



ADMISSIBILITY CRITERIA RELATING TO CLAIMS FOR COSTS OF PREVENTIVE MEASURES

Note by the Director

Summary:

As instructed by the Executive Committee the Director has examined the present criteria relating to the admissibility of claims for costs of preventive measures, in particular for the extraction of oil from sunken vessels. In this document he discusses how these criteria could be clarified and/or modified and what would be the likely consequences thereof. Some options in this regard are presented to the Assembly for consideration.

It is suggested that potential environmental damage should be taken into account when considering the reasonableness of preventive measures. It is also suggested that it would be possible to determine specific sub-criteria, to facilitate the consideration of the reasonableness of operations undertaken to extract oil from a sunken vessel and to promote equal treatment.

The document also addresses the issue of whether the admissibility criteria should be widened to include social and/or political considerations.

Action to be taken:

Decide whether to clarify and/or modify the existing criteria relating to the admissibility of claims for the costs of preventive measures, in particular for the extraction of oil from sunken vessels and, if so, to what extent and in which manner.

1 Introduction

- 1.1 At its 32nd session, held in February/March 2006, the Executive Committee considered the admissibility of a claim by the Spanish Government for the costs of the operation to remove the oil from the wreck of the *Prestige*. As regards this operation reference is made to document 92FUND/EXC.32/4/Add.1.
- 1.2 When the Spanish Government's claim was considered by the Executive Committee, many delegations expressed views both on the policy of the Funds as regards the interpretation and application of the present criteria for the admissibility of claims for costs of preventive measures of this kind and on the desirability of changing that policy so as to make it more flexible. The discussions and the decision relating to that claim are set out in paragraphs 3.2.72 – 3.2.81 of the Record of Decisions of that session (document 92FUND/EXC.32/6).

- 1.3 As a result of its consideration of this issue the Executive Committee instructed the Director to carry out an examination of the admissibility criteria relating to claims for costs of preventive measures, in particular for the extraction of oil from sunken vessels, with a view to enabling the 1992 Fund Assembly at its October 2006 session to discuss possible alternatives for the existing criteria for admissibility within the framework of the 1992 Conventions (document 92FUND/EXC.32/6, paragraph 3.2.81).

2 Definition of 'preventive measures'

- 2.1 Under the 1992 Civil Liability Convention, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol the concept of 'pollution damage' includes the costs of preventive measures and further loss or damage caused by preventive measures. 'Pollution damage' is defined as 'loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken'. 'Preventive measures' are defined as 'any reasonable measures taken by any person after an incident has occurred to prevent or minimise pollution damage'. 'Incident' means any occurrence, or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage (Articles I.6, I.7, and I.8 of the Civil Liability Convention, which are incorporated by reference in Article 1.2 of the 1992 Fund Convention and in Article 1.6 of the Supplementary Fund Protocol).
- 2.2 Preventive measures can take various forms, from preventing a spill occurring to minimising pollution damage once a spill has occurred. An example of the former would be the removal of oil from a stranded or sunken vessel before it breaks up and releases its cargo or fuel. Examples of the latter include the collection of oil at sea, application of dispersants, aerial surveillance to determine the extent of an oil spill and to monitor its movement and the deployment of booms across a marina. Clean-up operations can also normally be considered as preventive measures since they are intended to prevent or minimise further damage.
- 2.3 The IOPC Funds' governing bodies have over the years developed criteria for the admissibility of claims for costs of preventive measures. Reference is made to the 2005 2004 session which on this point reads^{<1>}:

Claims for the costs of measures to prevent or minimise pollution damage are assessed on the basis of objective criteria. The fact that a government or other public body decides to take certain measures does not in itself mean that the measures are reasonable for the purpose of compensation under the Conventions. The technical reasonableness is assessed on the basis of the facts available at the time of the decision to take the measures. However, those in charge of the operations should continually reappraise their decisions in the light of developments and technical advice.

Claims for costs of response measures are not accepted when it could have been foreseen that the measures taken would be ineffective, for example if dispersants were used on solid or semi-solid oils or if booms were deployed with no regard to their ineffectiveness in fast flowing waters. On the other hand, the fact that the measures proved to be ineffective is not in itself a reason for rejection of a claim.

