



INTERNATIONAL
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COMPENSATION
FUNDS

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1992 Fund Assembly	92AES20	•
1992 Fund Executive Committee	92EC66	
Supplementary Fund Assembly	SA12	•

PROPOSED TEXT FOR THE CLAIMS MANUAL IN RESPECT OF COMPENSATION FOR CLAIMS FOR VAT BY CENTRAL GOVERNMENTS

Note by the Secretariat

Summary:	<p>At the October 2015 sessions of the governing bodies, the 1992 Fund Administrative Council discussed document IOPC/OCT15/4/4 submitted by the Secretariat and document IOPC/OCT15/4/4/1 submitted by the delegation of France which examined the current policy of the IOPC Funds in respect of claims for compensation of Value Added Tax (VAT) from central governments.</p> <p>Following a debate on the issue, the 1992 Fund Administrative Council and Supplementary Fund Assembly decided that the IOPC Funds may pay compensation for claims for VAT by central governments if a State's national law allowed for the inclusion of VAT in the State's claim for compensation, and use criteria based on the principles of the law of damages (as contained in document IOPC/OCT15/4/4) to be applied in cases where the national law was not clear.</p> <p>The governing bodies instructed the Director to present a new text for the Claims Manual reflecting the above decision in respect of compensation for VAT by central governments for consideration at the April 2016 sessions of the governing bodies.</p> <p>This document provides a new text for the IOPC Funds' Claims Manual.</p>
Action to be taken:	<p><u>1992 Fund Assembly and Supplementary Fund Assembly</u></p> <ul style="list-style-type: none">(a) Take note of the information contained in this document; and(b) Approve the proposed new text for insertion into the Claims Manual as set out in section 2 of this document.

1 **Introduction**

- 1.1 At the October 2013 session of the 1992 Fund Administrative Council, the French Government submitted a document on the issue of whether Value Added Tax (VAT) should be excluded from compensation where claims are made by central governments (document [IOPC/OCT13/4/7](#)). The Secretariat also submitted a document, containing a preliminary legal opinion by Professor Alain Bénabent on the French civil law position, specifically whether, when the French State suffered a loss for which it could claim compensation, the calculation of the corresponding compensation should include VAT, or to the contrary, should exclude VAT (document [IOPC/OCT13/4/7/1](#)).
- 1.2 Following a debate on the issue, the 1992 Fund Administrative Council decided that given its complexity, the recoverability of VAT by central governments claiming from the IOPC Funds should be studied further. The Director was therefore instructed to examine the matter further and to report back during the October 2014 sessions.

Developments in 2014

- 1.3 The Director sought the legal opinions of lawyers from a wide cross-section of Member States and, at the October 2014 sessions of the governing bodies, submitted document [IOPC/OCT14/4/5](#) containing those legal opinions. Member States were invited to comment on the issue of compensation for claims for VAT by central governments, and to give further thought to adopting a test, such as the modified ‘Foster Test’ as proposed by Mr Harry Wright^{<1>}, in order to determine answers to the question of whether a payment of VAT qualified as a loss for which the IOPC Funds should pay compensation.
- 1.4 The 1992 Fund Assembly took note of the document submitted and the delegations’ views that obtaining a common approach might be difficult. It also noted that further time was required to discuss this difficult issue.

Developments in 2015

- 1.5 At the October 2015 session of the 1992 Fund Administrative Council, document [IOPC/OCT15/4/4](#) was presented by the Secretariat and document [IOPC/OCT15/4/4/1](#) was presented by the French delegation.

Document [IOPC/OCT15/4/4](#) submitted by the Secretariat

- 1.6 In the document submitted by the Secretariat, the current policy of the IOPC Funds in respect of compensation claims for VAT from central governments was summarised. It was submitted that the policy taken by the IOPC Funds over the years in the matter of VAT was that compensation for VAT was paid to all victims who have been required by national law to pay these sums in respect of the purchase of equipment or the procurement of services and who cannot recover it as part of their normal business. This includes private individuals, companies, or local and regional authorities as long as they are separate legal entities from the State.
- 1.7 It was also submitted that in this regard, although a central government may be made up of several ministries or departments, all of them were branches of a single legal entity. Furthermore, normally any VAT paid by a government department would be paid to that government’s Ministry of Finance and if the IOPC Funds were to pay the government as part of compensation of their department’s claim, the central government would have, in effect, received the same VAT twice, which would be double recovery.

