



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

SEVENTH INTERSESSIONAL
WORKING GROUP
Agenda item 2

FUND/WGR.7/13
5 April 1994

Original: ENGLISH

CRITERIA FOR THE ADMISSIBILITY OF CLAIMS FOR COMPENSATION

REINSTATEMENT OF THE MARINE ENVIRONMENT

Note by the Director

1 Introduction

1.1 At its first meeting, the 7th Intersessional Working Group discussed the issue of the admissibility of claims for environmental damage within the scope of the definition of "pollution damage" in the 1969 Civil Liability Convention, the 1971 Fund Convention and the 1992 Protocols thereto. The discussion is summarised in the Report of the meeting (document FUND/WGR.7/10, paragraph 6.4).

1.2 One of the questions examined at that meeting was whether and to what extent claims relating to the cost of measures to reinstate the marine environment were admissible. The French delegation had addressed this issue in document FUND/WGR.7/6/Add.2, paragraphs 11.3.1, 11.3.2 and 11.4. This issue had also been dealt with by the International Tanker Owners Pollution Federation Limited (ITOPF) in document FUND/WGR.7/9/3, paragraphs 4.1-4.8 and 5.3-5.5. Reference should also be made to the document presented by the United Kingdom delegation (document FUND/WGR.7/8, paragraphs 4.1 and 4.2). The Working Group decided that this question should be discussed further at its second meeting (document FUND/WGR.7/10, paragraph 6.4.14).

1.3 The purpose of the present document is to focus on the main issues involved in the context of the admissibility of claims relating to the cost of measures to reinstate the environment.

2 The Definition in the 1992 Protocol to the Civil Liability Convention

2.1 There is a specific reference to measures to reinstate the environment in the definition of "pollution damage" in the 1992 Protocol to the Civil Liability Convention which reads:

"Pollution damage" means:

- (a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;
- (b) the costs of preventive measures and further loss or damage caused by preventive measures.

2.2 The admissibility of claims for the cost of reinstatement of the marine environment is thus subject to certain qualifications under the 1992 Protocol to the Civil Liability Convention.

2.3 The first qualification is that compensation for reinstatement of the marine environment is limited to the cost of measures actually taken or to be undertaken. The words to be undertaken were added, as experience had shown in some cases that measures to reinstate the environment could not be carried out, due to the lack of financial resources. Such reinstatement may for example be the duty of local authorities with limited resources.

2.4 It should be noted that the word "actually" refers not only to "undertaken" but also to the expression "to be undertaken". This follows from the wording of the text. This interpretation is confirmed by the French version which uses the expression "des mesures raisonnables de remise en état qui ont été effectivement prises ou qui le seront". The discussions at the International Conference which adopted the 1984 Protocol clearly show that this was the intention^{<1>}. Payment for reinstatement measures not yet undertaken should therefore be made only if the claimant is unable to finance them. The claimant would have to present detailed plans of the measures to be undertaken.

2.5 The second qualification is that only costs of *reasonable* measures are recoverable. This was considered a necessary restriction. It should be noted that measures to reinstate the environment are not always clearly distinguishable from "preventive measures" as defined in the Conventions. For this reason, it is an advantage that the same qualification of reasonableness applies to both of these notions.

3 Documents Presented by the French Delegation and ITOPF

3.1 In the document presented by the French delegation as a basis for the Working Group's discussions, it was stated that it should be necessary to identify some concrete elements of evaluation of the reasonable nature of the cost of measures to reinstate the environment and that any theoretical assessment of an intrinsic value of the environment must be set aside.

3.2 In the French delegation's view, the IOPC Fund should consider paying the cost of measures not yet undertaken only if the measures had been substantiated by a scientific study and an estimate of the costs. It was also stated that the IOPC Fund should not get involved in financing such studies, although attention was drawn to the fact that this could cause difficulties in some Member States.

3.3 The French delegation mentioned that the IOPC Fund could make an undertaking to pay the cost of reinstatement measures to the body that carried out these measures, although they were undertaken under contract with the public authorities. An alternative solution would be, in the view of the French delegation, that the IOPC Fund would give a guarantee of payment to the body engaged by the public authorities to take these measures. The French delegation also drew attention to the need for the IOPC Fund to obtain a guarantee that the proposed measures would actually be carried out. The importance of monitoring the operations was mentioned.

