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CRITERIA FOR THE ADMISSIBILITY OF CLAIMS FOR COMPENSATION

Note by the Comité Maritime International

1. The Comité Maritime International (CMI) welcomes the opportunity to present this Note in response to the invitation received from the IOPC Fund to supply its Seventh Intersessional Working Group with a description of the work which the CMI has undertaken in recent years on the subject of admissibility and assessment of claims for pollution damage.

2. As will appear from this Note, there is a high degree of overlap between the CMI's work and the task currently facing the IOPC Fund's Working Group. At the outset the CMI wishes to acknowledge the considerable assistance it has gained through participation as observer at the Assembly and meetings of the IOPC Fund, and through the very helpful contributions to its work which have been made, both formally and informally, by the Director of the Fund and by various distinguished representatives of member states. The CMI hopes very much that collaboration between the two organisations will be of mutual benefit.

Background

3. It will be appreciated that the CMI has as its object the unification of maritime law. Its current work in this field dates from early 1991 and was prompted to a certain extent by the decision in 1990 of the US Congress to adopt its own unilateral approach to the compensation of oil pollution damage, by enacting its Oil Pollution Act (OPA) of that year, rather than participate in the international system contained in the Civil Liability and Fund Conventions.

4. As is well known, the framework of compensation set out in OPA is much more extensive than the concept of "pollution damage" as defined in the Conventions, or even in the 1992 Protocols. Some types of claims, such as those for damage to natural resources, may include substantial elements which are generally regarded as irrecoverable under the Conventions or Protocols. In this respect OPA naturally prompts the question whether the international system should be

accepted in the years ahead as providing adequate remedies for oil pollution damage, or whether instead the approach of the United States is to be regarded as an advanced model, which ought to be emulated by forward-thinking countries elsewhere.

OPA also left considerable scope for important details to be laid down at a later date by regulatory authorities, or by decisions of the courts. Regulations are currently being formulated by the National Oceanic and Atmospheric Administration to govern the assessment of claims for damage to natural resources; there is also a need for decisions of the courts to define the boundaries which will apply in future for recovery of claims for economic loss, there being very little guidance in the Act itself on this important issue.

In the period following the enactment of OPA there has been widespread concern that the legislation was passed in haste and as a largely political reaction to the *Exxon Valdez* casualty of March 1989. In the CMI it was believed that a need remained for a full and dispassionate debate to take place at international level on the legal problems involved, including some of the related practical and technical issues.

5. Part of the reason for this belief was an awareness that the term "pollution damage" is defined in the Civil Liability and Fund Conventions in only very general terms. This of course leaves scope for divergent decisions in different national courts to undermine the uniform application of the conventions which is so important to their success. It could be foreseen that in the 1990s the international system might increasingly come under strain, due to the growing public interest worldwide in environmental issues, and as a result of any tendency for developments in the United States to influence the expectations of claimants elsewhere, as well as the attitudes of judges and legislators.

6. Against this background an International Sub-Committee (ISC) and Working Group were established under the chairmanship of Professor Norbert Trotz, the Secretary-General of the CMI.[1] National associations affiliated to the CMI were circulated in 1991 with a report and questionnaire in which numerous issues were canvassed as to the types of claim for which compensation might be awarded under national laws. An analysis of the replies led to a discussion paper which was debated at a CMI colloquium on the subject in Genoa in September 1992. Immediately prior to the colloquium, a three-day seminar took place in which papers on various aspects of the subject were presented by 18 of the most knowledgeable experts in the field, including the Director of the IOPC Fund, the Secretary General of IMO, and past and present Chairmen of the IMO Legal Committee.[2] Following the seminar and colloquium a firm decision was made by the CMI to include the subject as one of the main items on the agenda for its conference to be held in Sydney on 2nd/8th October 1994.

7. In preparation for the conference the CMI Working Group prepared a draft Paper in which the following three main issues were addressed:

(1) Economic Loss,
(2) Environmental Damage and Restoration, and
(3) Preventive Measures and Clean-up

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[1] The other members of the Working Group were Prof. Edgar Gold, Mr Anthony Bessemer Clark, Mr Lloyd Watkins, and Mr Colin de la Rue (Rapporteur).

