



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

ASSEMBLY
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Agenda item 17

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**FUTURE DEVELOPMENT OF THE INTERGOVERNMENTAL
OIL POLLUTION LIABILITY AND COMPENSATION SYSTEM
BASED ON THE 1969 CIVIL LIABILITY CONVENTION
AND THE 1971 FUND CONVENTION**

Note by the Director

Introduction

1 At its 13th session, the Assembly established an Intersessional Working Group to consider the future development of the intergovernmental oil pollution liability and compensation system based on the 1969 Civil Liability Convention and the 1971 Fund Convention (document FUND/A.13/21, paragraph 15.2).

2 The Assembly decided that the report of the Working Group should be submitted to its 14th session for consideration. The Assembly, on considering the report, would then decide what further action would be appropriate, bearing in mind that any proposal to amend the Conventions or the 1984 Protocols thereto would have to be referred to the Secretary-General of the International Maritime Organization (IMO) for consideration by the Legal Committee.

3 The report of the Working Group, which has been prepared by the Director in consultation with the Group's Chairman, is set out in the Annex to this document.

Conclusions drawn by the Working Group

4 The Working Group decided to submit the following conclusions for consideration by the Assembly:

- (a) The Working Group was of the opinion that the entry into force conditions of the 1984 Protocol to the Civil Liability Convention should be amended so as to reduce the requirement as to the number of States each with not less than one million units of gross tanker tonnage from six to five or four.
- (b) The Working Group considered that the entry into force provisions in the 1984 Protocol to the Fund Convention should be amended so as to reduce the quantity of contributing oil required for the entry into force from 600 million tonnes; most delegations expressed preference for 400 million tonnes.

- (c) In the view of the Working Group, it would not be appropriate to amend the conditions laid down in Article 6.4 of the 1984 Protocol to the Fund Convention for the increase from 135 million SDR to 200 million SDR of the total amount of compensation payable by the IOPC Fund in respect of any one incident, even if the quantity of contributing oil required for the entry into force of the Protocol were to be reduced.
- (d) The majority of the Working Group expressed the opinion that it would not be appropriate to amend Article 31 of the 1984 Protocol to the Fund Convention governing the denunciation of the 1969 Civil Liability Convention and the 1971 Fund Convention by reducing the quantity of contributing oil prescribed therein, even if the quantity of contributing oil required for the entry into force of that Protocol were to be reduced. Some delegations, however, were of the opinion that this question should be given further consideration.
- (e) The Working Group submitted for consideration by the Assembly the question of whether there should be introduced in the Fund Convention a "cap" on contributions payable by oil receivers in any given State; a draft text setting out the provisions necessary for the introduction of such a capping system is contained in paragraph 8.7 of the report of the Working Group.
- (f) The Working Group considered that there was no legal impediment to the replacement of the 1984 Protocols by new protocols to modify the 1969 Civil Liability Convention and the 1971 Fund Convention. Draft texts for new protocols amending the entry into force provisions of the 1984 Protocols, which are set out in Annexes II and III to the report of the Working Group, are submitted to the Assembly for consideration.

Further Studies by the Director

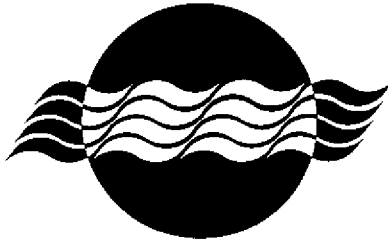
5 The Working Group instructed the Director to study any outstanding treaty law issues and make appropriate proposals to the Assembly at its 14th session. In particular, he should consider the scope of the recommendation referred to in paragraph 9.2(d) of the report. He should also examine any problems which might arise for States which had ratified the 1984 Protocols before they were replaced by the new protocols.

6 The results of the requested studies will be presented to the Assembly in an addendum to this document.

Action to be Taken by the Assembly

- 7 The Assembly is invited to:
- (a) consider the report of the Working Group;
 - (b) make such proposals to the Secretary-General of IMO as it deems appropriate; and
 - (c) take any further action it may consider necessary.

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INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

SIXTH INTERSESSIONAL
WORKING GROUP
Agenda item 3

FUND/WGR.6/12
18 June 1991

Original: ENGLISH

REPORT OF THE SIXTH INTERSESSIONAL WORKING GROUP

1 Introduction

1.1 The sixth Intersessional Working Group, established by the Assembly at its 13th session to consider the future development of the intergovernmental oil pollution liability and compensation system based on the 1969 Civil Liability Convention and the 1971 Fund Convention, held two meetings, the first on 13 and 14 March 1991, and the second on 17 June 1991.