<1> This text was based on the criteria for admissibility of claims for cost of preventive measures that were developed in 1994 by the 7th intersessional Working Group of the 1971 Fund, approved by the 1971 Fund Assembly in 1996 and endorsed by the 1992 Fund Assembly in 1996 (1992 Fund Resolution N°3, document 92FUND/A.1/34, Annex III).

The costs incurred, and the relationship between those costs and the benefits derived or expected, should be reasonable. For example, a high degree of cleaning, beyond removal of bulk oil, of exposed rocky shores inaccessible to the public is rarely justified, since natural cleaning by wave action is likely to be more effective. On the other hand, thorough cleaning is usually necessary in the case of a public amenity beach, particularly immediately prior to or during the holiday season. Account is taken of the particular circumstances of an incident.

Costs of reasonable aerial surveillance operations to establish the extent of pollution at sea and on shorelines and to identify resources vulnerable to contamination are accepted. Where several organisations are involved in the response to an incident, aerial surveillance should be properly co-ordinated to avoid duplication of effort.

- 2.4 It should be emphasised that costs of preventive measures qualify for compensation because such measures are taken in order to prevent or minimise 'pollution damage' as defined in the 1992 Conventions and the Supplementary Fund Protocol. This means that the reasonableness of any preventive measure should always be judged in the light of the extent to which the measures could reasonably be expected to prevent or minimise pollution damage as defined in the 1992 Conventions and the Protocol. It would seem, therefore, that on the basis of the present definition other motives for preventive measures cannot be taken into account.

3 The Director's considerations as to possible alternative criteria

General considerations

- 3.1 In order to qualify for compensation preventive measures should be reasonable. As mentioned above, the governing bodies of the Funds have taken the position that the criterion of reasonableness should be an objective one and that the relationship between the costs of the preventive measures and the benefits derived or expected should also be reasonable. As mentioned in paragraph 2.2 above, preventive measures can take various forms. In the Director's view the overarching criterion of reasonableness would have to be the same for all types of preventive measures, i.e. whether the measures taken were objectively reasonable under the circumstances existing at the time they were taken.
- 3.2 When applying the test of reasonableness of preventive measures, an examination should, under the present criteria, be made of the relationship between the costs of the measures and the likely benefits in the form of the expected reduction in loss or damage that would have resulted from those measures. It is, in the Director's view, not possible in the abstract to lay down in figures as to what a reasonable proportionality would be, since this would have to be decided in the light of the particular circumstances of the case. In general however, the Director takes the view that, when the oil remaining in the vessel objectively does not pose a significant pollution threat, very high costs of a removal operation would normally be considered disproportionate to any potential economic effects of leaving the oil in the vessel.

Environmental considerations

- 3.3 The Director also takes the view that when considering whether the criterion of reasonableness is fulfilled, ie whether the costs are admissible, account should also be taken not only of the potential direct economic effects of not taking a particular preventive measure, but also of potential damage to the environment, which may have a direct or indirect economic effect. Where for instance the oil in the sunken vessel would pose a significant risk of causing substantial damage to the marine environment, even very high costs of a removal operation would normally, in the Director's view, not be considered disproportionate in relation to the potential environmental consequences of leaving the oil in the vessel.