[2] The papers presented at the seminar, together with the paper discussed at the colloquium, have been published as a book under the title *Liability for Damage to the Marine Environment* (Lloyd's of London Press, 1993).

The Paper[3] was considered at a meeting of the ISC in Brussels in September 1993. It was then decided that certain revisions should be made to the draft, mainly in the area of environmental damage and restoration. The Working Group was thereafter expanded,[4] and after further revisions of the Paper the ISC met to consider an up-to-date draft[5] at a meeting in London in March 1994. After discussion of various further amendments, the ISC agreed on the final version of its report dated March 25th, 1994. This report is over 80 pages in length, and it has not been thought appropriate or practicable to submit it as a formal document to the IOPC Fund. Copies are nevertheless readily available on request, and for the purposes of this Note only a summary is given.

8. It should be noted that the report and the draft guidelines attached to this document have not yet been formally adopted by the competent bodies of the CMI. Both papers will be submitted to the International Conference of the CMI in October this year in Sydney for discussion and adoption. In spite of the unofficial status of the papers the CMI hopes that the submission of this Note may be of interest and assistance to the Working Group of the IOPC Fund.

Economic Loss

9. Under this heading the CMI has considered a problem with which the IOPC Fund is only too familiar: the question how to draw a reasonably clear line of demarcation between admissible and inadmissible claims for economic loss.

10. In addressing this question the CMI has reviewed the position in various different legal systems: apart from the relevant provisions of the Conventions and Protocols, and the relevant provisions of OPA, attention has been paid to the principles applied in the courts of various common law and civil law jurisdictions. It may fairly be said that the same problem has caused difficulty all over the world, and it is particularly noteworthy that precisely the same problem can be expected to arise under OPA as under the Conventions and Protocols.

11. In the search for some way of alleviating these problems the CMI has considered four main options:

1. to adhere to the so-called "bright line" rule and thereby disallow any claims for "pure economic loss";
2. to allow all claims for any economic loss resulting from an incident;
3. to devise a new test involving notions of remoteness, directness, foreseeability and/or proximity, so as to allow recovery of some claims of pure economic loss but not others; and
4. to adhere to the "bright line" rule, subject to certain specific exceptions.

12. A review of these options suggests that none offers a complete solution to the problems involved. Options 1 and 2 represent extreme solutions and are not thought to attract significant support.

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[3] Draft dated August 10, 1993.

[4] To include Dr Ian White and Mr Charles Anderson.

[5] Draft dated February 10, 1994.

13. Option 3 offers the advantage of a test which can be related more readily to the existing legal framework. Most relevant compensation laws or schemes employ a notion of causation in the definitions they give of recoverable claims. Criteria such as directness, foreseeability and proximity address the question how close the link of causation must be in order to justify recovery. Such criteria may be more readily defended in principle than rules of a purely pragmatic nature, and they also preserve sufficient flexibility to deal with each case on its merits. However, there is a problem involved in deciding exactly what test to adopt, bearing in mind that some concepts, notably that of directness, have been found in the past to mean different things to different people. General criteria may also be insufficiently precise to be of much practical use, on their own, in addressing the problems involved. In particular it is questionable how far they truly assist in the making of a decision, as distinct from its subsequent rationalisation.

14. Option 4 offers the advantages of greater clarity and certainty. In the particular context of pollution, the possibility exists of defining specific cases in which pure economic loss may be paid, by reference to specific types of claim or claimant commonly encountered in practice. A disadvantage lies in the fact the bright line rule is not widely recognised in civil law countries, and that even in common law jurisdictions it does not strictly constitute a hard-and-fast rule. An approach based on specific exceptions to the bright line rule might appear excessively arbitrary unless supported by general criteria. It may also be unduly rigid, unless care is taken to preserve adequate flexibility when defining specific categories of recoverable claim, recognising the scope for unforeseen situations to arise at a later date.

