.

22.5 The Working Group agreed at its second meeting 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.

22.6 This issue was not discussed at the Working Group's third meeting.

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

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

23.2 At its first meeting 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.

23.3 This issue was not discussed at the Working Group's second and third meetings.

24 Steps to reduce delays in the payment of compensation

24.1 At its first session 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.

24.2 The Working Group considered at its third meeting a proposal by the delegations of Italy and the Republic of Korea for a draft Resolution authorising the Director of the 1992 Fund to make advance payments to victims of pollution damage against security by the State of the victims or

by a first class bank in London. It was noted that the proposal was intended to ensure that victims whose claims had been settled were compensated in full in situations where payments by the Fund were pro-rated due to the total amount of claims exceeding the Fund limit. It was noted that the sponsoring delegations had drawn attention to the need for various factors to be taken into account before making payments against any security, such as the likely delay in ascertaining the total amount of admissible claims and the possibility that these would exceed the amount available under the Conventions, and the particular financial circumstances of the victim.

24.3 A number of delegations expressed reservations about the proposal and in particular the practical problems that the Fund would face in establishing the validity of a State guarantee and the problems the guarantor might face in recovering money from claimants in the event that payments by the Fund remained pro-rated after the settlement of all claims. The point was also made that it was very unlikely that payments would have to be pro-rated for those States which became Members of the proposed Supplementary Fund.

24.4 A number of delegations considered that, as in the past, the question of payments against any form of guarantee would have to be decided on a case-by-case basis.

24.5 In his summing up of the discussions at the third meeting the Chairman concluded that the proposal by Italy and the Republic of Korea to adopt a Resolution on this issue did not have the Working Group's support and that in any event the question of whether the Fund should make payments against guarantees would have to be considered on a case-by-case basis.

25 Uniform application of the Conventions

25.1 The Working Group considered at its second meeting 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* I (document 92FUND/WGR.3/5/1, paragraphs 2.30 – 2.32).

25.2 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).

25.3 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.

25.4 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.

25.5 At its third meeting the Working Group considered a document submitted by the Director (document FUND/WGR.3/8) in which the Director 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.

25.6 The Working Group concluded at its third meeting that uniformity of implementation and application 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 Convention that was the problem but rather the application of the relevant provisions in the national statutes. The Working Group concluded that the issue should be retained for further study.

25.7 It was suggested that Fund Member States should be under an obligation to inform the Director how the Conventions had been implemented, thereby enabling the Director to bring problems to the attention of the Assembly before difficulties arose in practice.

25.8 One delegation stated that it had no objection to Member States having to inform the Director of their implementing legislation but had to reserve its position if it was envisaged that the Fund should scrutinise national laws.

25.9 It was also suggested that the Fund Secretariat could assist States in their drafting of the implementing legislation. The Director mentioned that the Secretariat had over the years on request given assistance in this regard to a number of States.

26 Various issues of a treaty law nature

26.1 At its third session the Working Group took 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 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.

26.2 The Working Group took the view that these issues should be considered in the longer term and invited the Director to pursue them.

27 Conclusions of the Working Group

27.1 The Working Group decided to submit to the Assembly for consideration at its October 2001 session a draft Protocol to Supplement the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 as set out in document 92FUND/WGR.3/WP.1, which is reproduced in Annex II to this report (with some editorial corrections), and invited the Director to reconsider that draft and submit a revised draft to the Assembly (section 7.2 above).

27.2 The Working Group decided to recommend the Assembly:

(1) to consider modifying the 1992 Fund's position in respect of the admissibility of claims for the costs of reinstatement of the environment and the cost of environmental impact studies, provided that these modifications should remain within the scope of the present definition of "pollution damage" laid down in the 1992 Conventions (section 11 above);

(2) to consider a draft Resolution on the admissibility of claims for fixed costs on the basis of the discussion set out in section 15 above, if a draft Resolution were to be submitted by delegations;

(3) to consider a draft Resolution recommending States to ratify and implement fully the Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC Convention), if such a Resolution were to be submitted by delegations (section 16 above).

27.3 The Working Group decided to recommend that the Assembly should extend the Group's mandate so as to enable it to consider those issues retained for further consideration in the longer term, namely:

(a) shipowner's 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).

27.4 The Director was invited to inform the Secretary-General of IMO of the outcome of the Working Group's considerations in respect of the draft Protocol referred to in paragraph 27.1.

