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COMPENSATION  
FUND

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## INCIDENTS INVOLVING THE IOPC FUND

### HAVEN, AEGEAN SEA and BRAER

General Questions Concerning the Admissibility of Claims

Note by the Director

#### 1 Introduction

1.1 The HAVEN, AEGEAN SEA and BRAER incidents have given rise to a number of questions of principle as regards the admissibility of claims for compensation. These questions are to a large extent the same or similar for all three incidents. For this reason, it has been considered appropriate to deal with the general questions on the admissibility of claims in the present document jointly for these three incidents. The specific claims will be dealt with in the individual documents relating to these three incidents: in document FUND/EXC.35/3 as regards the HAVEN incident, document FUND/EXC.35/4 as regards the AEGEAN SEA incident and document FUND/EXC.35/5 as regards the BRAER incident.

1.2 The present document sets out the legal framework within which claims will have to be considered. It deals in particular with the important question of the admissibility of claims relating to pure economic loss.

1.3 The Executive Committee considered, at its 34th session, some questions of principle in respect of the HAVEN and BRAER incidents (document FUND/EXC.34/9, paragraphs 3.1.5 – 3.1.11 and 3.3.12 – 3.3.32, respectively). Decisions were taken in respect of some claims, whereas the Committee postponed to its 35th session its decision on other claims.

## **2 Notion of Pollution Damage**

### **2.1 The Conventions**

The system of compensation established by the Civil Liability Convention and the Fund Convention relates to "pollution damage" and "preventive measures" as defined in Articles 1.6 and 1.7 of the Civil Liability Convention which read:

- 1.6 "Pollution damage' means loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures."
- 1.7 "Preventive measures' means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage."

The same definitions are by reference included in the Fund Convention (Article 1.2).

### **2.2 Implementation into Italian Law**

The Civil Liability Convention and the Fund Convention are implemented into Italian law by the Act of 27 May 1978 (N°506). The definitions of "pollution damage" and "preventive measures" are, therefore, directly applicable in Italy.

### **2.3 Implementation into Spanish Law**

The Civil Liability Convention and the Fund Convention were incorporated into Spanish law by their publication in the Spanish Official Bulletin on 8 March 1976 (N°58) and 11 March 1983 (N°60), respectively. The definitions of "pollution damage" and "preventive measures" are, therefore, directly applicable in Spain.

### **2.4 Implementation into United Kingdom Law**

The definitions of "pollution damage" and "preventive measures" are implemented into United Kingdom law by Section 1.1 of the Merchant Shipping (Oil Pollution) Act 1971 as regards the Civil Liability Convention and by Section 1.3 of the Merchant Shipping Act 1974 as regards the Fund Convention which read:

#### **Section 1(1) of the Merchant Shipping (Oil Pollution) Act 1971**

"Where, as a result of any occurrence taking place while a ship is carrying a cargo of persistent oil in bulk, any persistent oil carried by the ship (whether as part of the cargo or otherwise) is discharged or escapes from the ship, the owner of the ship shall be liable, except as otherwise provided by this Act,-

- (a) for any damage caused in the area of the United Kingdom by contamination resulting from the discharge or escape; and
- (b) for the cost of any measures reasonably taken after the discharge or escape for the purpose of preventing or reducing any such damage in the area of the United Kingdom; and

- (c) for any damage caused in the area of the United Kingdom by any measures so taken."

#### Section 1(3) of the Merchant Shipping Act 1974

"'pollution damage' means damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever the escape or discharge may occur, and includes the cost of preventive measures and further damage caused by preventive measures."

"'preventive measures' means any reasonable measures taken by any person after the occurrence to prevent or minimise pollution damage."

### 2.5 Interpretation by National Courts

2.5.1 If out-of-court settlements cannot be reached, the admissibility of the claims will be decided by the competent courts of the State where the damage occurred, viz the Italian, Spanish and Scottish courts, respectively. The Italian and Spanish courts will base their decisions on the above-mentioned provisions of the Conventions, whereas the Scottish Courts will take as a basis the relevant provisions of the 1971 and 1974 Merchant Shipping Acts.

2.5.2 Under the Vienna Convention on the Law of Treaties, account should be taken in the interpretation of treaties of any subsequent agreement between the parties regarding the interpretation or application of the treaty or any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (Article 31.3(b) and (c)). Decisions taken by the Assembly and Executive Committee concerning the interpretation of the definitions of "pollution damage" and "preventive measures" could be considered as such agreements on the application and interpretation of the Civil Liability Convention and the Fund Convention. Despite this, it is uncertain to what extent national courts will take into account the international aspects of the case. In any event, the courts will probably take into consideration the general principles of their respective domestic laws concerning the admissibility of various kinds of claims for compensation.

2.5.3 It should be noted that the Assembly has expressed the opinion that a uniform interpretation of the definition of "pollution damage" is essential for the functioning of the regime of compensation established by the Civil Liability Convention and the Fund Convention (document FUND/A.11/20, paragraph 5.5).