1.2 The meetings were held in private, pursuant to Rule 12 of the Rules of Procedure of the Assembly.

2 Participation

2.1 The following Contracting States were present:

Bahamas	Kuwait ^{<2>}
Canada	Liberia ^{<2>}
Cyprus	Netherlands
Denmark	Nigeria ^{<2>}
Finland	Norway
France	Poland
Germany	Portugal ^{<2>}
Greece	Spain
India ^{<1>}	Sri Lanka ^{<2>}
Indonesia ^{<2>}	Sweden
Italy	Union of Soviet Socialist Republics
Japan	United Kingdom

2.2 The following non-Contracting States were represented as observers:

Belgium	Mexico ^{<2>}
Brazil	Saudi Arabia ^{<2>}
Chile ^{<2>}	United States of America
China	

<1> Only present at the second meeting
<2> Only present at the first meeting

2.3 The International Maritime Organization (IMO) also participated in the Working Group as an observer.

3 Mandate of the Working Group

The mandate of the Working Group, as determined by the Assembly, was as follows (document FUND/A.13/21, paragraph 15.2):

"To consider the future development of the intergovernmental oil pollution liability and compensation system by:

- (a) examining the prospects for the entry into force of the 1984 Protocols to the Civil Liability Convention and the Fund Convention;
- (b) considering whether it would be possible to facilitate the entry into force of the content of the 1984 Protocols possibly by amending their entry into force provisions;
- (c) considering which substantive provisions in the existing Conventions and the 1984 Protocols appear to form the main obstacles to their continued relevance, including an examination of the present contribution scheme."

4 Election of Chairman

At its first meeting, the Working Group elected Mr A H E Popp (Canada) as its Chairman.

5 Documentation examined by the Working Group

The Working Group based its deliberations on a number of documents prepared by the Director, as instructed by the Assembly. These documents were elaborated in consultation with the Secretary-General of IMO. At the invitation of the Assembly, some Member States made submissions on the issues referred to in the mandate of the Working Group. The documents are listed in Annex I to this report.

6 General Statements

6.1 Many delegations expressed their strong support of the system of compensation established by the 1969 Civil Liability Convention and the 1971 Fund Convention, which they considered to be working remarkably well. For this reason, a number of delegations stressed the importance that the 1984 Protocols to these Conventions should enter into force as soon as possible, so as to ensure the viability of this system in the future. These delegations were prepared to examine the best way of facilitating the entry into force of the 1984 Protocols to these Conventions. Several delegations expressed their firm opposition to any amendment of the substantive provisions of the 1984 Protocols but indicated that they were prepared to consider amending their entry into force provisions.

6.2 Two delegations stated that they had considerable problems with the 1984 Protocols in respect of the contribution system (Japan) and the definition of pollution damage (Italy).

7 Prospects for the Entry into Force of the 1984 Protocols to the Civil Liability Convention and the Fund Convention and the Possibility of Facilitating the Entry into Force of these Protocols by Amending the Entry into Force Conditions

Present Situation in respect of Ratification of the Protocols

7.1 It was noted that the 1984 Protocol to the Civil Liability Convention had been ratified by six States (Australia, France, Germany, Peru, Saint Vincent and the Grenadines and South Africa) and the 1984 Protocol to the Fund Convention by two States (France and Germany). In the United Kingdom, Parliament had approved the legislation necessary for the implementation of the Protocols. In a number of other States, ratification procedures were in progress, but these procedures had been suspended in some States in view of the uncertainty as regards the entry into force of the Protocols.

1984 Protocol to the Civil Liability Convention

7.2 The Working Group took note of the entry into force conditions of the 1984 Protocol to the Civil Liability Convention, ie ratification by ten States including six States each with not less than one million units of gross tanker tonnage.

7.3 It was noted that, in accordance with Lloyds Register of Shipping, Statistical Tables, November 1990, at 30 June 1990 the following States had gross tanker tonnage exceeding one million units:

Bahamas	Kuwait
Brazil	Liberia
China	Malta
Cyprus	Norway
Denmark	Panama
France	Singapore
Greece	Spain
India	Union of Soviet Socialist Republics
Islamic Republic of Iran	United Kingdom
Italy	United States of America
Japan	

Only three of these 21 States (namely, United States of America, Islamic Republic of Iran and Malta) were not Parties to the 1969 Civil Liability Convention. It was expected that Malta would soon ratify the 1969 Civil Liability Convention and the 1971 Fund Convention.

7.4 The Working Group considered that the entry into force conditions of the 1984 Protocol to the Civil Liability Convention should be amended by reducing the requirement as to the number of States each with not less than one million units of gross tanker tonnage from six to five or four, in order to ensure a rapid entry into force of this Protocol.

7.5 One delegation expressed the opinion, however, that it would not be necessary to amend the entry into force conditions of the 1984 Protocol to the Civil Liability Convention. In the view of that delegation, such an amendment might, instead of facilitating the entry into force, make States more reluctant to ratify the Protocol and thereby delay its entry into force.