* * *

ANNEX I

DRAFT PROTOCOL

OF 2000 TO SUPPLEMENT THE INTERNATIONAL CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE, 1992

Text reproduced from document 92FUND/WGR.3/8/4 presented by the delegations of Australia *et al*

THE PARTIES TO THE PRESENT PROTOCOL,

BEARING IN MIND the International Convention on Civil Liability for Oil Pollution Damage, 1992,

HAVING CONSIDERED the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992,

AFFIRMING the importance of maintaining the viability of the international oil pollution liability and compensation system,

NOTING that the maximum compensation afforded by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 might be insufficient to meet compensation needs in certain circumstances in some Contracting States to that Convention;

RECOGNISING that a number of States Parties to the 1992 Conventions consider it necessary as a matter of urgency to make available additional funds for compensation through the creation of a supplementary scheme to which States may accede if they so wish;

CONSIDERING that accession to the supplementary scheme should be open only to States Parties to the 1992 Fund Convention,

Have agreed as follows:

Article 1

1. This Protocol establishes a new compensation fund for oil pollution damage, to be named the "Supplementary Fund", to provide compensation in addition to that provided by the International Oil Pollution Compensation Fund, 1992.

2. For the purpose of this Protocol the "1992 Fund Convention" means the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992.

3. The compensation regime established by this Protocol shall be governed by the provisions of Articles 1, 2, paragraph 2, and Articles 3, 6-10, 12-20 and 28-34 of the 1992 Fund Convention, provided however that the expression "Contracting State" means a contracting state to this Protocol, unless stated otherwise.

4. Except where otherwise specified the expression "Fund" in the 1992 Fund Convention shall for the purpose of this Protocol be construed to mean "Supplementary Fund".

Article 2

For the purpose of this Protocol, the expression "1971 Fund Convention" in Article 1 bis of the 1992 Fund Convention shall be construed to mean 1992 Fund Convention.

Article 3

An International Supplementary Fund for compensation for pollution damage, to be named "The International Oil Pollution Supplementary Compensation Fund, [2000]" and hereinafter referred to as "the Supplementary Fund", is hereby established to provide compensation for pollution damage to the extent that the protection afforded by the 1992 Civil Liability Convention and 1992 Fund Convention is inadequate because the damage exceeds the applicable limits of compensation laid down in Article 4, paragraph 4 of the 1992 Fund Convention for any one incident.

Article 4

Supplementary Compensation

1. For the purpose of fulfilling its function under Article 3 of this Protocol, the Supplementary Fund shall pay compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for an established claim for such damage under the terms of the 1992 Fund Convention, because the damage exceeds the applicable limit of compensation laid down in Article 4, paragraph 4 of the 1992 Fund Convention.

2.

a) The aggregate amount of compensation payable by the Supplementary Fund under this Article shall in respect of any one incident be limited, so that the total sum of that amount and the amount of compensation actually paid under the 1992 Liability Convention and the 1992 Fund Convention within the scope of application of this Protocol shall not exceed [ ] million units of account.

b) The maximum amount of compensation referred to in sub-paragraph a) shall be [ ] million units of account with respect to any incident occurring during any period when there are [ ] Parties to this Protocol in respect of which the combined relevant quantity of contributing oil received by persons in the territories of such Parties, during the preceding calendar year, equalled or exceeded [ ] million tons.

c) The amounts mentioned in subparagraphs (a) and (b) shall be converted into national currency on the basis of the value of that currency by reference to the Special Drawing Right on the date of the decision of the Assembly of the 1992 Fund as to the first date of payment of compensation.

3. Where the amount of established claims against the Supplementary Fund exceeds the aggregate amount of compensation payable under paragraph 2(a) and (b), the amount available shall be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under this Convention shall be the same for all claimants.

4. "Established claim" means a claim which has been recognised by the 1992 Fund or been accepted by decision binding upon the 1992 Fund by a competent court and the claim would have been fully compensated if the limit set out in Article 4, paragraph 4 of the 1992 Fund Convention had not been applied to that incident.

5. No claim may be made against the Supplementary Fund unless it is admissible in respect of the 1992 Fund.

Article 5

1. Article 6 of the 1992 Fund Convention applies to the Supplementary Fund, provided however that the word "thereunder" shall be construed to mean "under Article 4 of the 1992 Fund Convention" and the reference to Article 7, paragraph 6 of the 1992 Fund Convention shall be construed to refer to that paragraph in that Convention.

2. For the purpose of this Protocol, the words "the owner of a ship or his guarantor" in Article 7, paragraph 4 of the 1992 Fund Convention shall be construed to mean "the owner of a ship, his guarantor or the 1992 Fund" and the words "the owner or his guarantor" in Article 7, paragraph 6 of the 1992 Fund Convention shall be construed to mean "the owner, his guarantor or the 1992 Fund".

