INTERNATIONAL OIL POLLUTION COMPENSATION FUND

FONDS INTERNATIONAL D'INDEMNISATION POUR LES DOMMAGES
DUS A LA POLLUTION PAR LES HYDROCARBURES

ASSEMBLY - 4th session
Agenda item 13

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CONSIDERATION OF THE CHAIRMAN'S REPORT OF THE FIFTH INTERSESSIONAL WORKING GROUP

Note by the Director

Annexed hereto is the Chairman's report of the fifth Intersessional Working Group set up by the Assembly at its first extraordinary session to consider the IOPC Fund's policy in respect of claim settlement procedures and the admissibility of claims. This report is submitted to the Assembly for consideration.

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ANNEX

REPORT OF THE CHAIRMAN OF THE FIFTH INTERSESSIONAL WORKING GROUP

1. The Assembly, at its first extraordinary session in October 1980, set up an Intersessional Working Group to consider the IOPC Fund's general policy in respect of claim settlement procedures and the admissibility of claims, with particular regard to their expeditious settlement. This Working Group held a meeting on 19 and 20 February 1981.

2. The meeting was attended by the following Members:

BAHAMAS
DENMARK
FINLAND
FRANCE
FEDERAL REPUBLIC OF GERMANY
INDONESIA
ITALY
JAPAN
LIBERIA
SWEDEN
UNITED KINGDOM
YUGOSLAVIA

The following States were represented by Observers:

BRAZIL
CANADA
IRELAND
NETHERLANDS
POLAND
PORTUGAL

The following Organizations also attended as Observers:

IMCO
EEC
BIMCO
ICS
ITOPF
CRISTAL
OCIMF
PIANC
INTERNATIONAL GROUP OF P & I CLUBS
OECD

The Chairman of the meeting was Mr. J. Perrett (United Kingdom).

Claim Settlement Procedures

3. The Working Group discussed the IOPC Fund's claim settlement procedures on the basis of documents FUND/WGR.5/1, submitted by the Director, and FUND/WGR.5/3, submitted by the International Group of P & I Clubs.

4. The Director introduced document FUND/WGR.5/1 and explained the Fund's procedures regarding the settlement of claims as practised at present. On the basis of the experience the Fund had gained so far, the Director referred to a number of problems encountered in settling claims and made suggestions as to how claim settlement procedures might be expedited.

5. The discussions concentrated mainly on three different subjects, namely:

(a) the settlement procedures, with particular reference to the conclusion of an agreement between the IOPC Fund, the shipowner and the P & I Club in the case of specific incidents;

(b) the question of whether the shipowner's limitation fund had to be established in all cases before the IOPC Fund paid any compensation or whether, in exceptional circumstances, payment by the IOPC Fund could be made before the establishment of the limitation fund;

(c) the possibility of a Contracting State establishing a central body with the authority either to submit claims under the CLC and Fund Convention on behalf of all claimants in that State or to act as an information and advisory centre by collecting information on claims from the Fund and advising claimants on the steps to be taken in the case of a claim under the CLC or Fund Convention.

6. The Working Group expressed agreement, both in general and in detail, with the procedures developed by the Director for the settlement of claims under the Fund Convention. It was appreciated that this procedure led to quick and friendly settlements. It was understood that an agreement between the IOPC Fund, the shipowner and his P & I Club was, in normal circumstances, helpful to the expeditious settlement of incidents but that such an agreement could not always be applied in exactly the same way to all incidents. The specific merits of each individual case had to be considered and the text had to be drafted according to the particulars of the individual cases. The agreement was considered to be useful for small claims and the Working Group expressed the opinion that such a procedure should continue as a way of enabling such claims, in particular those where there may be hardship to individuals, to be settled promptly.

