



ADMISSIBILITY CRITERIA RELATING TO CLAIMS FOR COSTS OF THE REMOVAL OF OIL FROM SUNKEN SHIPS

Note by the Director

Summary:

As instructed by the Assembly at its 11th session, the Director has developed, in consultation with the delegations of France and Spain, a set of sub-criteria relating to the admissibility of claims for costs of preventive measures, in particular for the removal of oil from sunken ships, based on the sub-criteria reflected in documents 92FUND/A.11/24 by the Director and 92FUND/A.11/24/1 by France and Spain, and taking into account the views expressed by the Assembly at that session.

These sub-criteria are intended to facilitate the consideration of the overall reasonableness of operations undertaken to remove the remaining persistent oil from a sunken ship and to promote the equal treatment of claims for the costs of such operations. A draft text for insertion in the Claims Manual, reflecting these sub-criteria, has been developed and is submitted for consideration and approval by the Assembly. The draft text also aims to incorporate in the Claims Manual the decision of the Assembly that potential environmental damage should be taken into account when considering the reasonableness of such preventive measures.

Action to be taken:

Consider whether to approve the proposed sub-criteria and the draft text for insertion in the Claims Manual.

1 Introduction

At its 11th session, held in October 2006, the Assembly considered document 92FUND/A.11/24 by the Director. This document set out the results of the examination of the criteria relating to the admissibility of claims for costs of preventive measures, in particular for the removal of any persistent oil remaining on board sunken ships, carried out by the Director as instructed by the Executive Committee at its 32nd session, held in February/March 2006. The Assembly also considered document 92FUND/A.11/24/1 by France and Spain. This document aimed at contributing to the review of the criteria relating to the admissibility of such claims.

2 The present situation: definition of 'preventive measures'

2.1 Under the 1992 Civil Liability Convention, the 1992 Fund Convention and the 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 respectively of the 1992 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 As reflected in the Claims Manual, 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 ship before it breaks up and releases its cargo or bunkers. 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 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.
- 2.4 The IOPC Funds' governing bodies have over the years developed criteria for the admissibility of claims for costs of preventive measures. The April 2005 version of the Claims Manual, which was adopted by the 1992 Fund Assembly at its October 2004 session, reflects the present situation and 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.

<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).

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.

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.'

3 Consideration and decisions made by the Assembly at its 11th session

- 3.1 At its 11th session, held in October 2006, the Assembly considered document 92FUND/A.11/24 by the Director. This document set out the results of the examination of the criteria relating to the admissibility of claims for costs of preventive measures, in particular for the removal of any persistent oil remaining on board sunken ships, carried out by the Director as instructed by the Executive Committee at its 32nd session, held in February/March 2006. The Assembly also considered document 92FUND/A.11/24/1 by France and Spain, aimed at contributing to the review of the criteria relating to the admissibility of claims for costs of such measures.
- 3.2 The Assembly considered that in order to qualify for compensation, preventive measures had to be reasonable and that the governing bodies of the Funds had consistently 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. The Assembly also considered that the overarching criterion for admissibility would have to be the same for all types of preventive measures, ie whether the measures taken were objectively reasonable under the circumstances existing at the time they were taken.
- 3.3 The Assembly also considered that when applying the test of reasonableness of preventive measures, an examination should 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 was further considered that it was not possible in the abstract to lay down in figures as to what a reasonable proportionality would be, since this would ultimately have to be decided in the light of the particular circumstances of the case.
- 3.4 The Assembly decided that when considering the reasonableness of preventive measures, account should be taken not only of the potential direct economic effects of not taking a particular preventive measure, but also of the potential environmental damage which could be caused if the measures were not taken, since practically all preventive measures taken to prevent environmental damage would also have a direct or indirect economic benefit. The Assembly also decided that a clarification of the Claims Manual in this respect was required and invited the Director to develop a draft text for that purpose.
- 3.5 The Assembly considered that it would be useful to determine specific sub-criteria to facilitate the consideration of the admissibility in terms of reasonableness of measures aimed at the removal of oil from sunken ships. It was noted that such sub-criteria had already been developed and applied by the Fund's governing bodies in the past for the purpose of considering the reasonableness of measures taken to prevent or mitigate pure economic loss (cf pages 29-30 of the Claims Manual), and for determining whether there was

a sufficiently close link of causation between the contamination and pure economic loss allegedly suffered as a result of the contamination (cf pages 25-26 and 28 of the Claims Manual).