3. For the purpose of this Protocol the words "the owner or his guarantor" in Article 9, paragraph 1 of the 1992 Fund Convention shall be construed to mean "the owner or his guarantor or under the 1992 Fund Convention".

Article 6

1. Notwithstanding Article 10, paragraphs 1 and 2 of the 1992 Fund Convention any Contracting State shall for the purpose of this Protocol be considered to receive a minimum of [1.000.000] tons.

2. When the aggregate quantity of contributing oil received in a Contracting State is less than [1.000.000] tons, the Contracting State assumes the obligations that are incumbent under this Protocol on any person who is liable to contribute to the Supplementary Fund in respect of oil received within the territory of that State in so far as no liable person exists for the aggregated quantity of oil received.

3. As regards Contracting States to this Protocol, communications made to the Director of the 1992 Fund under Article 15, paragraph 3 of the 1992 Fund Convention shall be deemed to be made also under this Protocol.

Article 7

1. If in a Contracting State there is no person to be reported under in Article 15, paragraph 2 of the 1992 Fund Convention, that Contracting State shall for the purpose of this Protocol inform the Director thereof.

2. No compensation shall be paid by the Supplementary Fund to a Contracting State or any of its citizens or residents in respect of a given incident until the obligations to communicate to the Director according to Article 15, paragraph 2 of the 1992 Fund Convention and the preceding paragraph of this Article have been completed in respect of that Contracting State for all years prior to the occurrence of that incident. However, the rights of citizens or residents of a Contracting State which has fulfilled its obligations in this regard shall not be affected by this provision, even if these citizens or residents are also citizens or residents of a Contracting State which has not fulfilled its obligations.

3. Any payments of contributions due to the 1992 Fund or the Supplementary Fund shall be set off against compensation to the debtor or his agents.

4. A Contracting State which temporarily has been denied compensation in accordance with paragraph 2, shall be denied any compensation if the conditions have not been met one year after the Director has notified the State of its failure to report.

Article 8

1. With respect to Article 19 of the 1992 Fund Convention regular sessions of the Supplementary Fund Assembly shall take place every [four] years.

2. The Assembly shall decide the budgetary period and the procedure for fixing contributions.

Final clauses

Article 9

Signature, ratification, acceptance, approval and accession

1. This Protocol shall be open for signature at London from [ ].

2. Subject to paragraph 4, this Protocol shall be ratified, accepted or approved by States which have signed it.

3. Subject to paragraph 4, this Protocol is open for accession by States which did not sign it.

4. This Protocol may be ratified, accepted, approved or acceded to only by States which have ratified, accepted, approved or acceded to the 1992 Fund Convention.

5. Ratification, acceptance, approval or accession shall be effected by the deposit of a formal instrument to that effect with the Secretary-General of the Organization.

Article 10

Information on contributing oil

Before this Protocol comes into force for a State, that State shall, when depositing an instrument referred to in Article 11, paragraph 5, and annually thereafter at a date to be determined by the Secretary-General of the Organization, communicate to him the name and address of any person who in respect of that State would be liable to contribute to the Supplementary Fund pursuant to Article 10 of the 1992 Fund Convention as well as data on the relevant quantities of contributing oil received by any such person in the territory of that State during the preceding calendar year.

Article 11

Entry into force

1. This Protocol shall enter into force [twelve] months following the date on which the following requirements are fulfilled:

a) at least [eight] States have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General of the Organization; and

b) the Secretary-General of the Organization has received information in accordance with Article 29 that those persons who would be liable to contribute pursuant to Article 10 of the 1992 Fund Convention have received during the preceding calendar year a total quantity of at least [450] million tons of contributing oil, including the amounts referred to in Article 10, paragraph 3.

2. Regardless of Article 19 the Secretary-General of the Organization shall convene the first Assembly not before the Director of the 1992 Fund deems, that the aggregated amount of compensation for any one incident within the scope of application of this Protocol Convention may exceed the applicable limits under the 1992 Fund Convention.

3. For each State which ratifies, accepts, approves or accedes to this Protocol after the conditions in paragraph 1 for entry into force have been met, the Protocol shall enter into force twelve months following the date of the deposit by such State of the appropriate instrument.

Article 12

Subject to the subsequent paragraphs of this Article, Articles 32, 35 and 37 to 39 of the 1992 Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 shall apply to this Protocol.

