



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUNDS

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COMPENSATION FOR VAT

Document submitted by France

Summary:	This document requests the Assembly to decide on the possibility of a State affected by an incident being compensated for the VAT paid by it for the supply of services and goods necessary for clean-up and protective measures.
Action to be taken:	<u>1992 Fund Assembly</u> (a) Note the information contained in this document; (b) Decide if a State affected may obtain compensation from the IOPC Funds for VAT paid to private contractors involved in operations to prevent pollution; (c) Amend the Claims Manual in accordance with the decision taken by the Assembly. <u>Supplementary Fund Assembly and 1971 Fund Administrative Council</u> Note the decision taken by the 1992 Fund Assembly.

1 Introduction

- 1.1 Following the wreck of the *Prestige* on 19 November 2002 off the coast of Spain, the French Government incurred expenditure for at sea and onshore response to the pollution which drifted towards the French coasts up to the end of December 2003.
- 1.2 This expenditure, which totalled €67 500 905.92, includes the cost of assets belonging to the French State (aircraft, ships, vehicles, personnel) and the cost of private assets contracted, in particular for the removal and transport of waste and cleaning and repair of the equipment used. The latter category of expenditure includes VAT paid by the State to private contractors.
- 1.3 The IOPC Funds' experts, who provisionally assessed the amount due to the State at €38 481 121.33, deducted the sum of €6.2 million from the French State's claim in respect of VAT paid by it for the supply of services and goods necessary for clean-up operations. According to the IOPC Funds, the payment of VAT was not eligible for compensation, since the State would recover the amount of VAT in the form of tax revenues.
- 1.4 In the case of previous large oil spills which affected France, in particular the oil slicks from the *Tanio* in 1980 and the *Dolly* in 1999, the French State was compensated by the IOPC Funds for the VAT paid to private contractors for clean-up operations. VAT was also reimbursed to the Maritime and Coastguard Agency following the *Sea Empress* incident in the United Kingdom in 1996.
- 1.5 France therefore requests the 1992 Fund Assembly to recognise that an affected State may obtain compensation for the VAT paid by it for the supply of services and goods necessary for clean-up and protective measures.

1.6 France points out that, because of the IOPC Funds compensation limits, the French State will not receive any compensation from the IOPC Funds as a result of the *Prestige* incident. This document is therefore not specific to the *Prestige* incident and will have no financial impact on the IOPC Funds in that regard.

2 Non-reimbursement of VAT would be an additional loss to the affected State

2.1 In the case of a large oil spill, it is up to the affected State to clean up its coasts using its own resources or by engaging private contractors specialising in the transport and treatment of waste. The State, like any victim of damage, must pay for the services provided by private contractors, including tax.

2.2 The non-reimbursement of VAT paid to private contractors for the supply of services and goods necessary for clean-up operations is an undue burden which causes financial loss to the affected State. If the State decided not to intervene but gave formal notice to the shipowner to carry out the clean up of the coasts, that shipowner would engage 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.

2.3 When the French State engages the contractors directly and pays the VAT itself, it therefore bears an additional loss when compared with the situation described above, if it does not obtain full reimbursement of the expenditures incurred, including VAT.

2.4 The circumstance in which the affected State recovers VAT in the form of tax revenues is not such as to justify the non-reimbursement of that tax by the IOPC Funds. Tax law and civil liability law are separate and subject to different rationales.

3 VAT was reimbursed by the IOPC Funds in previous oil spills

3.1 In the case of the many oil spills which have affected the French coast over 30 years, the French State, in accordance with French law, has automatically included in the calculation of its loss the amount of VAT paid to private contractors which have supplied services or goods for oil spill response.

3.2 The French State has always been compensated for its loss by the IOPC Funds (*Tanio* in 1980 and *Dolly* in 1999) or by the shipowner's insurer, without the compensation for VAT being disputed. In the case of the *Erika* incident, the French State was compensated in full for its loss by the IOPC Funds and the ship charterer, including VAT.