1984 Protocol to the Fund Convention

7.6 It was noted that the 1984 Protocol to the Fund Convention would enter into force after ratification by eight States, provided that the States which have become Parties to the Protocol had, during the preceding calendar year, together received a total quantity of at least 600 million tonnes of contributing oil.

7.7 The Working Group noted the quantities of contributing oil received in IOPC Fund Member States, as set out in the following table. The figures were based on the reports submitted by Governments of Member States in respect of 1990 or, if the 1990 report had not been submitted, in respect of 1989, as indicated:

<u>Member State</u>	<u>Contributing Oil</u> (tonnes)
Japan (1990)	258 092 934
Italy (1989)	133 830 783
Netherlands (1990)	90 202 605
France (1990)	85 595 016
United Kingdom (1990)	76 618 600
Spain (1990)	54 425 927
Canada (1990)	36 616 179
Germany (1990)	22 325 785
Norway (1990)	20 018 986
Sweden (1990)	18 460 909
Greece (1989)	17 893 714
Portugal (1990)	15 027 918
Bahamas (1989)	11 587 630
Finland (1989)	10 868 482
Denmark (1989)	9 721 976
Indonesia (1990)	9 713 606
Union of Soviet Socialist Republics (1990)	9 168 500
Yugoslavia (1990)	9 025 469
Côte d'Ivoire (1989)	3 114 038
Tunisia (1989)	2 611 875
Poland (1990)	2 258 000
Sri Lanka (1989)	1 283 468
Cameroon (1989)	1 226 762
Cyprus (1990)	1 184 020
Ghana (1990)	818 813
Syrian Arab Republic (1989)	421 078
	<u>902 113 073</u>

The remaining Member States had either reported that no contributing oil was received (Fiji, Iceland, Kuwait, Liberia, Maldives, Monaco, Oman, Papua New Guinea, Qatar, Seychelles and Tuvalu) or had not submitted any report in respect of these years (Algeria, Benin, Djibouti, Gabon, India, Nigeria, United Arab Emirates and Vanuatu).

7.8 In addition, the Director reported that contributing oil was received in significant quantities in the following non-Member States which were considering becoming Parties to the 1971 Fund Convention; the figures given below are estimates made by the Director on the basis of available information:

<u>State</u>	<u>Contributing Oil</u> (tonnes)
Brazil (estimate)	60 000 000
Singapore (estimate)	50 000 000
Republic of Korea (estimate)	37 000 000
Australia (estimate)	20 000 000
Malaysia (estimate)	20 000 000
	<u>187 000 000</u>

7.9 It should be noted that, because the United States Congress in August 1990 had adopted legislation which would not enable the United States of America to ratify the 1984 Protocols, the oil receipts in the United States (approximately 460 million tonnes) were not taken into account by the Working Group.

7.10 In a document submitted to the second meeting the Director made an assessment of the possibility of reaching certain quantities of contributing oil. As instructed by the Working Group, he gave examples with regard to individual countries on the basis of information available on their respective positions regarding ratification of the 1984 Protocol to the Fund Convention. The Director presented the following table for consideration by the Working Group:

<u>State</u>	<u>Contributing Oil</u> (tonnes)	
I Ratification Made or Approved by Parliament		
France	85 595 016	
United Kingdom	76 618 600	
Germany	<u>22 325 785</u>	
	<u>184 539 401</u>	184 539 401
II Ratification under Preparation		
Netherlands	90 202 605	
Norway	20 018 986	
Sweden	18 460 909	
Finland	10 868 482	
Denmark	<u>9 721 976</u>	
	<u>149 272 958</u>	149 272 958
III Indicated Support of 1984 Protocol		
Spain	54 425 927	
Canada	<u>36 616 179</u>	
	<u>91 042 106</u>	<u>91 042 106</u>
		<u>424 854 465</u>
IV Indicated Interest In 1984 Protocol		
India (estimate)	20 000 000	
Greece	17 893 714	
Portugal	15 027 918	
Bahamas	11 587 630	
Union of Soviet Socialist Republics	9 168 500	
Australia (estimate)	<u>20 000 000</u>	
	<u>93 677 762</u>	<u>93 677 762</u>
		<u>518 532 227</u>

7.11 The Director did not include Japan and Italy in this table, in view of the problems concerning the 1984 Protocols indicated by the delegations of these States (see paragraph 6.2 above).

7.12 The Working Group was of the view that the second condition for the entry into force of the 1984 Protocol to the Fund Convention, ie that relating to a total quantity of 600 million tonnes of contributing oil, would not be fulfilled within the foreseeable future.