- 3.4 In order to establish whether and, if so, to what extent the potential for environmental damage should be taken into account for the consideration of whether the costs of preventive measures are admissible for compensation, ie are reasonable, it is in the Director's view necessary to interpret the definitions of 'pollution damage' and 'preventive measures'.
- 3.5 Although the definition of 'pollution damage' limits compensation for impairment of the environment to losses of an economic nature and costs of reinstatement, in the Director's view practically all preventive measures taken to prevent environmental damage should be admissible in principle for compensation, since they would also have a direct or indirect economic benefit. Thus, the prevention of oil impacting marine or coastal habitats would avoid the need for clean-up, post-spill impact studies and possible reinstatement measures. Similarly, the prevention of contamination of birds, although of no direct economic value, would avoid the need to catch, clean and rehabilitate them or collect and dispose of oiled corpses.
- 3.6 The Director recognises that weighing economic and non-economic factors together when considering the reasonableness of preventive measures may not be easy in practice. He believes nevertheless that it would be feasible.
- 3.7 The Director considers that, if the Assembly were to agree with the interpretation proposed by the Director in paragraph 3.5, the Assembly may wish to consider whether a clarification of the Claims Manual in this respect would be required and, if so, invite the Director to develop a draft text for that purpose.
- 3.8 The Director's position set out above is in line with the position taken by the governing bodies in respect of the reasonableness of costs of reinstatement measures as set out in the Claims Manual (page 31), where it is stated that the measures of reinstatement of the environment should not be out of proportion to the extent and duration of the damage and the benefits likely to be achieved.

Possible development of sub-criteria

- 3.9 It would be possible to determine specific sub-criteria to facilitate the consideration of the admissibility in terms of reasonableness for certain types of preventive measures. Such specific sub-criteria have been developed for the consideration of the reasonableness of measures taken to prevent or mitigate pure economic loss (pages 29-30 of the Claims Manual), and they have been applied by the governing bodies for many years. A similar example is the sub-criteria which have been developed by the governing bodies to determine whether there is a sufficiently close link of causation between the contamination and pure economic loss allegedly suffered as a result of the contamination (pages 25-26 and 28 of the Claims Manual). It could be explored whether a similar set of sub-criteria could be developed to facilitate the consideration of the reasonableness of measures aimed at the extraction of oil from sunken vessels.
- 3.10 Elements to be taken into account when considering the objective reasonableness and therefore the admissibility of the costs of measures to extract oil from a sunken vessel could include:
- The extent to which the shoreline which is most likely to be affected by a release of the oil from the vessel is vulnerable to oil pollution, and the economic damage which is likely to occur if the remainder of the oil were to be released from the vessel;
 - The likely damage to the environment from a release of the oil from the vessel, including the potential costs of post-spill studies and measures of reinstatement;

- The likelihood that oil will be released from the vessel within the foreseeable future and will reach the shore or other natural or economic resources, the quantity, type and characteristics of the oil which could be released and the likely rate at which a release might take place;
- The extent to which alternative methods of containing the oil on board the vessel for an indefinite period, or of rendering the remaining oil harmless, are possible and adequate;
- The likely cost of the extraction operation and the likelihood that the operation would be successful, taking into account the location of the vessel and its condition, the type of the oil and the characteristics of the area where the ship is located and other relevant circumstances;
- The likelihood that significant quantities of oil would be released during the extraction operation and the likely amount of damage that would be caused as a result of such a release.

3.11 It is submitted that such sub-criteria would primarily be useful in cases where various elements point in different directions. By testing the case under consideration against other cases on the basis of these sub-criteria a clearer picture would emerge as to the merits of the case under consideration in relation to the previous decisions by the governing bodies in similar cases. The Funds' governing bodies already follow such an approach when determining whether there is a sufficiently close link of causation between the contamination and pure economic loss, or whether measures to prevent or mitigate pure economic loss are reasonable in the circumstances. The overarching criterion should in the Director's view remain the objective reasonableness of the extraction operation as a whole, but the sub-criteria would be taken into account to enhance the quality of the decision, as well as to facilitate equal treatment of claims of this kind over time.

3.12 It should be noted that under the present text of the Claims Manual, certain parts of an operation to prepare for and carry out extraction of oil from a sunken oil tanker could be considered reasonable whereas other parts could be considered not reasonable. For example costs incurred to establish whether oil removal should take place could fulfil the criterion of reasonableness, whereas in the light of the information gained from the studies the extraction of the oil from the wreck could be considered as not fulfilling this criterion. In some cases certain elements of a particular operation could be considered as fulfilling the criteria, which other measures taken in parallel would be considered not to.

Social and political considerations

3.13 A further question to be considered is whether, when determining whether the costs of certain preventive measures fulfil the criterion of reasonableness, other factors should be taken into account, such as social or even political factors.