<1>

LEG/CONF.6/SR.4 and LEG/CONF.6/SR.6; Official Records of the International Conference on Liability and Compensation for Damage in Connection with the Carriage of Certain Substances by Sea, 1984 and the International Conference on the Revision of the 1969 Civil Liability Convention and the 1971 Fund Convention, 1992, Vol 3, p 170, 487.

3.4 In its document, ITOPF dealt with the practicability of restoring the "damaged" environment. ITOPF mentioned that the first phase of restoration was clean-up, and that once this had been completed, other positive steps to encourage natural recovery might logically follow. It was also stated that in cases where it was not possible to repair the affected site, it might be feasible to take steps to prevent further degradation and, at the same time, to promote natural recovery. In the document, ITOPF drew attention to the difficulties in any attempt to take measures to restore the pre-spill situation in respect of animals.

3.5 The ITOPF document contained the following text:

There will always be significant limits to the extent to which man can repair "damage" which he has caused. It also follows that attempts to meticulously reinstate a "damaged" area will, in most cases, both be impossible and unreasonable, especially if natural recovery is likely to be rapid. In addition, it must be appreciated that excessive intervention by man, for example, by trying to remove every last drop of a pollutant or by trying to "engineer" the environment, can often itself be destructive and hinder natural recovery. The appropriate clean-up and restoration measures will always depend upon the environment in question and the nature and extent of the impact. This cannot be legislated for and requires clear but flexible criteria to be established that can be interpreted in an objective manner by experts.

3.6 ITOPF expressed the view that it would sometimes be necessary to carry out post-spill studies in order to determine the precise nature of the "damage" caused by an oil spill and/or the need for restoration measures, given the potential for natural recovery. In the view of ITOPF, it would be necessary to ensure that the scale of such studies was not out of proportion to the extent of the contamination and the predictable effects. ITOPF also considered it important that the studies would be practical rather than esoteric and that they would be likely to deliver the required data.

4 Considerations at the Working Group's First Meeting

4.1 In the document submitted to the Working Group's first meeting, the Director expressed the view that measures of reinstatement must be considered reasonable from an objective point of view in the light of the information available when the specific measures were taken. He also considered that it must be required that it would be technically feasible to carry out the proposed reinstatement measures. In his view, there must be a reasonable likelihood that the measures would achieve the results envisaged. According to the Director, the costs incurred must not be disproportionate to the results achieved or to the results which could reasonably be expected. He also maintained that account must be taken of the capacity of the marine environment to restore itself.

4.2 At its first meeting, the Working Group agreed in general that, in order to be admissible, measures to reinstate the environment would have to fulfil the following criteria:

- (a) the cost of the measures should be reasonable;
- (b) the cost of the measures should not be disproportionate to the results achieved or the results which could reasonably be expected; and
- (c) the measures should be appropriate and offer a reasonable prospect of success.

5 Director's Considerations

5.1 It appears that a starting point for the Working Group's further consideration of this issue is the list of criteria set out in paragraph 4.2 above. It should be emphasised that, in the Director's view, the test of reasonableness should be an objective one; the measures should therefore be reasonable from an objective point of view in the light of the information available when the specific measures were taken. However, there are a number of other elements which might be taken into account.

5.2 It should first be noted that, as shown by numerous studies, a major oil spill will not cause permanent damage to the marine environment, except in exceptional circumstances. In addition, the marine environment has a great potential for natural recovery. There are also severe limits to what man can actually do in taking measures to improve on the natural processes. In considering whether measures of reinstatement are reasonable, it would be necessary, in the Director's view, to establish whether such measures actually contributed to the reinstatement in an effective way.

5.3 In the light of these considerations, the Working Group may wish to consider whether the criteria set out in paragraph 4.2 should be modified to read as follows:

- (i) the measures should be technically feasible and offer a reasonable prospect of success, in particular in significantly accelerating the natural recovery of the damaged community or population of a species known to be at risk; and
- (ii) the cost of the measures should be reasonable and not disproportionate to the damage or to the results which could reasonably be expected.

6 Action to be Taken by the Working Group

The Working Group is invited to:

- (a) take note of the information contained in this document;
 - (b) consider the criteria to be applied in assessing the admissibility of claims relating to the cost of measures to reinstate the marine environment; and
 - (c) make such recommendations to the Assembly in respect of the admissibility of such claims as the Working Group may deem appropriate.
-