15. The conclusion suggested in the CMI report is that an amalgam of options 3 and 4 offers the best way forward. General criteria may assist in making what may sometimes amount to a discretionary judgment to accept or reject a specific claim, and to this extent they may have an important role to play in controlling the boundaries of recovery. At the same time, a degree of additional clarity may be achieved through broadly defined examples of specific cases in which pure economic loss may or may not normally be paid.

Environmental damage and restoration

16. Under this heading consideration has been given by the CMI to the conflict which has emerged in the 1990s between the expansive right of recovery allowed by OPA in respect of claims for loss of or damage to natural resources, and the more restrictive approach normally considered appropriate under the Conventions, as reflected in the 1992 Protocols.

17. The specific problem is foreseen that political interest in environmental issues will continue to grow in the decade ahead, and that in a growing number of countries public opinion will not be satisfied by a system which is perceived to provide an inadequate remedy for public grievance over environmental damage. In this context the CMI has considered the competing merits of the two systems, and has suggested that the most constructive contribution it could make to a uniform and satisfactory development of the law is to concentrate on possible ways of developing the concepts of restoration and reinstatement. In particular it is felt that there may be scope for such work to complement the Protocols if elaboration of the notion of "reinstatement" serves to reinforce its acceptance as the proper measure and appropriate limit of recovery. At the same time it is recognised that although the law of the United States contemplates damage awards assessed by theoretical methods, it was nevertheless stressed

in the *State of Ohio* case[6] that there should be a distinct preference in favour of restoration costs as the primary measure of damages.

18. On this basis, with the assistance of technical expertise, attention has been paid to general principles or criteria which may help to determine what costs or measures of restoration or reinstatement are normally to be considered reasonable and eligible for compensation.

Preventive measures and clean-up

19. In the CMI questionnaire of 1991 several issues were raised concerning different types of claim for preventive or clean-up measures, and a considerable degree of consensus was apparent from the replies received. This part of the CMI's report records the various points on which there was general agreement, and focuses mainly on the difficult question to what extent, if any, governments and other public bodies should be permitted to recover fixed costs which they would have incurred in any event. This is of course a subject which was specifically considered in 1981 by an earlier Intersessional Working Group of the IOPC Fund, and the conclusions reached are thought to be very much the same.

Guidelines

20. The primary aim of the CMI's work has been to promote a wider debate and clearer understanding of the problems involved in this field. At the same time, consideration has naturally been given to any practical ways in which its efforts might promote a uniform practice at international level, and assist those concerned with claims for pollution damage.

21. It need hardly be said that there would be significant obstacles and delays involved in any attempt to modify the definition of "pollution damage" in the Civil Liability and Fund Conventions, or in the Protocols thereto. Even if a more detailed definition could be agreed, it may not necessarily provide the best solution to the problems involved. Moreover it would not embrace the full scope of the CMI's work, which extends to very similar problems which may arise under national laws of non-CLC states, notably the USA, or under the voluntary industry schemes.

22. A proposal which has attracted much support in the CMI is the possibility of adopting Guidelines which would not directly affect strict legal rights, but which might help to promote a uniform international practice in assessing claims for pollution damage. Granted that such Guidelines are intended to be of practical use, it may be thought appropriate for them to go beyond mere statements of general principle, and to state the position with respect to specific types of claim commonly encountered in practice. At the same time, scope would exist in the drafting of such Guidelines to retain a greater degree of flexibility than would normally be found in formal legal definitions.

23. A first attempt at draft Guidelines was made by the CMI's Working Group in early 1992. These initial efforts highlighted the difficulties involved in devising a text which is specific enough to be of practical use, and at the same time flexible enough to enable each case to be treated on its merits. There were reservations as to the feasibility of the Guidelines, and no text was presented for discussion at the CMI colloquium in Genoa in 1992.

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[6] *State of Ohio v Department of Interior*, 880 F.2nd 432 (US Court of Appeals, D.C. Cir.1989).

