



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND

SIXTH INTERSESSIONAL  
WORKING GROUP  
Agenda item 5

FUND/WGR.6/5  
15 March 1991

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## REPORT OF THE FIRST MEETING OF THE SIXTH INTERSESSIONAL WORKING GROUP

### 1 Introduction

- 1.1 The first meeting of the sixth Intersessional Working Group was held on 13 and 14 March 1991.
- 1.2 The meeting was 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	Liberia
Canada	Netherlands
Cyprus	Nigeria
Denmark	Norway
Finland	Poland
France	Portugal
Germany	Spain
Greece	Sri Lanka
Indonesia	Sweden
Italy	Union of Soviet Socialist Republics
Japan	United Kingdom
Kuwait	

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

Belgium	Mexico
Brazil	Saudi Arabia
Chile	United States of America
China	

- 2.3 The International Maritime Organization also participated in the Working Group as an observer.

### 3 Mandate of the Working Group

The Working Group was set up by the Assembly, at its 13th session, with the following mandate (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 Adoption of the Agenda

The Working Group adopted the Agenda as contained in document FUND/WGR.6/1.

### 5 Election of Chairman

The Working Group elected Mr A H E Popp (Canada) as its Chairman.

### 6 Future Development of the Intergovernmental Oil Pollution Liability and Compensation System based on the 1969 Civil Liability Convention and the 1971 Fund Convention

6.1 The Working Group based its deliberations on the following documentation:

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

#### General Statements

6.2 A number of delegations made general statements on the issues covered by the Working Group's mandate.

6.3 From the general statements it emerged that many delegations strongly supported the system of compensation established by the 1969 Civil Liability Convention and the 1971 Fund Convention, and considered that the system had been 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 stated that they were prepared to examine the best way of facilitating such entry into force. It was pointed out that in 1984 it had been considered appropriate to amend the Conventions on a number of points, and that it was reasonable to believe that these amendments were relevant also today.

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.

6.4 Two delegations (Japan and Italy) stated that they had considerable problems with the 1984 Protocols. In respect of Japan, the contribution system was not acceptable. As for Italy, the definition of pollution damage laid down in the 1984 Protocol to the Civil Liability Convention caused difficulties.

**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***

6.5 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***

6.6 With respect to 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, most delegations were of the opinion that these conditions could be met without major difficulties. However, some delegations expressed concern that the condition relating to six States each with not less than one million units of gross tanker tonnage might not be fulfilled, and they considered that it might be appropriate to amend that condition. At the same time it was recognised that amendments to the entry into force conditions of the 1984 Protocol to the Civil Liability Convention might result in two Protocols to that Convention (that of 1984 and an amended one) coming into force, and it was important to avoid such a situation arising.

6.7 The Working Group concluded that, although it appeared that the entry into force conditions in the 1984 Protocol to the Civil Liability Convention might be fulfilled without major difficulties, it would nevertheless be appropriate to consider whether the entry into force of this Protocol should be facilitated by reducing the number of States each with not less than one million units of gross tanker tonnage.

***1984 Protocol to the Fund Convention***

6.8 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 have, during the preceding calendar year, together received a total quantity of at least 600 million tonnes of contributing oil.

6.9 Having examined the information presented by the Director in the Annex to document FUND/WGR.6/3 (paragraphs 2.3, 2.5 and 2.6), the Working Group concluded 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. A number of delegations stated that for this reason it was necessary to consider a reduction of the quantity of contributing oil required for entry into force from 600 million tonnes to 500, 450 or 400 million tonnes. These delegations declared that their Governments were prepared to consider accepting the increased financial burden on contributors in their country which such a reduction might entail. Several delegations emphasised that the quantity of contributing oil in the entry into force provisions should be fixed at such a level so as to ensure a rapid entry into force of the Protocol.

6.10 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 was discussed on the basis of the information contained in document FUND/WGR.6/4, which dealt with an incident causing pollution damage for a total amount of 135 million Special Drawing Rights (SDR). It was pointed out that this document was based on the "worst case" scenario. Attention was drawn to the fact that, outside the United States of America, no incident had ever caused damage on such a scale as to reach 135 million SDR. It was also mentioned that, although a reduction of the quantity of contributing oil on the basis of which contributions were levied would result in a higher figure of contribution per tonne of contributing oil to cover a given amount of damage, the exposure of the IOPC Fund to claims under the 1984 Protocol would be reduced, since the number of Member States would be lower.

6.11 The point was also 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.

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

6.12 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.

6.13 Some 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 the quantity provided in Article 31 should be reconsidered in the light of any reduction of the quantity required for the entry into force.

#### **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**

6.14 In accordance with its mandate, the Working Group considered whether the entry into force of the content of the 1984 Protocols to the Civil Liability Convention and the Fund Convention might be facilitated by amending certain provisions (other than the entry into force provisions) which, in one way or another, constituted obstacles to the acceptance of the 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, including the present contribution system. The examination was based on the information contained in document FUND/WGR.6/3.

#### ***Contribution System***

6.15 Most delegations stated that they found the present contribution system appropriate and did not consider any amendment necessary.