### 2.6 Various Types of Damage Relevant to the HAVEN, AEGEAN SEA and BRAER Incidents

2.6.1 Costs of clean-up operations and of measures taken to prevent or minimise pollution damage ("preventive measures") are to be compensated under the Civil Liability Convention and the Fund Convention, provided these costs are reasonable. Likewise, pollution damage to property should be compensated under the Civil Liability Convention and the Fund Convention.

2.6.2 Owners or users of property which has been contaminated as a result of an oil spill may suffer loss of earnings. For instance, a fisherman whose fishing gear has been polluted may lose earnings during the period when he is prevented from fishing, pending the cleaning of the polluted gear or the purchase of new equipment. Most legal systems recognise in principle claims for compensation of this kind, since the claimant has at the same time suffered damage to property. The IOPC Fund has in previous cases accepted claims for loss of earnings in such situations.

2.6.3 Persons whose property has not been polluted may nevertheless suffer economic loss as a result of oil pollution incidents (so-called "pure economic loss"). If a certain area of the sea is heavily polluted, fishing may be altogether impossible in that area for a certain period of time, which may cause economic loss to fishermen for whom there is no possibility of fishing elsewhere. Hoteliers and

restaurateurs whose establishments are located close to a public beach may lose income if tourists do not come to the area because the beach has become polluted. In most jurisdictions there has been a great reluctance to recognise claims in such cases, for fear of the far-reaching consequences that the acceptance of such claims would have. In most legal systems, a claim for compensation is generally accepted only if it relates to damage to a defined and recognised right (eg a right of property or a right of possession). Damage suffered by someone as a result of loss of use of the environment due to pollution is normally not considered as damage to an individual's recognised right in this sense.

2.6.4 Various criteria are applied by national courts to restrict the right to compensation for pure economic loss. In some countries the courts apply the tests of foreseeability, remoteness and causation.

2.6.5 Claims relating to pure economic loss have often been submitted to the IOPC Fund. The Executive Committee has agreed to compensate economic loss suffered by persons who depend directly on earnings from coastal or sea-related activities, even if the person concerned has not suffered any damage to property. In the past, the IOPC Fund has accepted claims relating to loss of earnings suffered by fishermen or by hoteliers and restaurateurs at seaside resorts. As regards the HAVEN and BRAER incidents, the Executive Committee accepted in principle claims presented by fishermen in respect of pure economic loss (document FUND/EXC.34/9, paragraphs 3.1.8 and 3.3.16).

2.6.6 In the HAVEN, AEGEAN SEA and BRAER cases, some claims for compensation for pure economic loss relate to activities which are less directly linked with the pollution than for example fishermen who have suffered damage of the kind referred to above. The question is what parameters should be applied in deciding which claims for economic loss should be admitted or, in other words, where to draw the line between those who should be entitled to compensation for pure economic loss and those who should not be granted such compensation. It is important to note that the definition of "pollution damage" only covers damage by contamination.

2.6.7 The Director is not aware of any court cases in States Parties to the Civil Liability Convention in which the definition of "pollution damage" laid down in the Convention has been interpreted in respect of claims for pure economic loss. In the following paragraphs an attempt has been made to summarise the general legal situation in Italy, Spain and the United Kingdom with regard to compensation for pure economic loss.

2.6.8 As regards Italian law, there are a few precedents dealing with the admissibility of claims relating to pure economic loss in connection with pollution. In one case, the Supreme Court of Cassation rejected a claim for compensation submitted by the owner of a property located close to a public beach who allegedly had suffered economic loss because the sea had become polluted (Cass civ, 27.5.1982, N°3214). The court stated that the pollution of the sea did not constitute any infringement of this person's ownership nor of the exercise of that ownership but only of the special advantages resulting from the location of the property. In another case, compensation was granted to the operator of bathing facilities located on a public beach who had suffered loss of income because the sea adjoining this beach had become polluted, but this operator had a special licence to use the beach and this right of use had the nature of a property right (Cass civ, 7.3.1975, N°848).

2.6.9 Concerning the position of Spanish law, the Spanish courts take a restrictive attitude to claims for compensation for pure economic loss. According to jurisprudence and doctrine, only such damage which is a direct consequence of the act creating liability should be compensated (Supreme Court, 23 March 1954). Damages may not be awarded only on the basis of a possibility of obtaining an income. The claimant may only qualify for compensation if there was an objective probability that, in the normal course of events and the particular circumstances of the case, he would have made the earnings for which compensation is claimed but for the act in question (Supreme Court, 2 June 1967, 6 May 1967, 20 March 1978 and 25 April 1978).

2.6.10 Under United Kingdom jurisprudence, there would not normally be any right to compensation for economic loss unless the claimant has also suffered damage to property or to a right of

possession, ie pure economic loss would not be compensated. The United Kingdom courts tend to take a very restrictive attitude to claims for compensation for pure economic loss (cf *Dynamco v Holland*, 1972 SLT p 38; *Esso Petroleum Co Ltd v Hall Russel and Co Ltd*, 1988 SLT p 872).

**3 Action to be Taken by the Executive Committee**

The Executive Committee is invited to take note of the information contained in the present document.

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