2. In Article 32 “1992 Fund Convention” shall be construed to mean this Protocol.

3. The application of Article 38 of the 1992 Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 is subject to the following adaptations:

a) The reference in paragraph 1 to Article 33 shall for the purpose of this Protocol be to Articles 13 and 14.

b) The reference in paragraph 2, litra a), subparagraph ii) to Article 30 shall for the purpose of this Protocol be to Article 11.

c) Paragraph 2, litra a), subparagraph iv) shall not apply for the purpose of this Protocol.

d) The reference in paragraph 2, litra a), subparagraph v) to Article 33, paragraph 1 shall for the purpose of this Protocol be to Article 13, paragraph 1.

e) The reference in paragraph 2, litra a), subparagraph vi) to Article 33, paragraph 4 shall for the purpose of this Protocol be to Article 13, paragraph 4.

f) The reference in paragraph 2, litra a), subparagraph vii) to Article 33, paragraphs 7, 8 and 9 shall for the purpose of this Protocol be to Article 13, paragraphs 7, 8 and 9.

g) Paragraph 2, litra a), subparagraph ix) shall not apply for the purpose of this Protocol.

Article 13

Amendment of compensation limits

1. Upon the request of at least one quarter of the Contracting States, any proposal to amend the limits of amounts of compensation laid down in Article 4, paragraph 2, subparagraph (a) and (b) shall be circulated by the Secretary-General to all Members of the Organization and to all Contracting States.

2. Any amendment proposed and circulated as above shall be submitted to the Legal Committee of the Organization for consideration at a date at least six months after the date of its circulation.

3. All Contracting States to this Protocol, whether or not Members of the Organization, shall be entitled to participate in the proceedings of the Legal Committee for the consideration and adoption of amendments.

4. Amendments shall be adopted by a two-thirds majority of the Contracting States present and voting in the Legal Committee, expanded as provided for in paragraph 3, on condition that at least one-half of the Contracting States shall be present at the time of voting.

5. When acting on a proposal to amend the limits, the Legal Committee shall take into account the experience of incidents and in particular the amount of damage resulting therefrom and changes in the monetary values. It shall also take into account the relationship between the limits in Article 4, paragraph 4, of the 1992 Fund Convention and those in this Protocol.

6.

a) No amendment of the limits under this Article may be considered before [date of entry into force]nor less than [five years] from the date of entry into force of a previous amendment under his Article. No amendment under this Article shall be considered before this Protocol has entered into force.

b) No limit may be increased so as to exceed an amount which corresponds to the limit laid down in this Convention [increased by [six] per cent per year calculated on a compound basis from [the date when this Convention is opened for signature]].

c) No limit may be increased so as to exceed an amount which corresponds to the limit laid down in this Convention multiplied by three.

7. Any amendment adopted in accordance with paragraph 4 shall be notified by the Organization to all Contracting States. The amendment shall be deemed to have been accepted at the end of a period of [eighteen months] [after the date of notification] unless within that period not less than one-quarter of the States that were Contracting States at the time of the adoption of the amendment by the Legal Committee have communicated to the Organization that they do not accept the amendment in which case the amendment is rejected and shall have no effect.

8. An amendment deemed to have been accepted in accordance with paragraph 7 shall enter into force [eighteen months] after its acceptance.

9. All Contracting States shall be bound by the amendment, unless they denounce this Protocol in accordance with Article 15, paragraphs 1 and 2, at least six months before the amendment enters into force. Such denunciation shall take effect when the amendment enters into force.

10. When an amendment has been adopted by the Legal Committee but the [eighteen-month] period for its acceptance has not yet expired, a State which becomes a Contracting State during that period shall be bound by the amendment if it enters into force. A State which becomes a Contracting State after that period shall be bound by an amendment which has been accepted in accordance with paragraph 7. In the cases referred to in this paragraph, a State becomes bound by an amendment when that amendment enters into force, or when this Protocol enters into force for that State, if later.

Article 14

Protocols to the 1992 Fund Convention

1. If the limits laid down in the 1992 Fund Convention have been increased by a Protocol thereto, the limit laid down in Article 4, paragraph 2, subparagraph (a) and (b), may be increased by the same amount by means of the procedure set out in Article 13. The provisions of Article 13, paragraph 6 shall not apply in such cases. Where the procedure set out in Article 13 is applied at a later stage, the limits laid down in Article 13, paragraph 6, subparagraphs (b) and (c), shall be calculated on the basis of the limits laid down in the present Protocol referred to therein with the addition of any increase in the limit laid down in Article 4, paragraph 2, subparagraph (a) and (b), which is decided in accordance with the procedure of this paragraph.