3.6 The Assembly also considered the following sub-criteria suggested by the Director to be taken into account when considering the admissibility of costs of measures to remove oil from a sunken ship:

- (a) The extent to which the shoreline which is most likely to be affected by a release of the oil from the sunken ship 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 ship;
- (b) The likely damage to the environment from a release of the oil from the ship, including the potential costs of post-spill studies and measures of reinstatement;
- (c) The likelihood that oil will be released from the ship 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;
- (d) The extent to which alternative methods of containing the oil on board the ship for an indefinite period, or of rendering the remaining oil harmless, are possible and adequate;
- (e) The likely cost of the removal operation and the likelihood that the operation would be successful, taking into account the location of the ship and its condition, the type of the oil and the characteristics of the area where the ship is located and other relevant circumstances;
- (f) The likelihood that significant quantities of oil would be released during the removal operation and the likely amount of damage that would be caused as a result of such a release.

3.7 The Assembly further considered the following sub-criteria suggested by the delegations of France and Spain to be taken into account when considering the admissibility of costs of measures to remove the remaining oil from a sunken ship:

- (a) Risks associated with the situation of the sunken ship: it will be necessary to take into account all the risks associated with the situation of the sunken ship, such as the instability of the sea bed (a factor which may give rise to a structural collapse of the sunken ship, resulting in a release of the remaining oil) and the proximity of areas vulnerable to oil pollution from different points of view (economic, environmental, etc.).
- (b) Risks associated with the volume of oil contained in the sunken ship: the volume of oil remaining in the ship, measured with the maximum precision possible, must be considerable and capable of producing considerable pollution damage if the ship collapses.
- (c) Technical viability of the operation: the viability of the removal operation must be assured on the basis that the sunken ship is within a range of depths where work is possible with sufficient guarantees of success.
- (d) The cost of the operation must be reasonable taking into account the cost per unit of product recovered, which must be within the limits for past operations.

- 3.8 The Assembly decided that the Fund should adopt specific sub-criteria for claims for costs of removing oil from sunken ships and instructed the Director to develop, in consultation with France and Spain, appropriate text to this effect to be included in the Claims Manual, amalgamating the sub-criteria proposed by him with those proposed by the French and Spanish delegations.
- 3.9 A number of delegations and the Director considered however that the criterion proposed by the French and Spanish delegations, which took into account the cost per unit of oil recovered compared with the unit cost from past oil removal operations, was not appropriate, since this represented too narrow a view and could preclude operations with a high cost per unit of oil recovered, which could be justified on other grounds, for example if a sunken ship was located close to a very sensitive area which needed a high degree of protection from pollution. In the view of these delegations and the Director, the relevant criterion was the overall cost of removing the oil from a sunken ship in relation to the potential total pollution damage eventually resulting from leaving the oil in that ship.
- 4 The Director's considerations as to an appropriate set of sub-criteria: draft text for inclusion in the Claims Manual**
- 4.1 Firstly, it should be kept in mind that the sub-criteria will primarily be useful in cases where various aspects of the case point in different directions. By testing the case under consideration against other cases on the basis of these sub-criteria, a clearer picture will emerge as to the merits of the case under consideration in relation to the decisions taken by the governing bodies in previous, similar cases. The Funds' governing bodies have already been following such an approach for many years when determining whether there was a sufficiently close link of causation between the contamination and pure economic loss (cf Claims Manual, pages 29-30), and whether measures to prevent or mitigate pure economic loss were reasonable in the circumstances (cf. Claims Manual, pages 25-26 and 28). Although clearly the overarching criterion remains the objective reasonableness of the removal operation as a whole, the sub-criteria will be taken into account and play a useful role to enhance the quality of the decision, as well as to promote and facilitate equal treatment of claims of this kind over time.
- 4.2 It should also be noted that under the present text of the Claims Manual, certain parts of an operation to prepare for and carry out the removal of oil from a sunken ship could be considered reasonable whereas other parts could be considered not reasonable. For example costs incurred for studies to establish whether oil removal should take place could fulfil the criterion of reasonableness, whereas in the light of the information gained from such studies the removal of the oil from the sunken ship could be considered as not fulfilling this criterion. In some cases certain elements of a particular operation could be considered as fulfilling the criteria, whereas other measures taken in parallel would be considered not to. The text proposed by the Director for inclusion in the Claims Manual does not intend to bring about any change in this respect.
- 4.3 In consultation with the delegations of France and Spain, the Director has developed a set of sub-criteria which he considers to be appropriate. This set of sub-criteria intends, in accordance with the instruction of the Assembly, to amalgamate the sets of sub-criteria proposed by the Director in document 92FUND/A.11/24 and by the delegations of France and Spain in document 92FUND/A.11/24/1, also taking into account the views expressed by the Assembly at its 11th session, held in October 2006.
- 4.4 Given the situation set out in paragraph 3.9, the delegations of France and Spain, although not necessarily agreeing with the Director and a number of delegations on this point, have agreed in the interest of consensus not to pursue the element of 'cost per tonne recovered' and have accepted the set of sub-criteria developed by the Director, set out in the annex. This text