3.3 In the case of the oil spill from the *Sea Empress* in the United Kingdom in 1996, the IOPC Funds also reimbursed the Maritime and Coastguard Agency for VAT paid to private contractors involved in the response operations. The IOPC Funds consider that the reimbursement of VAT in relation to this incident is justified by the fact that it concerns an agency, independent of the State. However, as the financing of that agency comes from public funds, the French State considers that no distinction can be made between reimbursement to a public agency and a State, for that would mean discrimination between States, depending on their administrative organisation.

4 In French law, compensation of the affected State for damage incurred by it includes VAT paid to contractors

4.1 In accordance with the request of the IOPC Funds' Director, France has produced a legal analysis proving that French courts recognise the right of the French State, as the victim of damage, to obtain reimbursement of VAT paid to private contractors. This analysis is reproduced below.

4.2 According to French jurisprudence, compensation is only paid net of tax when the victim enjoys a tax regime which allows it to deduct all or part of the VAT invoiced to it (1). In that case, the VAT is not included in the compensation, since the victim passes it on to a third party.

- 4.3 Conversely, when the VAT paid by the victim cannot be deducted, the loss must be compensated including VAT (2), so that the final tax charge is borne by the person causing the damage and not the victim.
- 4.4 Only persons subject to VAT (3) who are required to invoice this tax to their customers enjoy the right to deduct (4). However, legal persons under public law are not subject to VAT (5) for their administrative service activities (6). To the extent that they are not subject to a legal regime which allows them to deduct all or part of the tax paid with respect to their own operations, public persons have the right, in the exercise of their administrative tasks, to reimbursement of VAT by the person responsible for the damage (7).
- 4.5 In litigation relating to offences against the public domain, the Conseil d'État (highest administrative jurisdiction in France) has already had occasion to hold ineffective the method now suggested by the IOPC Funds. The fact that the State, which is responsible for collecting taxes and duties, is the beneficiary of the VAT revenue, "*does not have the effect of making it subject, with respect to this tax, to a particular tax regime which allows it to deduct VAT on the costs of restoration measures to the public domain*" (8). The VAT must therefore be included in the compensation granted to the State.
- 4.6 The judge in the ordinary court must (9), when the question of whether or not a person is subject to VAT or the amount deductible raises a serious difficulty (10), refer the question to the administrative judge for a preliminary ruling (11). The latter rules on those questions which are within his exclusive competence (12). In the civil liability litigation (13), the judge in the Civil Court is competent to decide whether or not the compensation payable by the person responsible for the damage includes VAT paid by the victim to have his loss compensated.
- 4.7 The solutions and criteria adopted by the judge in the ordinary court (14) are similar to those applied by the administrative judge:
- when the victim is subject (15) to VAT and can recover by deduction the tax paid on restoration measures, in application of the provisions of the General Tax Code, the person responsible for the damage is only required to pay compensation net of tax (16);
 - when the victim is not subject to VAT, the compensation payable by the person responsible for the damage includes the VAT on reparation measures (17).
- 4.8 The French State, which is required to pay VAT (18) to its service providers and suppliers, does not enjoy any right of deduction with regard to administrative police operations carried out following a large oil spill. It therefore follows that the compensation granted to the French State, in reparation for its loss, must include the total amount of VAT paid.

5 Action to be taken

1992 Fund Assembly

The 1992 Fund Assembly is invited to:

- (a) take note of the information contained in this document;
- (b) decide if a State affected may obtain compensation from the IOPC Funds for VAT paid to private contractors involved in operations to prevent pollution; and
- (c) amend the Claims Manual in accordance with the decision taken by the Assembly.

Supplementary Fund Assembly and 1971 Fund Administrative Council

The Supplementary Fund Assembly and 1971 Fund Administrative Council are invited to note the decisions taken by the 1992 Fund Assembly.