3.14 It is recognised that Governments sometimes consider it necessary to take certain measures in relation to an oil spill for reasons linked to certain circumstances which are specific for the Member State affected by the incident, for example to prevent social unrest or to avoid a crisis for the sitting Government or a bad result in upcoming elections, even when such measures are not well-founded from a technical and scientific point of view. Governments may also take social aspects into account, eg fears in the local population of the risk of further pollution which are not objectively justified. It is for Governments to decide what measures they want to take in the case of oil pollution incidents. A different question however is whether the costs of the measures taken qualify for compensation under the 1992 Conventions and the Supplementary Fund Protocol.

- 3.15 The current admissibility criteria state, *inter alia*, that the fact that a government or other public body decides to take certain measures does not of itself mean that the measures are reasonable for the purpose of compensation under the Conventions and the Protocol. The Director notes that it is rare for claims by government authorities for costs of preventive measures to be admitted for the full amount claimed. The reason for this in many cases is that one or more elements of the response are undertaken, not for objective reasons, but in response to, or anticipating, political pressure or reactions in the media. The Director is of the view that if such considerations were to be taken into account when deciding whether a claim is admissible for compensation, this would in practice require that all, or nearly all, measures taken by a government or public body would have to be regarded as reasonable under the Conventions and the Protocol. Such a widening of the criteria could in some cases result in the total amount of the admissible claims exceeding the amount of compensation available under the 1992 Conventions (and, as regards State parties to the Supplementary Fund Protocol, also under that Protocol) and other claimants therefore not being compensated in full.
- 3.16 The successful removal of the oil from the wreck of the *Prestige* has demonstrated that it is now technically feasible to remove oil from sunken vessels at practically any depth and any distance offshore. The question could arise in the future as to whether a claim for the costs of removing oil from a sunken vessel in the middle of the Atlantic Ocean should be considered admissible under the Conventions and the Protocol. Whilst such a claim would almost certainly be rejected on the basis of the Funds' current admissibility criteria, it might be difficult to reject it on the basis of such wider considerations as described in paragraph 3.14.
- 3.17 The Director is of the view that it would be very difficult to arrive at a consensus within the governing bodies if the admissibility criteria were widened to take into account considerations linked to certain social or political circumstances which are specific for the Member State involved. This could lead to severe disagreements between Member States, since the concept of reciprocity underlying the 1992 Conventions and the Supplementary Fund Protocol would not apply in such cases. The Director therefore does not recommend a widening of the criteria to include such considerations.
- 3.18 In general it is the Director's view that, if the Assembly were to decide to take considerations of a social and/or political nature into account when deciding on the admissibility of a claim for the costs of an extraction operation, it would, in the interest of ensuring the uniform application of the Conventions, also be necessary to take such considerations into account to the same extent in respect of claims for other types of preventive measures, such as clean-up. The same would apply in respect of claims for other types of damage where such considerations of a non-objective nature may play a role, such as claims for loss of earnings resulting from fishing bans, claims for costs of post-spill studies and claims for costs of reinstatement measures. The Director also considers that, if the Assembly were to decide to take social and/or political considerations into account for future cases, it would be necessary to add adequate sub-criteria to the list reflected in paragraph 3.10 and to develop an appropriate text to be inserted in the Claims Manual.

4 Action to be taken by the Assembly

The Assembly is invited:

- (a) to consider the information contained in this document;
- (b) to decide whether when considering the reasonableness of preventive measures account should be taken of the potential environmental damage which could be caused if the measures were not taken and to decide whether to amend the Claims Manual accordingly (paragraphs 3.3-3.8);

- (c) to consider whether to adopt specific sub-criteria for claims for costs of removing oil from sunken vessels, and if so, to consider developing a text to this effect to be included in the Claims Manual (paragraphs 3.9-3.12);
 - (d) to decide whether to widen the Funds' admissibility criteria relating to claims for costs of preventive measures so as to include social and/or political considerations, and if so, to consider developing a text to this effect to be included in the Claims Manual (paragraphs 3.13-3.18); and
 - (e) to consider any other issues dealt with in this document.
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