7.13 The Working Group examined three documents submitted by the Director concerning the financial consequences for contributors of a reduction of the quantity of contributing oil required for the entry into force of the 1984 Protocol to the Fund Convention. The Working Group was of the opinion that, since these documents were based on a number of assumptions, it was not possible to draw any firm conclusions from the figures presented therein. However, most delegations considered that nothing in these documents gave rise to any major concerns as to the cost for contributors of a considerable reduction of the entry into force conditions in respect of the quantity of contributing oil received.

7.14 The point was made that, although the maximum amount of compensation payable by the IOPC Fund under the 1984 Protocol to the Fund Convention was higher than that under the 1971 Fund Convention, this did not necessarily mean that there would be a major increase in the amounts of compensation actually paid by the IOPC Fund if the Protocol were to enter into force. This was due to the fact that the total payments by the IOPC Fund depended on several factors, inter alia the number of incidents occurring in Fund Member States and the tonnage of the vessels involved. It was also pointed out that the amounts actually paid by the IOPC Fund over the years were substantially lower than the maximum risk exposure of the Fund.

7.15 Having examined the figures presented by the Director on quantities of contributing oil received, the Working Group was of the opinion that, in order to ensure the entry into force of the contents of the 1984 Protocol to the Fund Convention, it would be necessary to amend the entry into force conditions by reducing the requirement as to the quantity of contributing oil. The majority of delegations which addressed this issue were in favour of a quantity of 400 million tonnes, whereas two delegations preferred 450 million tonnes. It was pointed out that the question as to the quantity required was of such a character that it would in any event be left for the International Conference which might be convened to adopt any new instruments.

7.16 One delegation was of the opinion that no amendment should be made to the entry into force conditions of the 1984 Protocol to the Fund Convention. This delegation stated that its Government would not consider ratifying that Protocol unless the total quantity of contributing oil received in the States Parties had reached at least 600 million tonnes, since otherwise the financial burden on the individual contributors would be too great.

Denunciation of the 1969 Civil Liability Convention and the 1971 Fund Convention

7.17 The Working Group noted the provisions in the 1984 Protocol to the Fund Convention (Article 31) governing denunciation of the 1969 Civil Liability Convention and the 1971 Fund Convention. In order to avoid the co-existence of two versions of the Fund Convention during a long period of time, the States Parties to the 1984 Protocol to the Fund Convention undertake, pursuant to that Article, to denounce the 1969 Civil Liability Convention and the 1971 Fund Convention when (a) at least eight States have become Parties to the 1984 Protocol to the Fund Convention and (b) a total quantity of at least 750 million tonnes of contributing oil has been received during the previous calendar year in the States which have become Parties to that Protocol.

7.18 The majority of delegations were of the opinion that, even if the quantity of contributing oil required for the entry into force were to be reduced, the quantity of contributing oil laid down in Article 31 of the 1984 Protocol to the Fund Convention should not be changed. Some other delegations, however, were of the opinion that this question should be given further consideration.

8 Examination of which Substantive Provisions in the Existing Conventions and the 1984 Protocols Appeared to Form the Main Obstacles to their Continued Relevance, Including an Examination of the Present Contribution System

8.1 The Working Group considered whether certain provisions (other than the entry into force provisions) constituted obstacles to the acceptance of the 1984 Protocols by various States. The Working Group also examined which substantive provisions in the existing Conventions and the 1984 Protocols appeared to form the main obstacles to their continued relevance.

Contribution System

8.2 In view of the problems raised by the Japanese delegation in respect of the contribution system, the Working Group discussed a proposal by that delegation to introduce a system setting a cap on contributions payable by oil receivers in a single Member State.

8.3 The Working Group took note of the following table presented by the Director giving information on the shares of the contributions to the IOPC Fund in respect of Member States.