REFERENCES

- (1) Council of State (CE) Sect., 29 January 1982, *SA des docks lorrains*, No.13690; CE 22 January 1986, *Cotechnip*, No. 50646.
 - (2) CE 25 April 1980, *Minister of Education v. Gonnot*, No. 06288; CE 22 March 1985, *Sté SECOMETAL v Minister of Town Planning*, No. 42637; CE Sect., 20 January 1995, *Commune of St-Michel de Maurienne*, No. 126175; CE 10 July 1996, *Commune of St-Martin de Crau v Sté SERI-Renault*, No. 132638.
 - (3) General Tax Code, s. 256.
 - (4) General Tax Code, s. 271.
 - (5) General Tax Code, s. 256B
 - (6) CE 19 May 2004, *Schultz van Treek v City of Paris*, No. 207391.
 - (7) CE Sect., 20 January 1995, *Commune of Sallanches*, No. 126198; CE 17 March 1999, *Municipality of Le Havre*, No. 159443; CE Sect., 6 April 2007, *Centre hospitalier de Boulogne-sur-mer v SARL Atelier PAC*, No. 264490; CE 4 March 2009, *Cité des sciences et de l'industrie v Spie Batignolles TPCI*, No. 296069; CAA Nancy, 16 December 2004, *AUREE v Commune of Hochstatt*, No. 98NC00973; CAA Douai, 26 November 2009, *Centre hospitalier de Gisors v Sté Danjou*, No. 07DA01159; CAA Nancy, 11 February 2010, *Minister of Ecology v Sté Eiffage Travaux publics*, No. 09NC00067; CAA Nancy, 31 May 2010, *SARL Terrier v Commune of Santans*, No. 08NC00483;
 - (8) CE 18 June 1997, *Minister of Public Works v Galano*, No. 156875; CE 6 March 2002, *Minister of Public Works v Sté TSR*, No. 228663; CAA Lyon, Plenary, 16 November 1989, *Minister of Education v Sté Rochas-Étanchéité*, No. 89LY00150, T. p. 793.
 - (9) Civil Procedure Code, s. 49.
 - (10) Court of Cassation – Civil Chamber (Cass. civ.) 1st, 19 April 1988, *Bull. civ. I*, No. 113; Cass. civ. 3rd, 26 February 1997, *Bull. civ. III*, No. 44.
 - (11) Court of Cassation – Commercial Chamber (Cass. com.), 18 June 1991, *VIA assurances v Sté Sogelco*, No. 89-16967.
 - (12) Book of Tax Procedures, s. L. 199
 - (13) Civil Code, s. 1382 and following.
 - (14) Civil Code, s. 1149 and General Tax Code, s. 271
 - (15) A person subject to VAT is a person required to invoice this tax on goods and services that he supplies to his customers.
 - (16) Cass. com., 15 October 1973, *Bull. civ. IV*, No. 281; Cass. civ. 1st, 6 January 1993, No. 91-14449; Cass. civ. 3rd, 27 March 1996, *Bull. civ. III*, No. 85; Cass. civ. 1st, 4 June 1996, *Bull. civ. I*, No. 240; Cass. civ. 3rd, 10 January 2001, *Bull. civ. III*, No. 2; Cass. civ. 1st, 17 July 2001, No. 98-18758; Cass. civ. 3rd, 28 May 2002, No. 00-13817; Cass. com., 18 June 2002, No. 99-19748; Cass. civ. 1st, 13 November 2002, No. 99-14865 Cass. com., 6 February 2007, No. 05-10410; Cass. com., 3 June 2009, No. 07-21510.
 - (17) Cass. com., 11 July 1983, No. 81-16835, *Bull. civ. IV*, No. 216; Cass. civ. 3rd, 25 June 1997, No. 95-20840; Cass. civ. 1st, 9 May 1972, *Bull. civ.*, No. 126; Cass. civ. 3rd, 6 November 2007, No. 06-17275, *Bull. civ. III*, No. 190; Cass. civ. 3rd, 6 December 2006, *CIRP v Axa and others*, No. 05-17553; Cass. civ. 3rd, 17 February 2010, No.09-11900.
 - (18) No tax provision exempts contractors which supply goods or provide services to the State from invoicing VAT.
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