should be inserted in the Fund's Claims Manual on page 22 of the April 2005 version, immediately after the text quoted in paragraph 2.4 of this document.

- 4.5 The sub-criteria also intend to incorporate the decision by the Assembly to reflect in the Claims Manual that, when considering the reasonableness of preventive measures, account should be taken not only of the potential direct economic effects of not taking a particular preventive measure, but also of the potential environmental damage which could be caused if the measures were not taken, since practically all preventive measures taken to prevent environmental damage would also have a direct or indirect economic benefit.

5 Action to be taken by the Assembly

The Assembly is invited:

- (a) to consider the information contained in this document;
- (b) to consider whether to adopt the sub-criteria for claims for costs of removing the remaining oil from sunken ships, as developed by the Director in consultation with the delegations of France and Spain and taking into account the views expressed by the Assembly at its 11th session, and if so, to adopt the draft text to this effect (see annex) to be included in the Claims Manual; and
- (c) to consider any other issues dealt with in this document and give the Director such instructions as it may deem appropriate.

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ANNEX

Draft text for inclusion in the 1992 Fund Claims Manual

'Claims for the cost of measures to remove any remaining persistent oil from a sunken ship are also subject to the overall criterion of reasonableness from an objective point of view, which applies equally to all preventive measures. In order for the costs of such measures to be admissible, the measures should therefore have been reasonable from an objective point of view at the time they were taken, as set out in the previous paragraphs, and the relationship between the costs and the benefits derived or reasonably to be expected at the time the measures were taken should be reasonable as well. If it is possible to measure, with a degree of accuracy, at reasonable cost and with minimal risk of causing further pollution, the quantity of oil remaining on board a sunken ship, this should normally be the first step before deciding whether or not to remove the oil.

Whether measures to remove any remaining oil from a sunken ship were reasonable, is determined on a case by case basis, taking into account the following factors, as appropriate:

A. Factors relating to the situation and condition of the sunken ship, such as:

- The likelihood of the release of the remaining oil from the ship, for example because of damage to its structure, corrosion, etc.;
- The quantity, type and characteristics of the oil remaining on board the ship;
- The stability of the seabed at the location of the ship.

B. Factors relating to the likelihood, nature and extent of the possible damage, such as:

- The likely pollution damage which would have resulted from the release of the remaining oil from the ship, especially in relation to the cost of the removal operation;
- The extent to which areas which were most likely to be affected by a release of the remaining oil from the ship were vulnerable to oil pollution damage, either from an economic or an environmental point of view;
- The likely environmental damage which would have resulted from the release of the remaining oil from the ship.

C. Factors relating to the feasibility of the operation, such as:

- The technical feasibility and likelihood of success of the operation, for example taking into account visibility, currents, the presence of other wrecks in the vicinity and whether the ship was at a depth at which operations of the kind envisaged were likely to be carried out successfully;
- The likelihood of a release of a significant quantity of oil from the ship during the removal operation.

D. The cost of the operations, especially in relation to the likely pollution damage which would have resulted from the release of the remaining oil from the ship.'