2. If a provision in the 1992 Fund Convention has been amended by a protocol thereto, corresponding amendments to this instrument may also be made by means of the procedure set out in Article 13, paragraphs 1-4 and 7-10, [provided the amendment concerns:

   (i) the contribution system
   (ii) the limits of liability
   (iii) definitions
   etc].

   Such amendments shall not enter into force before the amendments to the 1992 Fund Convention.

3. If pollution damage may be compensated both under the present Protocol and under another Protocol to the 1992 Fund Convention, any contributions due under that other Protocol in respect of Contracting States thereto which are also Contracting States to the present Protocol shall be considered as pollution damage under the present Protocol, but the pollution damage covered by the Protocol to the 1992 Fund Convention shall not otherwise be compensated under the present Protocol.

Article 15

Denunciation

1. This Protocol may be denounced by any Party at any time after the date on which it enters into force for that Party.

2. Denunciation shall be effected by the deposit of an instrument with the Secretary-General of the Organization.

3. A denunciation shall take effect twelve months, or such longer period as may be specified in the instrument of denunciation, after its deposit with the Secretary-General of the Organization.

4. Denunciation of the 1992 Protocol to amend the 1969 Liability Convention or the 1992 Protocol to amend the 1971 Fund Convention shall be deemed to be a denunciation of the present Protocol. Such denunciation shall take effect on the date on which denunciation of the 1992 Protocol to amend the 1969 Liability Convention or the 1992 Protocol to amend the 1971 Fund Convention takes effect according to Article 16 or Article 34 of the respective Protocol.

5. Notwithstanding a denunciation of the present Protocol by a Party pursuant to this Article, any provisions of this Protocol relating to the obligations to make contributions to the Supplementary Fund with respect to an incident referred to in Article 12, paragraph 2(b), of the 1992 Fund Convention and occurring before the denunciation takes effect shall continue to apply.

Article 16

Termination

1. This Protocol shall cease to be in force on the date when the number of Contracting States falls below [seven] or contributing oil fall below [250] million tons, whichever is the earliest.

2. States which are bound by this Protocol on the day before the date it ceases to be in force shall enable the Supplementary Fund to exercise its functions as described under Article 37 of the 1992 Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 as supplemented by this Protocol and shall, for that purpose only, remain bound by this Protocol.

* * *

ANNEX II

DRAFT PROTOCOL

OF 200_ TO SUPPLEMENT THE INTERNATIONAL CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE, 1992

Text prepared by the Director as set out in document 92FUND/WGR.3/WP.1 (with some editorial corrections)

THE PARTIES TO THE PRESENT PROTOCOL,

BEARING IN MIND the International Convention on Civil Liability for Oil Pollution Damage, 1992,

HAVING CONSIDERED the International Convention on the Establishment of an International Fund Compensation for Oil Pollution Damage, 1992,

AFFIRMING the importance of maintaining the viability of the international oil pollution liability and compensation system,

NOTING that the maximum compensation afforded by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 might be insufficient to meet compensation needs in certain circumstances in some Contracting States to that Convention;

RECOGNISING that a number of States Parties to the 1992 Conventions consider it necessary as a matter of urgency to make available additional funds for compensation through the creation of a supplementary scheme to which States may accede if they so wish;

CONSIDERING that accession to the supplementary scheme should be open only to States Parties to the 1992 Fund Convention,

Have agreed as follows:

General provisions

Article 1

For the purposes of this Protocol:

1 "1992 Fund Convention" means the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992;

2 "Contracting State" in the 1992 Fund Convention and in this Protocol means a contracting state to this Protocol, unless stated otherwise;

3 "Fund" in the 1992 Fund Convention means "Supplementary Fund", unless stated otherwise;

4 the definitions in Article 1 of the 1992 Fund Convention shall apply unless stated otherwise;

5 "established claim" means a claim which has been recognised by the 1992 Fund or been accepted by decision binding upon the 1992 Fund by a competent court and the claim would have been fully compensated if the limit set out in Article 4, paragraph 4 of the 1992 Fund Convention had not been applied to that incident.

Article 2

1 An International Supplementary Fund for compensation for pollution damage, to be named "The International Supplementary Fund for compensation for pollution damage [200.]" and hereinafter referred to as "the Supplementary Fund', is hereby established.

2 The Supplementary Fund shall in each Contracting State be recognised as a legal person capable under the laws of the State of assuming rights and obligations and of being a party in legal proceedings before the courts of that State. Each Contracting State shall recognise the Director of the Supplementary Fund (hereinafter referred to as "The Director") as the legal representative of the Supplementary Fund.