6.16 The Japanese delegation drew the Working Group's attention to the fact that the Japanese contributors paid a large part of the total contributions to the IOPC Fund; the Japanese contributors' share of the annual contributions for 1980 (ie the IOPC Fund's second year of operation) was 44%, and their share represented 29% of the 1989 annual contributions. In the view of this delegation, the Japanese Government would not be prepared to consider ratification of 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. The Japanese delegation stated that, in order to enable Japan to consider ratification of the 1984 Protocol, the contribution system had to be revised so as to include a cap on the contributions payable in respect of a single Member State.

6.17 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.

6.18 It was pointed out by several delegations that the contribution system contained in the 1971 Fund Convention and in the 1984 Protocol thereto established a regime of mutual co-operation in the fight against pollution and that this fact had been recognised by the 1990 International Conference on International Co-operation on Oil Pollution Preparedness and Response. In their view, the existing contribution system was based on a balance between the various interests concerned. It was also emphasised that a basic feature of the present contribution system was that every contributor should pay the same amount per tonne of contributing oil received. Some delegations mentioned that, if a capping system were to be introduced, this could lead to a situation in which the contributors in one or two States would pay a lower amount per tonne of contributing oil than contributors in other Member States. Several delegations stated that if the contribution system were to be amended, this would create a very complex situation during the period of co-existence of different versions of the Fund Convention.

#### ***Amounts of Limitation of Liability and Related Issues***

6.19 The Working Group considered the information contained in document FUND/WGR.6/3 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.

6.20 The Working Group considered that these provisions in the 1984 Protocols did not constitute any obstacles to ratification.

6.21 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 is 135 million SDR. However, that amount would be increased from 135 million SDR 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 was prepared to consider a reduction of the quantity of contributing oil required for the entry into force of the Protocol, 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"***

6.22 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.

6.23 The Italian delegation stated that this amended version of the definition of "pollution damage" 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 should also be compensated, 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.

6.24 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 pointed out that this definition had been adopted by the 1984 Conference after extensive preparatory work and that it constituted a carefully balanced compromise. It was also 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.

6.25 The Working Group concluded that if the Italian delegation wanted further consideration of this question, that delegation would have to present a concrete proposal for consideration at a later stage.

#### ***Other Issues Dealt with at the 1984 Conference***

6.26 In document FUND/WGR.6/3, the Director had set out a number of other issues that had been dealt with at the 1984 Conference which adopted the Protocols to the Civil Liability Convention and the Fund Convention. The Working Group agreed with the Director that there were no issues other than those discussed by the Group which were of major importance for the purpose of its mandate.

### **7 Further Meeting**

The Working Group decided to hold a second meeting from 17 to 19 June 1991.

### **8 Instructions to the Director**

The Working Group instructed the Director to prepare documentation, in consultation with the Secretary-General of the International Maritime Organization, as a basis for the second meeting of the Working Group, in respect of the following issues:

- (a) Although the majority of delegations were of the opinion that the 1984 Protocol to the Civil Liability Convention would come into force without any amendment to its entry into force provisions, the Director should examine whether there was a risk that the required number of States representing each not less than one million units of gross tanker tonnage might not be reached, in the light of the tonnage figures given in paragraph 1.3 of document FUND/WGR.6/3 and the information available as to the position of individual Member States regarding ratification of the Protocol.
- (b) The Director should examine in detail the prospects for the entry into force of the 1984 Protocol to the Fund Convention if the quantity of contributing oil required for its entry into force were to be reduced to 500, 450 and 400 million tonnes, respectively. His analysis should be based on the figures set out in paragraphs 2.3, 2.5 and 2.6 of document FUND/WGR.6/3. If he considered it appropriate in order to give a clearer picture of the likelihood of the entry into force at these three levels of contributing oil, he should give specific examples with reference to individual countries, on the basis of the information available as to their respective positions regarding ratification of the Protocol.
- (c) The Director should pursue further the study of the financial consequences of a modification of the entry into force provisions in the 1984 Protocol to the Fund Convention. Firstly, the Director should make a study corresponding to that already contained in document

FUND/WGR.6/4, based on the entry into force of the Protocols at the levels of 500, 450 and 400 million tonnes of contributing oil, respectively. He should also, to the extent possible, examine the financial consequences for contributors of the entry into force of the 1984 Protocol, based on the occurrence of incidents in IOPC Fund Member States in the past.

- (d) The Director should examine the treaty law problems that would arise if the entry into force provisions in the 1984 Protocols to the Civil Liability Convention and the Fund Convention were to be amended along the lines discussed by the Working Group.
  - (e) The Director should, if possible, prepare a draft text for amending the entry into force provisions in the 1984 Protocols to the Civil Liability Convention and the Fund Convention along the lines discussed by the Working Group, in the form of appropriate instrument(s).
  - (f) In view of the statement by the Japanese delegation concerning the contribution system, the Director should, in consultation with that delegation, examine the possibility of presenting a draft text introducing a system for capping contributions in respect of the total share of contributions payable by contributors in any one Member State.
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