24. Subsequently however there were various developments which added considerably to the demand for general criteria to be drawn up to clarify the admissibility of claims for pollution damage. The CMI is very conscious of the very difficult nature of some of the issues which the Executive Committee of the IOPC Fund has had to address when considering claims arising from recent cases, notably the *Haven, Aegean Sea* and *Braer* incidents.

25. At the same time, the cost of oil spills to the shipping and oil industries has continued to rise, and there are concerns that the absence of clearer criteria facilitates a "leap-frogging" of claims, and a progressive opening of the floodgates towards a point where the international system may be jeopardised by the weight of the burden upon it.

26. The task of technical experts attending at the scene of oil spills has been made no easier by the glare of public attention, and concerns have been expressed that response measures are sometimes instigated for reasons of public relations, without sufficient regard for an objective appraisal of their technical merits. It is felt that there may be cases in which it would assist technical experts in advising the parties concerned if reference could be made to general criteria relating to the compensation to be paid for the cost of preventive or clean-up measures.

27. Indeed there are other reasons why it may be beneficial to all concerned for claimants to be fully informed of their rights under the conventions. The Fund has of course issued its Claims Manual to assist claimants with basic information on how to present claims in cases in which it is involved. In the post-*Exxon Valdez* era there has been an increasing tendency for claimants to be encouraged to seek alternative remedies for incidents in convention countries, notably those involving some connection with the United States. In such cases the relative advantages of the international system could be more apparent to claimants and their advisers if a document were available which summarises at least the main principles normally applied in determining the admissibility of claims.

28. In these circumstances the CMI has continued its earlier efforts to develop suitable Guidelines on the admissibility of claims. In so doing it has recognised that a significant challenge is involved, and that even the best available solution would be far from perfect. It has nevertheless been thought important that every effort should be made to address the difficulties involved, in order to clarify so far as possible the present uncertain position.

Against this background a revised version of the CMI draft Guidelines was appended to the draft CMI paper dated August 10th, 1993. The appendix has since been subject to numerous further revisions in meetings of the CMI Working Group and ISC. The draft attached to the final report of the ISC, dated 25th March 1994, has therefore evolved from the combined efforts of maritime lawyers from several countries, representing a variety of legal systems, and working in close consultation with technical experts.

Further developments

29. It is to be emphasised that the draft Guidelines are, as mentioned earlier, still only a draft. Should the CMI decide to adopt any Guidelines at its conference in October, the final text may well be different. In the meantime, the CMI is very happy to submit to the IOPC Fund the current version of its draft Guidelines by way of Appendix to this Note, in the hope that this will be of some interest and assistance in addressing the problems which the Working Group has been asked to consider.

30. It would unduly lengthen this note if a detailed commentary were to be given on each of its provisions. However two general points may be made:

Firstly, from the very initial version in 1992, the CMI draft Guidelines have included a provision stressing the importance of maintaining a uniform application in contracting states of CLC and the Fund Convention, together with any amendments thereof, and of due weight being attached to any relevant policy or resolutions of the IOPC Fund. Although the Guidelines are not limited to any particular legal framework, it is recognised that particular importance attaches to the practice of the IOPC Fund, especially as its decisions are published. For this reason, the CMI has striven to avoid any inconsistencies between the terms of the Guidelines and the practice of the IOPC Fund. In some instances it has been noted that the CMI and the Fund appear independently to have adopted very similar criteria. In other instances, where the Fund has already formulated specific criteria, these have been adopted in the relevant part of the text. In further areas, where the Fund has identified a need for clearer criteria but is still searching for suitable tests, the CMI has attempted to formulate an appropriate text. The draft is not intended in any way as a substitute for an explanatory Claims Manual, since a need will doubtless remain for a source of basic information to claimants expressed in simple terms. However it will hopefully be of some assistance in establishing the underlying principles to be applied in determining claims.

