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## CONSEQUENTIAL LOSS AND PURE ECONOMIC LOSS

THE LINE BETWEEN ADMISSIBLE AND NON-ADMISSIBLE CLAIMS FOR ECONOMIC LOSS

Note by the Swedish Delegation

### 1 Introduction

1.1 The Swedish delegation has no difficulties in accepting the conclusions by the Intersessional Working Group that in principle consequential economic loss and pure economic loss should be compensated by the IOPC Fund (cf paragraphs 6.3.18-19 of the report of the first meeting of the Seventh Intersessional Working Group, document FUND/WGR.7/10).

1.2 However, these conclusions do not answer the question how far the right to compensation extends for economic loss. The Working Group had at its first meeting a preliminary discussion on this question. Though there was agreement in the Group that in principle claims for pure economic loss were acceptable delegations expressed that a line had to be drawn between admissible and non-admissible claims for economic loss (paragraphs 6.3.20-24 of document FUND/WGR.7/10).

1.3 The purpose of this document is to focus on the question where to draw the borderline between admissible and non-admissible claims for economic losses and to initiate further discussion of the question at the second meeting of the Working Group. The question could also be put as how far in the chain of victims should the IOPC Fund compensate economic loss caused by oil pollution?

1.4 This document is submitted as discussion material for the Working Group. Also the concluding remarks are put forward for discussion.

### 2 The Problem

#### 2.1 Background

2.1.1 The experience of recent oil incident cases shows that a wide variety of claims for economic loss can be presented to the IOPC Fund. Many of these claims are new in the Fund practice and

might under general principles of compensation law of some – or many – of the Contracting States to the Fund Convention not be admissible since they can be described as not being a direct result of the defendant's action. An acceptance of all of these types of claims can create a wide scope of recovery and also introduce principles of compensation in one area of compensation law which might be deviating from general principles of law of tort of many national legislations.

2.1.2 One example of these types of claims for economic loss are claims by fish processors for loss of income due to stop or lack of deliveries from fishermen prevented from fishing in a polluted sea area.

2.1.3 Another example is loss of income of employees of fish processing enterprises made redundant as a consequence of the pollution damage.

2.1.4 Another example could be loss of income for a wholesaler to which processed fish usually is delivered from a fish processor which has had to close down his fish processing activity due to stop or lack of deliveries of fish from fishermen.

2.1.5 Also in the tourist industry a variety of claims from persons not directly affected by an oil spill might be presented. Such as loss of income of wholesalers of victuals to hotels and restaurants in an area affected by a pollution damage and for travel agents, for instance even in other countries, specialising in arranging holidays in the affected area.

2.1.6 Another example which can be brought up for discussion is if a power plant station depending on sea water for its cooling system has to close down because of the oil polluted sea water and thereby stops to deliver electricity to a whole town or a whole region. Would in such case individuals and/or companies depending on supply of electricity be entitled to compensation from the Fund? A similar example could be an aluminium plant which cannot use sea water intake because of oil polluted water. Would other industries depending on deliveries from the aluminium plant be entitled to compensation from the Fund?

2.1.7 For the shipping industry costs or loss of income could arise as a consequence of a ship being prevented to enter or leave a port due to the fact that the oil incident has made the authorities to close the harbour area for traffic for some time or that the tanker from which the oil has escaped has sunk and is blocking the entering or leaving the port.

## 2.2 The Problem

2.2.1 It seems to be obvious that accepting all claims for economic losses which are not a direct result of the defendant's action could open the flood-gates to a wide range of claims. To accept all economic claims is not a realistic approach and would also be an extension of the right to compensation contradictory to general principles of many national legislations. It could also create a risk of diminishing the general acceptance of the international liability and compensation system for oil pollution damage.

2.2.2 A too broad acceptance of claims for economic losses could also imply some adverse effects for claimants depending directly on sea-related or coastal-related activities, such as fishermen, owners of polluted fish-farms and hoteliers situated at the sea, since the international liability and compensation system is working under financial limits. It should therefore be observed that if claims for remote economic losses are accepted as payable under the Fund and the amount of established claims against the Fund exceeds the maximum amount of compensation payable by the Fund, the claims which are not a direct result of the defendant's action will diminish the possibilities of claimants depending directly on earning from coastal or sea-related activities to get full and adequate compensation. This follows from the provisions on the distribution of the IOPC Fund's limit in Article 4.5 of the 1971 Fund Convention.