Article 3

The scope of application of this Protocol shall be governed by Article 3 of the 1992 Fund Convention.

Supplementary Compensation

Article 4

1 The Supplementary Fund shall pay compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for an established claim for such damage under the terms of the 1992 Fund Convention, because the damage exceeds the applicable limit of compensation laid down in Article 4, paragraph 4 of the 1992 Fund Convention in respect of any one incident.

2 (a) The aggregate amount of compensation payable by the Supplementary Fund under this Article shall in respect of any one incident be limited, so that the total sum of that amount and the amount of compensation actually paid under

the 1992 Liability Convention and the 1992 Fund Convention within the scope of application of this Protocol shall not exceed [ ] million units of account.

(b) The maximum amount of compensation referred to in sub-paragraph a) shall be [ ] million units of account with respect to any incident occurring during any period when there are [ ] Parties to this Protocol in respect of which the combined relevant quantity of contributing oil received by persons in the territories of such Parties, during the preceding calendar year, equalled or exceeded [ ] million tons.

(c) The amounts mentioned in subparagraphs (a) and (b) shall be converted into national currency on the basis of the value of that currency by reference to the Special Drawing Right on the date of the decision of the Assembly of the 1992 Fund as to the first date of payment of compensation.

3 Where the amount of established claims against the Supplementary Fund exceeds the aggregate amount of compensation payable under paragraph 2, the amount available shall be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under this Protocol shall be the same for all claimants.

4 The Supplementary Fund shall apply the same principles and procedures for the payment of compensation as the 1992 Fund.

5 No claim may be made against the Supplementary Fund unless it is admissible in respect of the 1992 Fund.

Article 5

Rights of compensation against the Supplementary Fund shall be extinguished only if they are extinguished against the 1992 Fund under Article 6 of the 1992 Fund Convention.

Article 6

1 Jurisdiction, intervention in legal proceedings, notification of actions, recognition and enforcement of judgements and subrogation are governed by Articles 7 to 9 of the 1992 Fund Convention.

2 Notwithstanding paragraph 1, where an action for compensation against the 1992 Fund has been brought before a court in a Contracting State to the 1992 Fund Convention but not to this Protocol, any action against the Supplementary Fund shall, at the option of the claimant, be brought either before a court of the State where the Fund has its headquarters or before any court of a Contracting State competent under paragraph 1.

3 The Supplementary Fund shall acquire by subrogation any rights which persons compensated by it may enjoy under the 1992 Civil Liability Convention and the 1992 Fund Convention.

Contributions

Article 7

The obligation to pay contributions to the Supplementary Fund, the assessment of these contributions and the reporting of oil receipts are governed by Articles 10 and 12 to 15 of the 1992 Fund Convention and of Articles 8 and 9 of this Protocol.

Article 8

1 Notwithstanding Article 10, paragraphs 1 and 2 of the 1992 Fund Convention, for the purpose of this Protocol there shall be deemed to be a minimum receipt of [1.000.000] tons of contributing oil in each Contracting State.

2 When the aggregate quantity of contributing oil received in a Contracting State is less than [1.000.000] tons, the Contracting State assumes the obligations that are incumbent under this Protocol on any person who is liable to contribute to the Supplementary Fund in respect of oil received within the territory of that State in so far as no liable person exists for the aggregated quantity of oil received.

3 As regards Contracting States to this Protocol, communications made to the Director of the 1992 Fund under Article 15, paragraph 3 of the 1992 Fund Convention shall be deemed to be made also under this Protocol.

Article 9

1 If in a Contracting State there is no person to be reported under Article 15, paragraph 2 of the 1992 Fund Convention, that Contracting State shall for the purpose of this Protocol inform the Director thereof.

2 No compensation shall be paid by the Supplementary Fund to a Contracting State or any of its citizens or residents in respect of a given incident until the obligations to communicate to the Director according to Article 15, paragraph 2 of the 1992 Fund Convention and the preceding paragraph of this Article have been complied with in respect of that Contracting State for all years prior to the occurrence of that incident. However, the rights of citizens or residents of a Contracting State which has fulfilled its obligations in this regard shall not be affected by this provision, even if these citizens or residents are also citizens or residents of a Contracting State which has not fulfilled its obligations. <5><6>

3 Any payments of contributions due to the Supplementary Fund shall be set off against compensation to the debtor or his agents.