Secondly, the importance will surely be recognised in both organisations of their respective efforts leading to consistent results. The CMI would be very happy if its draft Guidelines were found to provide a suitable basis for any further work which the IOPC Fund may wish to undertake for its own purposes. At the same time, any suggestions by the Fund for possible improvement of the draft will naturally be received with considerable interest. The CMI has noted with pleasure that the Fund Director is able to accept an invitation to participate in the Sydney conference, despite the many demands on his time during that period. In the meantime, the CMI would be willing to nominate representatives to meet with the Fund Secretariat to discuss any detailed drafting matters, if it is felt that this would be a worthwhile process.

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APPENDIX

CMI DRAFT GUIDELINES ON ADMISSIBILITY AND ASSESSMENT OF CLAIMS FOR OIL POLLUTION DAMAGE

PART I: GENERAL

1. Compensation for pollution damage shall be paid in accordance with the following Guidelines.

2. The importance is to be recognised of maintaining a uniform application in contracting states of the Civil Liability Convention 1969, the Fund Convention 1971, together with any amendments thereof, and to that end due weight should be attached to any relevant policy or resolutions of the IOPC Fund.

3. In every case it is the duty of a claimant to take reasonable steps to avoid or mitigate any loss, damage or expense incurred as a result of an incident, and any failure to do so may result in compensation being correspondingly refused or reduced.

PART II: ECONOMIC LOSS

4. For the purpose of these Guidelines the following definitions are employed:

   (a) "Consequential loss" means financial loss sustained by a claimant as a result of physical loss of or damage to property caused by contamination by oil;

   (b) "Pure economic loss" means financial loss sustained by a claimant otherwise than as a result of such physical loss of or damage to property;

   (c) "Property" means anything in which the claimant has a legally recognised interest by virtue of a proprietary or possessory right.

5. In principle compensation is payable for consequential loss. Pure economic loss may be compensated in certain cases, but normally only as set out below.

6. Pure economic loss may be compensated when caused by contamination by oil, and may be accepted as so caused when a reasonable degree of proximity exists between the contamination and the loss. In ascertaining whether such proximity exists, account is to be taken of all the circumstances, including (but not limited to) the following general criteria:

   (a) the geographic proximity between the claimant's activities and the contamination;

   (b) the degree to which the claimant is economically dependent on an affected natural resource;

   (c) the extent to which the claimant's business forms an integral part of economic activities in the area which are directly affected by the contamination;

(d) the scope available for the claimant to mitigate his loss;

(e) the foreseeability of the loss; and

(f) the effect of any other concurrent causes contributing to the claimant's loss.

7. Pure economic loss is not recoverable by reason only that a causal connection is shown between the incident (as opposed to contamination resulting therefrom) and the financial loss; the loss must be caused by contamination resulting from the escape or discharge of oil from the ship involved in the incident.

8. (a) The specific categories of recoverable claim for pure economic loss are not necessarily closed, but normally they will be limited in accordance with the foregoing principles to claims by parties who depend for their profits or earnings on commercial exploitation of the affected coastal or marine environment; such parties will normally be confined to those involved in:

(i) fishing, aquaculture and similar industries;

(ii) the operation of hotels, restaurants, shops, beach facilities and similar tourist establishments;

(iii) the operation of salt-extraction plants, power stations and similar installations reliant on the intake of seawater for production or cooling processes.

Those involved in the aforesaid activities shall be limited to owners, operators and their employees.

(b) Compensation will not normally be paid to parties claiming merely to have suffered:

(i) delay, interruption or other loss of business not involving commercial exploitation of the environment as aforesaid (*e.g.* diversion, detention or delay of ships or cargoes); or

(ii) loss of taxes and similar revenues by public authorities.

9. Compensation may be paid for economic loss if it results from damage to, or loss or infringement of, a recognised legal right or interest of the claimant. Such a right or interest must be vested only in the claimant (or in a reasonably limited class of persons to which the claimant belongs) and must not be freely available to the public at large.

PART III: PREVENTIVE MEASURES, CLEAN-UP AND RESTORATION

10. (a) The cost of preventive measures (including clean-up and disposal) is recoverable insofar as both the measures themselves and the cost thereof were reasonable in all the particular circumstances.