Percentage of Total Annual Contributions for Certain Years <3>

State	1979 GF	1980 GF	1980 MCF	1985 GF	1990 GF
Algeria	0.07	0.04	0.08	0.04	-
Bahamas	3.91	3.76	4.32	1.53	1.33
Cameroon	-	-	-	0.16	0.14
Canada	-	-	-	-	4.62
Côte d'Ivoire	-	-	-	-	0.35
Cyprus	-	-	-	-	0.12
Denmark	1.47	1.35	1.63	0.89	1.09
Finland	-	-	-	1.45	1.22
France	15.50	15.62	17.12	11.39	9.92
Gabon	-	-	-	0.08	-
Germany	7.51	6.15	10.44	2.86	2.73
Ghana	0.20	0.11	0.22	0.10	0.10
Greece	-	-	-	-	2.01
Indonesia	2.00	1.77	2.21	1.16	1.00
Italy	11.46	17.64	-	14.58	15.01
Japan	40.51	37.52	44.75	32.59	26.90
Liberia	0.03	0.06	0.03	0.00	0.00
Netherlands	-	-	-	9.51	10.44
Norway	0.99	0.90	1.09	1.09	1.72
Papua New Guinea	-	0.00	-	0.03	0.00
Poland	-	-	-	0.00	0.20
Portugal	-	-	-	0.08	1.65
Spain	-	-	-	5.91	6.26
Sri Lanka	-	-	-	0.21	0.14
Sweden	2.71	2.80	3.00	1.97	1.92
Syrian Arab Republic	0.23	0.00	0.26	0.76	0.05
Tunisia	0.19	0.16	0.21	0.29	0.29
Union of Soviet Socialist Republics	-	-	-	-	1.30
United Kingdom	12.12	10.99	13.43	12.00	8.53
Yugoslavia	1.10	1.13	1.21	1.30	0.99
Remaining Member States	0.00	0.00	0.00	0.00	0.00
	100%	100%	100%	100%	100%

8.4 The Japanese delegation emphasised that the Japanese contributors paid a large part of the total contributions to the IOPC Fund. This delegation drew the Working Group's attention to the fact that the Japanese contributors' share of the annual contributions for 1980 (the IOPC Fund's second year of operation) was 44% and that their share represented 27% of the 1990 annual contributions. In the view of this delegation, it would be difficult for the Japanese Government to ratify the 1984 Protocol to the Fund Convention unless guarantees could be given that the Japanese oil industry would not be excessively burdened by a large share of the total contributions levied under the Protocol. A solution could be to revise the contribution system so as to include a cap on the contributions payable in respect of a single Member State. In principle, the Japanese delegation would favour a capping system on a permanent basis. However, in view of the difficulties that such a solution would probably cause to other Member States, the Japanese delegation would be prepared to accept such a cap being introduced as a transitional measure until the aggregate quantity of contributing oil received in all Member States reached a certain level. Without such a capping system, the Japanese Government might lose the possibility of ratifying the 1984 Protocols. The Japanese delegation pointed out that a capping system would only cover the contributions payable under the 1984 Protocol and would not affect the obligation to pay contributions under the 1971 Fund Convention.

<3> GF = General Fund
MCF = Major Claims Fund in respect of an incident which occurred in 1979

8.5 Some delegations stated that, although they did not have any problems with the present contribution system, they were prepared to consider the question raised by the Japanese delegation so as to establish whether there was a solution which would be acceptable both to Japan and to other IOPC Fund Member States. A number of delegations indicated that they were opposed, in principle, to any system setting a cap on contributions payable by oil receivers in a single Member State. The reason for this position was that contributions were not levied on Member States but on individual contributors in these States. These delegations pointed out that the present contribution system was based on the idea that every contributor should pay the same amount per tonne of contributing oil received. They expressed the view that a capping system would introduce an element of discrimination since contributors in Member States benefiting from the capping provisions would pay a lower amount per tonne of contributing oil than oil receivers in other Member States; such a system would therefore distort competition between the industries in various Member States. However, it was generally accepted that the question of such a system was mainly a political one and that the final decision on this issue would have to be taken by the International Conference convened for the purpose of adopting any new instruments.

8.6 As instructed by the Working Group at its first meeting, the Director had elaborated, in consultation with the Japanese delegation, a draft text containing provisions introducing a cap on the contributions payable in respect of oil receivers in a given Member State. This draft was examined by the Working Group at its second meeting. The Working Group was generally of the view that, if a capping system were to be introduced, provisions along the lines set out by the Director would provide a possible solution.

8.7 The Working Group decided to submit the following text for consideration by the Assembly^{<4>}: the provisions could be included in the 1971 Fund Convention as new paragraphs 7 to 9 of Article 12:

7 In the event that the total quantity of contributing oil received in all Contracting States during a given calendar year is less than [750 million] tonnes, the aggregate amount of the annual contributions payable by persons in respect of contributing oil received in a single Contracting State shall not exceed X% of the total amount of annual contributions to the IOPC Fund pursuant to this Protocol in respect of that calendar year.

8 If in respect of a given calendar year during which the quantity of contributing oil received in all Contracting States is less than [750 million] tonnes the application of the provisions in paragraphs 2 and 3 of this Article would result in the aggregate amount of the contributions payable by contributors in a single Contracting State exceeding X% of the total annual contributions, the contributions payable by all contributors in that State shall be reduced pro rata so that their aggregate contributions equal X% of the total annual contributions to the IOPC Fund in respect of that year.

9 If the contributions payable by persons in a given Contracting State shall be reduced pursuant to paragraph 8 of this Article, the contributions payable by persons in all other Contracting States shall be increased pro rata so as to ensure that the total amount of contributions payable by all persons liable to contribute to the IOPC Fund in respect of the calendar year in question will reach the total amount of contributions decided by the Assembly.