7. As to the question of whether the shipowner's limitation fund had to be established before the Director could make any payments by way of compensation, most States agreed that this procedure was required by the CLC and therefore had to be followed. However, it was widely considered that the increased flexibility asked for by the Director might be justified under certain circumstances, especially if, for procedural reasons, the establishment of the limitation fund was likely to take some time and/or immediate payment was required in order to avoid financial hardship to claimants. The Working Group asked the Director to explain in a document to be submitted to the Assembly the nature of the extraordinary circumstances which he believed would justify the Fund, as an exception, being allowed to make payments to claimants on the basis of an agreement between parties but before the limitation fund was established.

8. The members of the Working Group agreed that it had to be left to the Contracting States whether they wished to appoint a central office to deal with claims against the IOPC Fund. This was not a matter to be decided upon by the Fund Assembly. It was accepted that there could be an advantage to claimants, as well as to the IOPC Fund,if an office familiar with the Fund's procedures could either make a claim on behalf of other claimants of that State or advise claimants on the procedures to be followed. However, whether it was legally possible to establish such a body and, if so, what authority such an office would have, depended entirely on the laws and the policies of the Member States concerned.

9. The Working Group also considered the Director's proposal that the Internal Regulations should be amended so as to allow the Fund to make part payments to claimants before final agreement had been reached on their claim. Such an interim payment could be justified and advisable in circumstances where part of the claim had been accepted by the Fund but another part required further lengthy investigations or negotiations. The provision in Internal Regulation 8.6 was not appropriate in such circumstances since it allowed provisional payments only in exceptional cases and to a very limited extent. The Working Group considered this suggestion favourably and asked the Director to submit a paper to the next session of the Assembly making a proposal for the amendment of the Internal Regulations. The Assembly could then discuss this proposal in detail on the basis of that document.

10. The Fund's administrative arrangements for the assessment of claims was the subject of a brief discussion. The Working Group noted with approval that the Director had taken measures to overcome earlier concerns.

11. The Working Group appreciated and endorsed the Director's suggestion that the Fund should prepare and publish a brochure setting out in detail the claims procedure followed by the Fund and the formalities required for the submission of claims. This brochure should be published in sufficient numbers for it to be distributed not only to Governments of Member States but also to potential claimants in the case of an incident.

Admissibility of Claims

12. In its discussion on the admissibility of claims, the Intersessional Working Group followed the categorisation of claims as outlined in document FUND/WGR.5/2, submitted by the Director to the Working Group. The Group discussed two separate items, firstly, the question of whether precautionary and pre-spill preventive measures are covered by the CLC and Fund Convention and, secondly, if the requirements for a claim under the Fund Convention are fulfilled, which claims are admissible.

Pre-Spill and Precautionary Preventive Measures

13. The members of the Working Group expressed different views on the question of whether precautionary or pure threat preventive measures, i.e. measures successfully taken to prevent any spillage of persistent oil, are covered by the Convention. Some delegations expressed the view that, although the definitions in Article I of the CLC were not very clear and their interpretation doubtful, Article II of the CLC stated that the Convention covered not only "pollution damage" but also expenses for measures to prevent such damage. They thought this wording could be reasonably understood as covering expenses for preventive measures even if there was no spill.

14. Rather more delegations held the view that Article III of the CLC establishing the owner's liability expressly stated that the owner was liable only for damage caused by oil which had actually escaped or been discharged from the ship. This clearly excluded

expenses if there was no actual spill of oil. In contrast to the definitions, this was quite explicit and was in accordance with what was understood to be the intentions at the 1969 Conference.

15. A similar divergence of views existed with respect to the question of whether pre-spill preventive measures were covered, i.e. whether measures taken in advance of a spill to prevent pollution were covered if, in the course of those preventive measures, a spill of persistent oil actually did occur. The balance of views was more inclined to an interpretation of the Convention which allowed the recovery of such expenses, but there was no unanimous view.