<5> It might be considered to amend this provision to read:

No compensation shall be paid by the Supplementary Fund for damage in the territory, territorial sea or Exclusive Economic Zone of a State in respect of a given incident until the obligations to communicate to the Director according to Article 15, paragraph 2 of the 1992 Fund Convention and the preceding paragraph of this Article have been complied with in respect of that Contracting State for all years prior to the occurrence of that incident.

<6> It may be considered to add the following sentence: The Assembly shall determine in the Internal Regulations the conditions under which no compensation is payable.

4 A Contracting State which temporarily has been denied compensation in accordance with paragraph 2, shall be denied any compensation if the conditions have not been met one year after the Director has notified the State of its failure to report.

Organisation and administration

Article 10

1 The Supplementary Fund shall have an Assembly and a Secretariat headed by a Director.

2 Articles 17 to 20 and 28 to 34 of the 1992 Fund Convention shall apply to the Assembly, Secretariat and Director of the Supplementary Fund.

3 Regular sessions of the Supplementary Fund Assembly shall take place every [four] years.

4 The Assembly shall decide the budgetary period and the procedure for fixing contributions.

Final clauses

Article 11

Signature, ratification, acceptance, approval and accession

1 This Protocol shall be open for signature at London from [ ].

2 Subject to paragraph 4, this Protocol shall be ratified, accepted or approved by States which have signed it.

3 Subject to paragraph 4, this Protocol is open for accession by States which did not sign it.

4 This Protocol may be ratified, accepted, approved or acceded to only by States which have ratified, accepted, approved or acceded to the 1992 Fund Convention.

5 Ratification, acceptance, approval or accession shall be effected by the deposit of a formal instrument to that effect with the Secretary-General of the Organization.

Article 12

Information on contributing oil

Before this Protocol comes into force for a State, that State shall, when depositing an instrument referred to in Article 11, paragraph 5, and annually thereafter at a date to be determined by the Secretary-General of the Organization, communicate to him the name and address of any person who in respect of that State would be liable to contribute to the Supplementary Fund pursuant to Article 10 of the 1992 Fund Convention as well as data on the relevant quantities of contributing oil received by any such person in the territory of that State during the preceding calendar year.

Article 13

Entry into force

1 This Protocol shall enter into force [twelve] months following the date on which the following requirements are fulfilled:

(a) at least [eight] States have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General of the Organization; and

(b) the Secretary-General of the Organization has received information in accordance with Article 11 that those persons who would be liable to contribute pursuant to Article 10 of the 1992 Fund Convention have received during the preceding calendar year a total quantity of at least [450] million tons of contributing oil, including the quantities referred to in Article 8, paragraph 1.

2 The Secretary-General of the Organization shall convene the first session of the Assembly. This session shall take place as soon as possible after entry into force of this Protocol and, in any case, not more than thirty days after such entry into force.

3 For each State which ratifies, accepts, approves or accedes to this Protocol after the conditions in paragraph 1 for entry into force have been met, the Protocol shall enter into force twelve months following the date of the deposit by such State of the appropriate instrument.

Article 14

1 Subject to the subsequent paragraphs of this Article, Articles 32, 35 and 37 to 39 of the 1992 Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 shall apply to this Protocol.

2 In Article 32 "1992 Fund Convention" shall be construed to mean this Protocol.

3 The application of Article 38 of the 1992 Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 is subject to the following adaptations:

(a) The reference in paragraph 1 to Article 33 shall for the purpose of this Protocol be to Articles 13 and 14.

(b) The reference in paragraph 2, litra a), subparagraph ii) to Article 30 shall for the purpose of this Protocol be to Article 11.

(c) Paragraph 2, litra a), subparagraph iv) shall not apply for the purpose of this Protocol.

(d) The reference in paragraph 2, litra a), subparagraph v) to Article 33, paragraph 1 shall for the purpose of this Protocol be to Article 13, paragraph 1.

(e) The reference in paragraph 2, litra a), subparagraph vi) to Article 33, paragraph 4 shall for the purpose of this Protocol be to Article 13, paragraph 4.

(f) The reference in paragraph 2, litra a), subparagraph vii) to Article 33, paragraphs 7, 8 and 9 shall for the purpose of this Protocol be to Article 13, paragraphs 7, 8 and 9.

(g) Paragraph 2, litra a), subparagraph ix) shall not apply for the purpose of this Protocol.

Article 15

Amendment of compensation limits

1 Upon the request of at least one quarter of the Contracting States, any proposal to amend the limits of amounts of compensation laid down in Article 4, paragraph 2, subparagraph (a) and (b) shall be circulated by the Secretary-General to all Members of the Organization and to all Contracting States.

