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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

Submissions by Governments

1 At its 13th session, the Assembly decided to set up an Intersessional Working Group to consider the future development of the intergovernmental oil pollution liability and compensation system. Member States were invited to provide the Director with information, by 15 December 1990, on their position in respect of the issues set out in the mandate and to submit any observations which could be of assistance to the Director in preparing documentation for the meeting of the Working Group. The text of the mandate is set out in paragraph 2 of document FUND/WGR.6/3.

2 *Submissions have been received* from the Governments of France, Germany, Greece, Netherlands and Spain. These submissions are reproduced in the Annexes to this document.

Action to be Taken by the Intersessional Working Group

3 The Intersessional Working Group is invited to consider the information contained in the Annexes to this document.

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ANNEX I

Submission by the Government of France

1 France, as a coastal State particularly at risk from marine pollution by oil, has regularly supported initiatives designed to prevent the risk of pollution, to strengthen means of pollution combating and to ensure the most satisfactory possible compensation of claimants.

For this reason, the current delay in the entry into force of the 1984 Protocols is regarded by France as a matter of concern. At the time, there was a consensus in favour of developing the compensation system; today, owing to the non-entry into force of the Protocols, no one can say what future the system has. The problem is not exclusively one of the compensation amounts; the sums paid following the EXXON VALDEZ incident are not a useful point of reference since the claims submitted to the IOPC Fund have not, since the TANIO incident, exceeded the limit of the Fund's liability. It is now appropriate to consider the continuance of a system which was a forerunner of and also instrumental in the creation of a voluntary compensation system.

In the opinion of the Government of the French Republic, an effective compensation system provides the most reliable guarantee that a prompt start will be made on pollution combating, particularly if such action involves international co-operation.

The experience gained over the last twenty years makes clear the substantial improvement brought about by the IOPC Fund in the handling of compensation cases. On the one hand, in the AMOCO CADIZ case, legal proceedings are continuing at the appeals stage more than ten years after the incident, a situation which imposes heavy procedural costs on the victims and on the French State, without any compensation having been paid to this day. On the other hand, in the TANIO case which occurred in 1980, it was possible for the compensation, in which the IOPC Fund shared, to be paid within four years in an amount of some 400 million francs. As regards the AMAZZONE incident, the smallest amounts were paid within 18 months on average and compensation is also likely to be paid shortly to the French State.

In respect of its management as an international organisation, the IOPC Fund gives every satisfaction as regards both the reasonable increase in its operating costs and the efficiency with which cases are handled.

The IOPC Fund is also - and this was one of the ambitions which led to its being set up - an effective instrument in the service of the required solidarity between States in the efforts that are incumbent upon them to combat pollution. On that basis, the outstanding quality of the negotiations between the IOPC Fund, insurers and victims guarantees equitable treatment for victims, whether they are individuals or legal persons, under either private or public law.

2 It is worth recalling at this stage the legal situation in France with regard to the 1984 Protocols. The necessary arrangements have been made in the French legal system for ratification of the 1984 Protocols. Law N°87-272 of 16 April 1987, authorising the approval of a Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969), and Law N°87-273 of 16 April 1987, authorising the approval of a Protocol to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 18 December 1971), have been adopted by Parliament at the request of the Government. On that occasion, French members of Parliament emphasised that the text of the Protocols was no more than a compromise solution to the extent that the amounts of liability remained inadequate. The French Government, however, wished to show its resolve to achieve a concrete solution and gave its support to a text likely to be accepted by a majority of States and thus likely to enter into force within a reasonable period.

3 In the context of the preparation for the meeting of the Working Group, scheduled for March 1991, it appeared necessary to the French Government that financial data of the greatest possible accuracy should be available. The Government therefore wishes the IOPC Fund to carry out a technical study, the findings of which might be attached to the documentation to be distributed to the various participants in the Working Group, in order to provide them with a practical reference on which a discussion could take place. The study would comprise an evaluation of the implications of the entry into force of the 1984 Protocols:

- if all States currently Members of the IOPC Fund (in respect of an amount of contributing oil of 830 million tonnes) were to ratify immediately (assumption 1);

- if only some of the States were to ratify immediately, in respect of a quantity of contributing oil corresponding to 380 million tonnes (assumption 2).

For each of these assumptions, and in the event of an incident in respect of which the "1984 Fund" were to pay compensation in the amount of 135 million SDR after the "1971 Fund" had itself paid 60 million SDR, it would be necessary to seek answers to the following questions: what would be the amount of contributions, per tonne, required from Member States under the 1984 Protocols if the incident were caused by:

- a ship of 25 000 tons
- a ship of 50 000 tons
- a ship of 100 000 tons?

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ANNEX II

Submission by the Government of Germany

The Government of the Federal Republic of Germany, having ratified the 1984 Protocols, strongly holds the view that the Protocols should enter into force as soon as possible. For the German Government such entry into force would be most welcome without any amendments which under German law again would require additional parliamentary procedures. The German Government does not see any need for structural changes of the system established by the 1969 and 1971 Conventions which has proved to be practical and reliable.

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ANNEX III

Submission by the Government of Greece

1 Amending the entry into force provisions is not a desirable procedure. It will not deal with the substantive issues of facilitating entry into force and will be time-consuming, since it will have to result in negotiating a new Protocol, not to mention the future complications of having two different instruments open to ratification and running in parallel. Furthermore, the new Protocol will upset the existing balance of contributions without any assurance that it will attract more ratifications.