16. Although the Working Group was unable to agree on a legal interpretation of the CLC regarding the coverage of pre-spill or precautionary preventive measures, there was general support for their eventual inclusion and it was agreed that the Assembly should be asked to adopt a resolution, directed to IMCO, expressing the IOPC Fund's desire that this aspect of the scope of application of the CLC should be taken care of in a future revision of the Convention. However, it was agreed that this question was not of immediate importance since TOVALOP and CRISTAL provided cover for preventive measures in CLC and Fund Convention Member States.

Extent of Claims Covered by Fund Convention

17. The different categories of claims as specified in document FUND/WGR.5/2 were discussed and considerable unanimity of view was established.

Environmental Damage

18. In discussing the question of whether and, if so, to what extent a claim for environmental damage was admissible under the CLC and the Fund Convention, members of the Working Group were aware of the fact that the 1969 Conference adopting the

CLC had left the interpretation of the term "loss or damage" to the national law and that in many countries there were now discussions taking place on this question. Reference was also made to the resolution adopted by the Assembly at its first extraordinary session in October 1980 which had agreed that the assessment of compensation payable by the IOPC Fund should not be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models.

19. The Working Group agreed that compensation could be claimed from the shipowner under the CLC or from the IOPC Fund under the Fund Convention only if a claimant having a legal right to claim under national law had suffered quantifiable economic loss. States suffering pollution damage were, of course, entitled to restore the environment by cleaning the water and the beaches but the possible remaining effect of the oil on the marine environment could not lead to a claim for compensation if it did not have any effect on economic interests. It would be impossible to identify the person having a legal right for such a claim if no such interests were affected.

Research Studies

20. There was agreement that expenses for research studies should be compensated under the CLC or the Fund Convention only if these studies were carried out as a direct consequence of a particular oil spill and as a part of the spill response.

Interest

21. As to the question of whether interest on the principal claim can be charged against the IOPC Fund, most delegations agreed that, in principle, interest was an acceptable item of a claim. There was a strong wish for some harmonisation, but a great variety of views were expressed as to the rate of interest to be claimed and as to the period over which it should be calculated based on the various positions existing under national laws.

Since it was most likely that the interest rate charged by a claimant would be related to the Minimum Lending Rate applicable in that State, it seemed advisable for the Director to try to reach agreement with claimants, if such a claim for interest was admissible under the applicable national law, on a rate related to the Minimum Lending Rate of the State in question, in particular MLR plus 2% which is the rate corresponding to the rate charged by the IOPC Fund on unpaid annual contributions. The members of the Working Group agreed that, although in negotiations with the Fund claimants of course had the possibility of agreeing on a certain rate for interest suggested by the Director, the Fund had no alternative but to follow the national law on interest, which in all States was a general law and not one dealing with claims for pollution damage only.

Additional Costs and Fixed Costs

22. In introducing Part C of document FUND/WGR.5/2, the Director pointed out that, although it was normally possible to distinguish clearly between "fixed" and "additional" costs as defined in the document, the distinction between these two different categories of costs was not as rigid as it might appear. The question of whether certain expenses would fall under one or the other category depended on the organization of the oil spill response in a particular country and it was possible to shift certain expenses from one category to another by changing the structure of an oil spill response.

23. The Working Group had a long discussion on these items which appeared as major parts of claims represented to the Fund with regard to pollution incidents. The Working Group agreed that additional costs are always recoverable under the CLC and the Fund Convention, but could not reach unanimity on the question of the admissibility of fixed costs. However, most delegations agreed that a reasonable proportion of fixed costs should be recoverable since it was in the interest not only of the particular State but also of the Fund if a State maintained a response force in order to be able to respond quickly and cheaply in the case of a spill. If the clean-up operations were left entirely to private firms, this would exclude fixed costs from the bill to the Fund, but it would mean that the additional costs would be much higher and possibly even higher than if the clean-up operations had been carried out by State employees with fixed costs included in the bill. The Working Group agreed that in the calculation of the relevant fixed costs only those expenses which correspond closely to the clean-up period in question and which do not include remote overhead charges should be included.