8.8 Without prejudice to their general reservations in respect of the introduction of a capping system, several delegations pointed out that it was difficult to assess the financial consequences of such a system in the absence of the figure which in the draft text was represented by the letter X.

8.9 Some delegations stated that the introduction of a capping system was not an alternative to a reduction of the quantity of contributing oil required for the entry into force of the 1984 Protocol to the Fund Convention but a separate issue.

<4> As instructed by the Working Group, the Director has made drafting amendments on certain points raised during the discussions.

Amounts of Limitation of Liability and Related Issues

8.10 The Working Group considered that the provisions on the amounts of limitation in the 1984 Protocols to the Civil Liability Convention and the Fund Convention, as well as on the procedure for updating these amounts, did not constitute an obstacle to ratification.

8.11 The Working Group noted that under the 1984 Protocol to the Fund Convention, the maximum amount of compensation payable by the IOPC Fund in respect of any one incident was 135 million SDR. However, that amount would be increased to 200 million SDR during any period when there were three States Parties to the Protocol in respect of which the combined quantity of contributing oil received by persons in those States during the previous calendar year exceeded 600 million tonnes. Although the Working Group considered that the quantity of contributing oil required for the entry into force of the Protocol should be reduced, the Group was of the opinion that it would not be appropriate to amend the conditions laid down in the Protocol for the increase from 135 million SDR to 200 million SDR of the total amount of compensation payable by the IOPC Fund in respect of any one incident.

Definition of "Pollution Damage"

8.12 It was noted that the definition of the notion of "pollution damage" in Article I.6 of the Civil Liability Convention had been amended in the 1984 Protocol by the addition of a proviso to the effect that compensation for impairment of the environment, other than loss of profit from such impairment, should be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.

8.13 The Italian delegation stated that the amended definition of "pollution damage" in the 1984 Protocol to the Civil Liability Convention caused considerable difficulties for the Italian Government, as the new definition excluded compensation for damage to the environment per se. This delegation informed the Working Group that, under Italian legislation adopted a few years ago, damage to the marine environment per se was compensable, even if the damage could not be quantified in economic terms; if necessary, the amount of compensation had to be established by the court on the basis of equity.

8.14 A number of delegations strongly opposed any amendment to the definition of "pollution damage" in the 1984 Protocol to the Civil Liability Convention. It was emphasised that the new wording constituted a codification of the interpretation of the definition in the 1969 Civil Liability Convention as developed by the IOPC Fund. The Working Group suggested that any further consideration of the matter would have to be based on a concrete proposal by the Italian delegation.

Other Issues

8.15 The Working Group expressed the view that there were no issues other than those referred to above which were of major importance for the purpose of its mandate.

9 Treaty Law Problems Arising out of Amendments to the Entry Into Force Provisions of the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention

9.1 The Working Group noted that certain treaty law problems would arise if the entry into force provisions of the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention were to be amended. These treaty law problems were studied on the basis of a document submitted by the Director (document FUND/WGR.6/10)^{<5>}.

<5> That document had been prepared on the basis of a study carried out, at the Director's request, by Dr T A Mensah, former Assistant Secretary-General and Director of Legal Affairs and External Relations Division, International Maritime Organization.

9.2 Having examined the study presented by the Director, the Working Group drew the following conclusions:

- (a) There was no legal impediment to the "amendment" of the entry into force provisions of the 1984 Protocols to the Civil Liability Convention and the Fund Convention, if it were to be considered that such amendment would facilitate the entry into force of the content of the 1984 Protocols.
- (b) The most practical way of bringing about such "amendment" would be by adopting new protocols to modify the 1969 Civil Liability Convention and the 1971 Fund Convention. The new protocols would incorporate the provisions of the 1984 Protocols, but with different entry into force provisions, along the lines discussed by the Working Group.
- (c) If it were decided to adopt new protocols, these protocols would constitute amending instruments to the 1969 Civil Liability Convention and the 1971 Fund Convention and would replace the 1984 Protocols. States would be expected to ratify or accept only the new protocols.
- (d) It would be important to ensure that the 1984 Protocols were no longer viable. There were no legal means by which States would be prevented from bringing the 1984 Protocols into force. However, the conference adopting the new protocols might find it useful to make a recommendation, possibly in the form of a conference resolution, to the States concerned to take action only in relation to the new protocols, thus ensuring that the 1984 Protocols did not enter into force.
- (e) It was very unlikely that the conditions for the entry into force of the 1984 Protocols would be satisfied following the adoption of new protocols. States which decided to participate in a modernised regime of compensation based on the Civil Liability Convention and Fund Convention would accede to the new protocols. It was hardly conceivable that States which contributed to bringing the new protocols into force would be willing to bring the 1984 Protocols into force also, thus creating a situation in which two conflicting treaty regimes would become operational.
- (f) The procedure for convening a conference to adopt the new protocols, and the rules on participation and voting at the conference, might be the same as those applied in respect of the Conference which adopted the 1984 Protocols. This would involve the convening by IMO, the depositary to the 1969 Civil Liability Convention and the 1971 Fund Convention, of an international conference to which would be invited all States normally invited to attend conferences convened in the United Nations system. Subject to the agreement of the conference, all the participating States would be entitled to vote at that conference. Amendments to the Conventions would be adopted by two-thirds of the States participating in the conference, provided that the two-thirds included also one-half of the votes of the States Parties to the respective Conventions, present and voting.

