



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND

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## **APPLICABILITY OF THE FUND CONVENTION TO OIL POLLUTION DAMAGE CAUSED BY SPILLS FROM UNIDENTIFIED SOURCES**

Note by the Director

### **1 Introduction**

In paragraph 17 of document FUND/EXC.35/7, the Director informed the Executive Committee that he was carrying out an in-depth study of the interpretation of Article 4.2(b) of the Fund Convention. This study is contained in the present document.

### **2 Relevant Provisions of the Fund Convention**

Under Article 4.1 of the Fund Convention, the IOPC Fund is obliged to pay compensation for pollution damage, inter alia, where the victim is unable to obtain compensation because "no liability arises under the Civil Liability Convention". One of the situations in which no liability would arise under the Civil Liability Convention is where the identity of the ship which caused the damage is not known, since in that case no shipowner can be held liable under that Convention. In respect of such cases, Article 4.2(b) of the Fund Convention provides, however, that the IOPC Fund will not be obliged to pay compensation if "the claimant cannot prove that the damage resulted from an incident involving one or more ships".

### **3 Discussions at the 1971 International Conference**

3.1 The decision of the 1971 International Conference which adopted the Fund Convention to relieve the IOPC Fund of the obligation to pay compensation in the cases referred to in Article 4.2(b) of the Fund Convention was a carefully considered one. With only a few exceptions, there was general agreement among the delegations at that Conference that the IOPC Fund should only be required to pay compensation for damage which was caused by a ship as defined in the Fund Convention, ie a vessel or other craft actually carrying oil in bulk as cargo.

3.2 The original draft provision on the subject, as presented to the Conference, stated that the IOPC Fund would not be obliged to pay compensation for pollution damage "if the identity of the ship that caused the damage has not been established". The delegation of the Federal Republic of Germany proposed that this provision be amended so as to provide that the IOPC Fund would not be obliged to pay compensation for damage "if the claimant cannot prove that the damage was caused by a particular incident involving a ship". In an accompanying note, that delegation explained that its proposal did "not mean any change in substance, but only [intended] to improve the wording .....".

3.3 In fact the text proposed by the delegation of the Federal Republic of Germany was much more than a drafting improvement on the original draft. It addressed issues which had not been dealt with sufficiently or at all in the original draft provision. The proposed text made it clear that the IOPC Fund would be obliged to pay compensation for any particular damage only if it was proved that the oil which caused the damage had escaped or been discharged as a result of an "incident" involving "a ship", both these terms being defined in the Fund Convention (by reference to the relevant definitions in the Civil Liability Convention). It also made it clear that the burden of proving these facts was on the person claiming compensation from the IOPC Fund. The delegation of the Federal Republic of Germany stated that, unlike the original draft, its text did not require the claimant to establish the precise identity of the ship which actually caused the pollution. In the view of the German delegation, proof of the fact "that the oil escaped from one identified ship" might be difficult "if two or more ships are involved in one specific accident".

3.4 It appears that these basic elements of the provision proposed by the delegation of the Federal Republic of Germany were clearly understood by all delegations during the debates, although they were by no means acceptable to all the delegations. Several unsuccessful attempts were made to remove or modify the provision. One proposal (by the United States delegation) was to delete the provision altogether. A proposal by the Nordic countries sought both to lighten the burden of proof on the claimant and to limit the application of the provision to major cases of pollution damage, ie damage exceeding a specified threshold.

3.5 The proposal to delete the provision was opposed by many delegations on several grounds. It was argued by some delegations that deletion of the provision would place insuperable difficulties on courts "in deciding the validity of claims where the offending ship was not identified". Other delegations also claimed that deletion of the provision would have the effect of including within the scope of the Fund Convention damage which was not caused by ships carrying oil as cargo, such as for example "damage originating from on- or off-shore installations". These objections were not seriously challenged by those who supported the proposal to delete the provision. Indeed, the delegation proposing the deletion (the United States delegation) noted that even after deletion of the provision, it "would still be necessary for a victim to meet the burden of proof that the oil came from a ship". This delegation also stressed that its proposal was not "intended to allow for all occurrences of oil in the sea".

3.6 Some other delegations favoured the deletion of the provision because it required a claimant to establish the identity of the ship which caused the damage, a requirement which they considered unnecessarily burdensome, especially for claimants in developing countries. It was explained, however, that while this might be a plausible objection to the original draft text, it was not valid in relation to the text proposed by the delegation of the Federal Republic of Germany which, as that delegation had pointed out, "was intended to bring out clearly that the victim must establish as the basis of his claim that the damage was occasioned by pollution emanating from a ship as defined in the Convention, without necessarily being obliged to establish the identity of the ship concerned".