### **3 Some Elements to Take into Account when Considering the Problem**

#### **3.1 The Damage must be Caused by Contamination!**

3.1.1 The Intersessional Working Group has taken the view that the point of departure must be the concept of "loss or damage caused by contamination", ie the damage must be a result of escape or discharge of oil (a pollution damage).

3.1.2 The fact that the damage must be caused "by contamination" (ie be an oil pollution damage) is a restrictive element when deciding if a claim is admissible or not. It seems not to be enough only to prove that a damage was caused by an incident which resulted in pollution. If for instance a ship is prevented to enter or leave a port due to the fact that the tanker, from which the oil has escaped, has sunk and is blocking the entering or leaving the port it could be argued that a claim for pure economic loss from the ship which was prevented from entering or leaving the port should be rejected since the blockage rather than the contamination is the cause of the loss.

#### **3.2 Comparison with National Legislation?**

3.2.1 At the previous meeting several delegations stated (paragraph 6.2.4 of document FUND/WGR.7/10) that the Fund should exercise a certain caution in accepting claims beyond those admissible under the general principles of law in Member States.

3.2.2 It is assumed that many national legislations – both civil law countries and common law countries – apply some principles in order to restrict the consequences when accepting claims for compensation which are an indirect result of the defendant's action. The reason for such attitude is the fear of far-reaching consequences that acceptance of such claims could have. For this purpose there are in national legislations various criteria for the test of causation and remoteness.

3.2.3 It should be considered whether it would be appropriate for the Fund to accept or introduce a principle in compensation law which allows that also an economic loss not being a direct result of the defendant's action is compensable. This might mean that the Fund introduces a principle which deviates from general principles of law of tort of many national legislations.

#### **3.3 The Notion "Pollution Damage" in the 1992 Protocols to the Civil Liability Convention and the Fund Convention**

3.3.1 It should be considered if under the 1992 definition of pollution damage it is the intention to extend the right to compensation for economic loss to a loss which is not a direct result of the defendant's action.

3.3.2 During the deliberations at the 1984 Diplomatic Conference many delegations and observers underlined that claims which only had remote connection with the damage should not be compensated (for the debate, reference is made to LEG/CONF.6/C.2/SR.3, 4, 15, 16, 17 and 24/PROV). Special reference could in this aspect be made to the intervention of the then Director of the IOPC Fund who recalled that the intention of the Working Group, [a group which elaborated the new definition of pollution damage] which had based its work on experience of the IOPC Fund, had been to ensure compensation for persons living directly from tourism, such as hoteliers and restaurant owners also under the Protocols to the Civil Liability Convention and the Fund Convention, as was the case under the instruments in force, "but excluding those who where not directly dependant on such activities" (LEG/CONF.6/C.2/SR.16/PROV p6).

## 4 Concluding Remarks

### 4.1 General

4.1.1 For obvious reasons it is not possible to accept all claims for economic loss. The IOPC Fund should in its claims procedure recognise the need for a borderline between admissible and non-admissible claims for economic loss. The Fund should apply some general criteria for the admissibility of claims which in a reasonable way limits the right to compensation for economic loss and enables claimants to foresee with some degree of certainty whether a particular claim is admissible or not.

4.1.2 The Working Group considered, on a preliminary basis, at its first meeting some elements which could be decisive criteria as to the admissibility of claims (paragraph 6.3.24 of document FUND/WGR.7/10).

### 4.2 Foreseeability

4.2.1 Of the elements considered by the Working Group it could be argued that the *test of foreseeability* is of little use since the limits of foreseeability may easily be extended from one case to another. Loss or damage which were unforeseen in one incident is not unforeseen when a later incident occurs.

### 4.3 Direct Result

4.3.1 One approach is that the IOPC Fund when deciding on claims for economic loss applies the qualifying requirement that the economic loss must be a *direct result* of the oil pollution damage for being admissible. This would imply a restriction in the right of compensation and not extend the right to more remote victims in the chain.

### 4.4 Proximity

4.4.1 Another approach could be a *test of proximity*. Decisive criteria for such a test could be that there should exist a geographic proximity between the pollution damage and the claimant's activity as well as a business proximity between the claimant's activity and the sea or coastal related activities directly affected by the oil spill.

4.4.2 An example shows how the test of proximity could be applied. The requirement of geographic proximity excludes claimants which do not have their activity in the area – or closely related to the area – affected by the spill. The business proximity criterion would mean that it is necessary that the activity of a claimant not directly affected by the oil spill is an integrated part of the economic coastal or sea related activity directly affected by the spill.

4.4.3 It must be recognised that the test of proximity needs further and thorough consideration by the Working Group and the IOPC Fund.

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