9.3 The Working Group examined draft instruments in the form of two new protocols prepared by the Director for "amendments" of the requirements for the entry into force of the content of the 1984 Protocols to the Civil Liability Convention and the Fund Convention. The Group generally agreed with the texts proposed by the Director, which are enclosed as Annexes II and III to this report, and decided to submit these texts to the Assembly for consideration.

9.4 The Working Group instructed the Director to study any outstanding treaty law issues and make appropriate proposals to the Assembly at its 14th session. In particular, he should consider the scope of the recommendation referred to in paragraph 9.2(d) above. He should also examine any problems which might arise for States which had ratified the 1984 Protocols before they were replaced by the new protocols.

10 Working Group's Conclusions

The Working Group decided to submit the following conclusions for consideration by the Assembly:

- (a) The Working Group was of the opinion that the entry into force conditions of the 1984 Protocol to the Civil Liability Convention should be amended so as to reduce the requirement as to the number of States each with not less than one million units of gross tanker tonnage from six to five or four.
- (b) The Working Group considered that the entry into force provisions in the 1984 Protocol to the Fund Convention should be amended so as to reduce the quantity of contributing oil required for the entry into force from 600 million tonnes; most delegations expressed preference for 400 million tonnes.
- (c) In the view of the Working Group, it would not be appropriate to amend the conditions laid down in Article 6.4 of the 1984 Protocol to the Fund Convention for the increase from 135 million SDR to 200 million SDR of the total amount of compensation payable by the IOPC Fund in respect of any one incident, even if the quantity of contributing oil required for the entry into force of the Protocol were to be reduced.
- (d) The majority of the Working Group expressed the opinion that it would not be appropriate to amend Article 31 of the 1984 Protocol to the Fund Convention governing the denunciation of the 1969 Civil Liability Convention and the 1971 Fund Convention by reducing the quantity of contributing oil prescribed therein, even if the quantity of contributing oil required for the entry into force of that Protocol were to be reduced. Some delegations, however, were of the opinion that this question should be given further consideration.
- (e) The Working Group submitted for consideration by the Assembly the question of whether there should be introduced in the Fund Convention a "cap" on contributions payable by oil receivers in any given State; a draft text setting out the provisions necessary for the introduction of such a capping system is contained in paragraph 8.7 above.
- (f) The Working Group considered that there was no legal impediment to the replacement of the 1984 Protocols by new protocols to modify the 1969 Civil Liability Convention and the 1971 Fund Convention. Draft texts for new protocols amending the entry into force provisions of the 1984 Protocols, which are set out in Annexes II and III to this report, should be submitted to the Assembly for consideration.

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ANNEX I

**DOCUMENTATION EXAMINED BY THE
SIXTH INTERSESSIONAL WORKING GROUP**

A Documentation Prepared for the First Meeting

- (a) FUND/WGR.6/1 Provisional Annotated Agenda
- (b) FUND/WGR.6/2 Submissions by Governments
FUND/WGR.6/2/Add.1 Idem
- (c) FUND/WGR.6/3 Issues Covered by the Mandate of the Intersessional Working Group
- (d) FUND/WGR.6/4 Financial Consequences of a Modification of the Entry into Force Provisions in the 1984 Protocol to the Fund Convention

B Report of the First Meeting

- FUND/WGR.6/5 Report of the First Meeting of the Sixth Intersessional Working Group

C Documentation Prepared for the Second Meeting

- (a) FUND/WGR.6/6 Provisional Annotated Agenda
- (b) FUND/WGR.6/7 Facilitating the Entry into Force of the Content of the 1984 Protocols to the Civil Liability Convention and the Fund Convention by Amending their Entry into Force Provisions
- (c) FUND/WGR.6/8 Financial Consequences of a Modification of the Entry into Force Provisions of the 1984 Protocol to the Fund Convention
- (d) FUND/WGR.6/9 Further Study of the Financial Consequences of a Modification of the Entry into Force Provisions of the 1984 Protocol to the Fund Convention
- (e) FUND/WGR.6/10 Treaty Law Problems Arising out of Amendments to the Entry into Force Provisions of the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention
- (f) FUND/WGR.6/11 Examination of the Contribution Scheme under the 1971 Fund Convention and the 1984 Protocol thereto