3.7 Similarly the proposal by the Nordic countries to replace the provision with a new Article which would reduce the burden of proof on the claimant and restrict the application of the Article to major claims (ie those above a specified threshold) did not attract sufficient support. The first part of the proposal was opposed by many delegations. That part provided that, where the origin of the oil causing damage had not been established, such damage would be deemed to be compensable by the IOPC Fund if the victim or victims "show that it is probable that the damage resulted from one single

incident involving one or more ships". The objection raised against this proposal was that it could lead to situations in which the IOPC Fund would be obliged to pay compensation for "damage which might not have been caused by a ship". It was insisted that the Fund Convention should "confine itself to the idea that it must be established that a ship was responsible for the damage" before the IOPC Fund would be obliged to pay compensation. In this context it was pointed out that the Fund Convention was "based on the idea that the Fund would not be required to compensate for damage resulting from just any kind of oil spill on the sea".

3.8 The second part of the Nordic proposal would have imposed an obligation on the IOPC Fund to pay compensation in such cases but only if the damage exceeded a certain stipulated amount. This part of the proposal was unacceptable to the majority of delegations and it was accordingly rejected by the Conference.

3.9 It was after this exhaustive consideration of all the relevant issues, and after the International Conference had rejected all other proposed alternatives, that the Conference finally adopted the text proposed by the delegation of the Federal Republic of Germany, subject to drafting refinement. As redrafted the new provision established the basic conditions which have to be fulfilled before the IOPC Fund would be obliged to pay compensation for pollution damage where the identity of the ship concerned cannot be established, namely that the claimant must prove that the damage resulted from an incident (ie an occurrence or series of occurrences) involving one or more ships (ie a sea-going vessel or other seaborne craft actually carrying oil in bulk as cargo). The reference in the proposed text to a "particular incident" was amended to "an incident involving one or more ships". This amendment was not intended to change the meaning of the provision, which is that proof must be given that the pollution originated from an incident which involved a ship or ships as defined in the Convention.

#### **4 Director's Conclusions**

4.1 In the light of the wording adopted by the International Conference and the reasons given for that wording, the Director considers that the following conclusions could be drawn with regard to the obligation of the IOPC Fund to pay compensation for pollution damage in cases where there is no liability in respect of a specific ship because no such ship can be identified.

4.2 The IOPC Fund is not relieved of the obligation to pay compensation for the damage solely because the identity of the ship from which the polluting oil escaped or was discharged has not or cannot be established. It is clear that it was not the intention of the International Conference that the claimant should be required to establish the precise identity of the ship which caused the pollution. It may well be that, in the majority of cases, it will not be possible to prove that the pollution resulted from "an incident involving one or more ships" without also identifying the particular ship or ships involved. In some situations, as for example a collision involving two laden tankers, it will be fairly easy to prove the causal link between the pollution and a specific maritime incident involving one or more ships, and it would then not be necessary to establish the precise identity of the tanker whose oil actually caused the damage.

4.3 In the Director's view, it will depend on the facts of the particular case whether the IOPC Fund has an obligation to pay compensation in a given case. For the Fund to be obliged to pay compensation, it must be established by the claimant that the damage resulted from an incident, and that this incident involved a ship or ships falling within the scope of the Fund Convention, ie one or more tankers or any other sea-going craft carrying oil in bulk as cargo.

4.4 These two elements of the burden of proof on the claimant are necessarily interrelated and equally essential. This means that the claimant must prove both elements, viz that a particular incident caused the damage, and that this incident involved a ship or ships as defined in the Fund Convention (by reference to Article 1.1 of the Civil Liability Convention). The relevant provision in the Fund Convention requires therefore more than that the claimant should prove that the damage was caused by a ship in the ordinary sense of the word. It requires proof that the ship concerned is a ship in

respect of which the IOPC Fund has an obligation to pay compensation. This burden of proof can be discharged either by identifying the ship or ships from which the polluting oil escaped or was discharged or, at the very least, by specifying the particular incident from which the pollution is claimed to have resulted.

4.5 In the Director's view, the claimant cannot discharge the burden of proof required solely by proving that there is a strong likelihood that the damage was caused by an incident involving a ship as defined or that the damage could not have been caused other than by a ship. To permit a claimant to obtain compensation on such grounds would appear to be contrary to the intention of the International Conference in adopting the text after careful consideration. The records of the International Conference show that the Conference specifically decided against a system under which the IOPC Fund would be obliged to pay compensation solely on the probability that the damage might have been caused by a ship as defined in the Convention.

4.6 It is worth noting that, under Article 4.2(a) of the Fund Convention, the IOPC Fund is relieved of the obligation to pay compensation for pollution caused by warships or other ships "owned or operated by a State" and used "only on Government non-commercial service" at the time of the incident. The IOPC Fund also has no obligation to pay compensation for pollution damage caused by bunkers or the tank washings of an unladen tanker or the bunkers of a vessel other than a tanker. The Convention places the burden of proving these exemptions on the IOPC Fund, but the Fund cannot discharge its burden of proof where no details of the incident on which the claim is based are provided by the claimant. It is only after a claimant has provided some evidence that the damage resulted from an incident involving a ship as defined in the Convention that the IOPC Fund can reasonably be expected to determine whether any of the exemptions accorded under the Convention apply in the particular case.

## 5 Action to be Taken by the Executive Committee

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

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