Document [IOPC/OCT15/4/4/1](#) submitted by the French delegation

- 1.8 In the document submitted by the French delegation, it was explained that in the case of a major spill, it was up to the affected State to clean its coasts using its own resources or by engaging private contractors in the transport and treatment of waste. The State, like any victim of damage, must pay for the services provided by private contractors, including all taxes.
- 1.9 It was submitted that the non-reimbursement of VAT paid to private contractors for the supply of services and goods necessary for clean-up operations was an undue burden, which caused financial loss to the affected State. If the State decided not to intervene but gave formal notice to the shipowner to clean up the coasts, that shipowner would then hire private contractors which it would pay for the services provided, including VAT. That VAT would then be paid to the affected State in the form of tax revenues.

<1> A practising barrister of 7 King’s Bench Walk Chambers, London, who was asked to provide a legal opinion to answer the primary question of whether, as a matter of English law, VAT paid by governments in response to an oil pollution incident, should be reimbursed by the IOPC Funds. Mr Harry Wright also considered the position under Australian, Canadian, Indian, New Zealand, Singaporean and South African law.

- 1.10 That delegation therefore invited the 1992 Fund Assembly and Supplementary Fund Assembly to decide that the IOPC Funds may compensate an affected State including VAT if that State's national law allowed for the inclusion of VAT in the State's claim for compensation.

Consideration by the 1992 Fund Administrative Council in October 2015

- 1.11 In the debate which followed the presentation of the two documents at the October 2015 sessions, one delegation stated that in its view, VAT should be treated in the same manner as all other claims, and that only if a State could prove that it had not received VAT because an intermediary had not passed it back to the State, should that State be able to recover the VAT from the 1992 Fund.
- 1.12 Another delegation speaking in support of both the French delegation's proposal and the Director's proposal, stated that in circumstances where the national law did not provide clarity regarding how VAT was to be treated, often the national law itself contained instruments to clarify the matter, and that only if no solution could be found using those instruments should a modified Foster test be used.
- 1.13 A significant number of delegations spoke in support of the proposal to include amended text in a revised Claims Manual, noting that it was important that Member States' national law and the principles of the law of damages were respected. One of the delegations stated that in its view, domestic tax arrangements were beyond the remit of the IOPC Funds' governing bodies, and that it broadly agreed that if the national law permitted recovery of VAT, then the IOPC Funds should pay it to the affected State.

1992 Fund Administrative Council and Supplementary Fund Assembly decision in October 2015

- 1.14 In October 2015, the 1992 Fund Administrative Council and Supplementary Fund Assembly decided that the IOPC Funds may pay compensation for claims for VAT by central governments if a State's national law allowed for the inclusion of VAT in the State's claim for compensation, and use criteria based on the principles of the law of damages (as contained in document [IOPC/OCT15/4/4](#)) to be applied in cases where the national law was not clear.
- 1.15 The 1992 Fund Administrative Council and Supplementary Fund Assembly also instructed the Director to present a new text for the Claims Manual reflecting the above decision in respect of compensation for VAT by central governments for consideration at the April 2016 sessions of the governing bodies.

2 Proposed new text for the Claims Manual

The suggested amendment to the Claims Manual could be made in section 3.1 by introducing new paragraphs 3.1.20, 3.1.21 and 3.1.22 under the new sub-heading 'Claims for VAT by central governments':

Claims for VAT by central governments

- 3.1.20 The central government of an affected State may incur significant costs following an oil spill, *inter alia*, by using its own resources to undertake the clean-up and counter-pollution operations, or by engaging private contractors specialising in the collection, transport and treatment of waste.
- 3.1.21 The central government of a Member State which incurs VAT in connection with the prevention of oil pollution operations may recover VAT, if its national law allows for its inclusion in the claim for compensation.
- 3.1.22 In cases where it is not clear whether national law allows for the inclusion of VAT in the claim for compensation, the claim will be assessed applying the rules of the law of damages, namely that:
- (1) a party may not recover damages where it has suffered no loss; and
 - (2) a party may not be entitled to a double recovery of damages.

3 Action to be taken

1992 Fund Assembly and Supplementary Fund Assembly

The 1992 Fund Assembly and the Supplementary Fund Assembly are invited to:

- (a) take note of the information contained in this document; and
 - (b) approve the proposed new text for insertion into the Claims Manual as set out in section 2 of the document.
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