2 Any amendment proposed and circulated as above shall be submitted to the Legal Committee of the Organization for consideration at a date at least six months after the date of its circulation.

3 All Contracting States to this Protocol, whether or not Members of the Organization, shall be entitled to participate in the proceedings of the Legal Committee for the consideration and adoption of amendments.

4 Amendments shall be adopted by a two-thirds majority of the Contracting States present and voting in the Legal Committee, expanded as provided for in paragraph 3, on condition that at least one-half of the Contracting States shall be present at the time of voting.

5 When acting on a proposal to amend the limits, the Legal Committee shall take into account the experience of incidents and in particular the amount of damage resulting therefrom and changes in the monetary values. It shall also take into account the relationship between the limits in Article 4, paragraph 4, of the 1992 Fund Convention and those in this Protocol.

6 (a) No amendments of the limits under this Article may be considered before [date of entry into force of this Protocol] nor less than [five years] from the date of entry into force of a previous amendment under this Article. No amendment under this Article shall be considered before this Protocol has entered into force.

(b) No limit may be increased so as to exceed an amount which corresponds to the limit laid down in this Protocol [increased by [six] per cent per year calculated on a compound basis from [the date when this Protocol is opened for signature] [to the date on which the Committee's decision comes into force].

(c) No limit may be increased so as to exceed an amount which corresponds to the limit laid down in this Protocol multiplied by three.

7 Any amendment adopted in accordance with paragraph 4 shall be notified by the Organization to all Contracting States. The amendment shall be deemed to have been accepted at the end of a period of [eighteen months] [after the date of notification] unless within that period not less than one-quarter of the States that were Contracting

States at the time of the adoption of the amendment by the Legal Committee have communicated to the Organization that they do not accept the amendment in which case the amendment is rejected and shall have no effect.

8 An amendment deemed to have been accepted in accordance with paragraph 7 shall enter into force [eighteen months] after its acceptance.

9 All Contracting States shall be bound by the amendment, unless they denounce this Protocol in accordance with Article 17, paragraphs 1 and 2, at least six months before the amendment enters into force. Such denunciation shall take effect when the amendment enters into force.

10 When an amendment has been adopted by the Legal Committee but the [eighteen-month] period for its acceptance has not yet expired, a State which becomes a Contracting State during that period shall be bound by the amendment if it enters into force. A State which becomes a Contracting State after that period shall be bound by an amendment which has been accepted in accordance with paragraph 7. In the cases referred to in this paragraph, a State becomes bound by an amendment when that amendment enters into force, or when this Protocol enters into force for that State, if later.

Article 16

Protocols to the 1992 Fund Convention

If the limits laid down in the 1992 Fund Convention have been increased by a Protocol thereto, the limit laid down in Article 4, paragraph 2, subparagraph (a) and (b), may be increased by the same amount by means of the procedure set out in Article 15, provided however that the provisions of Article 15, paragraph 6 shall not apply in such cases. If this procedure has been applied in the situation referred to in the previous sentence, calculation of the limits laid down in Article 15 paragraph 6, subparagraphs (b) and (c), shall be made on the basis of the limits laid down in the present Protocol referred to therein with the addition of any increase in the limit laid down in Article 4, paragraph 2, subparagraph (a) and (b), which is decided in accordance with the procedure of this paragraph.

Article 17

Denunciation

1 This Protocol may be denounced by any Party at any time after the date on which it enters into force for that Party.

2 Denunciation shall be effected by the deposit of an instrument with the Secretary-General of the Organization.

3 A denunciation shall take effect twelve months, or such longer period as may be specified in the instrument of denunciation, after its deposit with the Secretary-General of the Organization.

4 Notwithstanding a denunciation of the present Protocol by a Party pursuant to this Article, any provisions of this Protocol relating to the obligations to make contributions to the Supplementary Fund with respect to an incident referred to in Article 12, paragraph 2(b), of the 1992 Fund Convention and occurring before the denunciation takes effect shall continue to apply.

Article 18

Termination

1 This Protocol shall cease to be in force on the date when the number of Contracting States falls below [seven] or the total quantity of contributing oil received in the remaining Contracting States falls below [250] million tons, whichever is the earliest.

2 States which are bound by this Protocol on the day before the date it ceases to be in force shall enable the Supplementary Fund to exercise its functions as described in Article 37 of the 1992 Protocol to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 as supplemented by this Protocol and shall, for that purpose only, remain bound by this Protocol.