ANNEX II

DRAFT

**PROTOCOL TO THE INTERNATIONAL CONVENTION ON CIVIL LIABILITY
FOR OIL POLLUTION DAMAGE, 1969**

THE PARTIES TO THE PRESENT PROTOCOL,

HAVING CONSIDERED the International Convention on Civil Liability for Oil Pollution Damage, 1969, and the 1984 Protocol thereto,

HAVING NOTED that the 1984 Protocol to that Convention, which provides for improved scope and enhanced compensation, has not entered into force,

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

AWARE OF the need to ensure the entry into force of the content of the 1984 Protocol as soon as possible,

RECOGNISING that special provisions are necessary in connection with the introduction of corresponding amendments to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971,

HAVE AGREED as follows:

Article 1 – Article 11

Identical to the text of Article 1 to Article 11 of the 1984 Protocol to the Civil Liability Convention.^{<1>}

Article 12

Signature, ratification, etc

1 This Protocol shall be open for signature at London from to by all States.

2-6 Identical to the text of Article 12.2 – 12.6 of the 1984 Protocol to the Civil Liability Convention.^{<1>}

<1> The references to "1984" in the 1984 Protocol to the Civil Liability Convention should be replaced by references to "19XX" in Article XII ter, Article 11.2, Article 12.4, Article 13.2, Article 14.1 and 14.2, Article 15.5, Article 16.5 and Article 17.2 (a)(ii) and in the certificate annexed to that Protocol.

Article 13

Entry into Force

1 This Protocol shall enter into force twelve months following the date on which ten States including [four] [five] States each with not less than one million units of gross tanker tonnage have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General of the Organization.

2-4 Identical to the text of Article 13.2 - 13.4 of the 1984 Protocol to the Civil Liability Convention. <2>

Article 14 to Article 18

Identical to the text of Article 14 to Article 18 of the 1984 Protocol to the Civil Liability Convention. <2>

DONE AT LONDON, this day of

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments for that purpose, have signed this Protocol.

* * *

ANNEX III

DRAFT

**PROTOCOL TO THE INTERNATIONAL CONVENTION ON THE ESTABLISHMENT OF AN
INTERNATIONAL FUND FOR COMPENSATION FOR OIL POLLUTION DAMAGE, 1971**

THE PARTIES TO THE PRESENT PROTOCOL,

HAVING CONSIDERED the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 and the 1984 Protocol thereto,

HAVING NOTED that the 1984 Protocol to that Convention, which provides for improved scope and enhanced compensation, has not entered into force,

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

AWARE OF the need to ensure the entry into force of the content of the 1984 Protocol as soon as possible,

RECOGNISING the advantage for the States Parties of arranging for the amended Convention to coexist with and be supplementary to the original Convention for a transitional period,

CONVINCED that the economic consequences of pollution damage resulting from the carriage of oil in bulk at sea by ships should continue to be shared by the shipping industry and by the oil cargo interests,

BEARING IN MIND the adoption of the Protocol of 19XX to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969,

HAVE AGREED as follows:

Article 1 to Article 27

Identical to the text of Article 1 to Article 27 of the 1984 Protocol to the Fund Convention.^{<1>}

Article 28

Signature, ratification, etc

1 This Protocol shall be open for signature at London from to by any State which has signed the 19XX Liability Convention.

<1> The references to "1984" in the 1984 Protocol to the Fund Convention should be replaced by references to "19XX" in Article 2.1, 2.3, 2.4, 2.5 and 2.6, Article 3, Article 6.1, 6.2, 6.3 and 6.5, Article 9.1, Article 10, Article 11.1, Article 36 bis, Article 36 quater, Article 27, Article 28.4, Article 30.2 and 30.6, Article 33.5 and Article 34.4.

2-7 Identical to the text of Article 28.2 – 28.7 of the 1984 Protocol to the Fund Convention. <2>

Article 29

Identical to the text of Article 29 of the 1984 Protocol to the Fund Convention.

Article 30

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 1971 Fund Convention as amended by this Protocol have received during the preceding calendar year a total quantity of at least [500] [450] [400] million tons of contributing oil.

2-6 Identical to the text of Article 30.2 – 30.6 of the 1984 Protocol to the Fund Convention. <2>

Article 31 to Article 39

Identical to the text of Article 31 to Article 39 of the 1984 Protocol to the Fund Convention. <2>

DONE AT LONDON, this day of

IN WITNESS WHEREOF the undersigned being duly authorized for that purpose have signed this Protocol.