(b) In general compensation is payable where the measures taken or equipment used in response to an incident were likely, on the basis of a technical appraisal at the time any relevant decisions were taken, to be successful in avoiding or minimising pollution damage. Compensation is not to be refused by reason only that preventive or clean-

up measures prove ineffective, or mobilized equipment proves not to be required. A claim may however be refused if the steps taken could not be justified on a technical appraisal, in the circumstances existing at the relevant time, of the likelihood of the measures succeeding, or of mobilized equipment being required.

(c) Where preventive or clean-up measures are undertaken by a government agency or other public body, compensation may be claimed for an appropriate proportion of normal salaries paid to their employees engaged in performing the measures during the time of such performance, and such a claim will not be rejected on the sole ground that the salaries concerned would have been payable by the claimant in any event.

(d) Where any plant or equipment owned by a claimant is reasonably used for the purpose of preventive or clean-up measures, the claimant may claim reasonable hire charges for the period of the use, and any reasonable costs incurred to clean or repair the plant or equipment after its use; provided always that the aggregate of such charges and/or costs should not exceed the acquisition cost or value of the plant or equipment concerned.

(e) Compensation paid in accordance with sub-paragraphs (c) and (d) is to be limited to expenses which relate closely to the clean-up period in question, and is not to include remote overhead charges.

(f) Where equipment or material is reasonably purchased for the purpose of preventive or clean-up measures, compensation is payable for the cost of acquisition, but subject always to a deduction for the residual value of such equipment or material after completion of the measures.

(g) Compensation is payable for the cost of reasonable repairs of damage unavoidably caused by clean-up measures, such as damage to sea-defences, roads and embankments caused by heavy machinery.

(h) Compensation is payable for the cost of reasonable measures of wildlife rehabilitation, *e.g.* cleaning oiled seabirds.

11. Compensation for impairment of the environment (other than loss of profit) shall be limited to the costs of reasonable measures of reinstatement actually undertaken or to be undertaken. It is not payable where the claim is made on the basis of an abstract quantification of damage calculated in accordance with theoretical models.

12. (a) Reasonable measures of reinstatement need not be limited to the removal of spilt oil, but may include appropriate steps to promote the restoration of the damaged environment or assist in its natural recovery.

(b) Specific studies may be necessary to quantify or verify pollution damage and to determine whether or not reinstatement measures are in fact feasible and will accelerate natural recovery. The reasonable costs of such studies are admissible, provided they are not out of proportion to the actual damage.

(c) A claimant may recover a reasonable estimate of the cost of reinstatement measures, before they have actually been incurred, provided always that an undertaking is given, or other satisfactory evidence is provided, that the proposed measures of reinstatement will actually be carried out.

(d) In determining whether measures of reinstatement are reasonable, account is to be taken of all the relevant technical factors including (but not limited to) the following:

(i) the extent to which the observed state of the environment, and any changes therein, are to be regarded as damage truly actually caused by the incident in question, as distinct from other factors whether man-made or natural;

(ii) whether the measures are technically feasible and likely to contribute to the re-establishment at the site in question of a healthy biological community in which the organisms characteristic of that community are present and are functioning normally;

(iii) the speed with which the affected environment may be expected to recover by natural processes and the extent to which the reinstatement measures concerned may accelerate (or inadvertently impede) natural processes of recovery; and

(iv) whether the cost of the measures is disproportionate to the damage or the results which could reasonably be expected.

13. Compensation may be paid for the cost of reasonable measures taken by a claimant to prevent or minimise economic loss or damage, where such loss or damage would itself have qualified for compensation under the terms of these Guidelines. In determining what is reasonable for this purpose, it will normally be required that:

(a) the costs of the measures were reasonable;

(b) the costs of the measures were not disproportionate to the loss or damage which they were intended to prevent or minimise;

(c) the measures were appropriate and offered a reasonable prospect of being successful; and

(d) in the case of a marketing campaign, the measures related to actual targeted markets.