2 The prospect of the United States ratifying the present or a new Protocol is, in our view, remote, particularly after the recent United States legislation which not only deals with the amount of compensation but also meets the prerogative of State legislation vis-à-vis Federal legislation.

3 Re-examining the present contribution system includes the risk of re-opening the delicate issue of the cargo/ship contributions, with the certainty that either or probably both parties will be left unsatisfied.

4 While we can see the point of identifying the main obstacles amongst the existing provisions of the Conventions and the Protocols and also exploring means of attracting more support for these instruments, we are concerned about the possibility of adversely affecting an arrangement which is at present functioning properly and which was the result of long and difficult negotiations.

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ANNEX IV

Submission by the Government of the Netherlands

1 The Netherlands Government considers that the 1984 Protocols to the Civil Liability Convention and the Fund Convention should enter into force as soon as possible. By its signature, the Netherlands Government demonstrated its intention to ratify the Protocols. If it becomes clear that the number of States which are prepared to ratify the Protocols makes it likely that the entry into force conditions will be met, bills to approve and implement the Protocols will be submitted to Parliament.

2 If it appears to be unlikely that the Protocols will come into force in view of the requirements for entry into force, the Netherlands is prepared to consider the feasibility of amending the final clauses with a view to facilitating the entry into force of the content of the Protocols.

3 The Netherlands is satisfied about the functioning of the present system of the Conventions and considers that the Protocols provide for better protection of victims without increasing the burden of shipowners or oil receivers in an unacceptable way. Any consideration of suggestions for further improvement of the system should not lead to an undue postponement of an early modernisation of the system of the Conventions as brought about by the Protocols.

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ANNEX V

Submission by the Government of Spain

A Prospects for the Entry into Force of the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention

1 As a consequence of the promulgation in August 1990 of the United States Oil Pollution Act, together with the individual Federal States' regulations on the same matter, it seems clear that this country will never, or at least not for a long time, adopt the 1984 Protocols. This fact will possibly have a significant influence on the decision of other countries that are now considering whether or not to move towards adopting the Protocols either for political or practical reasons.

2 Under a practical approach, it is necessary to assess if both of the 1984 Protocols could come into force without the participation of the US. The entry into force provisions of the 1984 Protocol to the Fund Convention are less stringent than those for the Fund Convention itself (600 million tons versus 750 million, same number of countries), so it would appear sufficient for the entry into force of the 1984 Protocol to the Fund Convention if the present Member States of the Fund Convention would adopt its 1984 Protocol.

3 However, bearing in mind that the 1984 Protocol to the Fund Convention can only be adopted by the Member States that have adopted the 1984 Protocol to the Civil Liability Convention, the entry into force provisions of this Protocol are the ones to primarily consider. These provisions are more demanding than for the parent Convention (ten countries versus eight and six of them with more than one million tons tanker fleet).

4 In September 1990 there were six countries Parties to the 1984 Protocol to the Civil Liability Convention (Australia, France, Germany, Peru, Saint Vincent and the Grenadines, South Africa). It is well known that several other countries have indicated that they are in a more or less advanced process of adoption of the 1984 Protocol to the Civil Liability Convention.

5 It must be noted that, in general, the EEC countries have adhered early to both the 1969 Civil Liability Convention and to the 1971 Fund Convention (10 countries out of 11 are Members of both Conventions) and it is not impossible that Italy, Greece, United Kingdom, Denmark, Netherlands and Spain could adopt both Protocols in a not very distant future.

6 Although it is always possible that the domestic decision of the US regarding pollution matters will delay or discourage the process of adoption in other countries, their final positive reaction cannot be ruled out, since it seems clear that many individual countries and the international maritime community have understood the usefulness and necessity of both of the 1984 Protocols. In summary, it may be thought that the US Oil Pollution Act 1990 makes the entry into force of both of the 1984 Protocols more difficult but not impossible.

B Consideration of Whether it would be Possible to Facilitate the Entry into Force of the 1984 Protocols by Amending their Entry into Force Provisions

7 In view of the comments in A above, Spain would be in favour of adopting more flexible conditions for the entry into force of both of the 1984 Protocols. In particular, the requirement of six countries having more than one million tons of their respective tanker fleet is difficult to meet (only

France meets it), and there is no clear or definite likelihood of six such countries adopting the 1984 Protocol to the Civil Liability Convention in the near future.

8 That figure of six countries with more than one million tonnes could be reduced to five, as is actually required in the 1969 Civil Liability Convention, without major loss in the global consensus, but it would increase noticeably the prospects for the entry into force of both Protocols.

C Consideration of 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

9 There is no doubt that the 1984 Protocols are a substantial improvement compared with their parent Conventions of 1969 and 1971, not only by actualizing the limits of liability but for other elements that these Conventions had not foreseen, ie pollution incident threats, damage outside the territorial sea, the inclusion of unloaded ships and other points. It does not seem that these and other related provisions could be obstacles to the relevance of the Protocols, but the thorough appraisal of the provisions of the Protocols will be an exacting task requiring extensive contributions from the participants in the Intersessional Working Group.