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COMPENSATION
FUND

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CRITERIA FOR THE ADMISSIBILITY OF CLAIMS FOR COMPENSATION

GENERAL ISSUES AND QUESTIONS RELATING TO PURE ECONOMIC LOSS

Note by the Director

1 Introduction

1.1 At its 16th session, the Assembly decided that a Working Group should be set up to study the criteria for admissibility of claims for compensation with the following mandate (document FUND/A.16/32, paragraph 23.4):

1 to examine the general criteria for the admissibility of claims for compensation for "pollution damage" and "preventive measures" within the scope of the 1969 Civil Liability Convention and the 1971 Fund Convention and the 1992 Protocols thereto;

2 to study in particular problems relating to claims in respect of so-called "pure economic loss" and "preventive measures" taken to prevent or minimise pure economic loss;

3 to consider problems relating to the admissibility of claims for environmental damage within the scope of the definition of "pollution damage" referred to above;

4 to study the procedures to be applied by the IOPC Fund in the assessment and settlement of claims.

1.2 The Director was instructed to make a preliminary study of the issues included in the mandate of the Working Group. The Assembly invited Member States to submit observations on the issues to the Director by 1 December 1993.

1.3 The Director has carried out a preliminary study as requested by the Assembly, the results of which are set out in documents FUND/WGR.7/2, FUND/WGR.7/3 and FUND/WGR.7/4. The present

document deals with certain general issues relating to the legal regime of compensation established by the Civil Liability Convention and the Fund Convention and the admissibility of claims. The document also examines certain questions relating to claims for pure economic loss and claims for preventive measures to prevent or minimise such loss. The IOPC Fund's past practice in respect of the admissibility of claims is reviewed in document FUND/WGR.7/3. The questions relating to environmental damage are dealt with in document FUND/WGR.7/4. The procedure of the IOPC Fund for dealing with claims for compensation will be examined at a later stage.

2 Definitions of "Pollution Damage" and "Preventive Measures" in the 1969 Civil Liability Convention

2.1 The deliberations at the 1969 International Conference which adopted the Civil Liability Convention were based on a text elaborated by the IMO (then IMCO) Legal Committee. That text contained the following definition of "pollution damage" in draft Article I.6:

> "Pollution damage" means loss or damage outside the ship carrying oil, caused by the escape or discharge of oil, wherever such escape or discharge may occur, and includes the costs of preventive measures.

2.2 The definition of "pollution damage" was not subject to any detailed discussion at the 1969 International Conference, although several proposals were made to amend the text proposed by the Legal Committee.

2.3 The United Kingdom delegation presented a proposal to limit the scope of the definition to "damage by contamination". This proposal was adopted (document LEG/CONF/C.2/WP.9; Official Records of the International Legal Conference on Marine Pollution Damage, 1969 (hereinafter referred to as "Records 69"), pages 566, 714, 715).

2.4 The delegation of the Federal Republic of Germany proposed that the words "and further loss caused or damage done by reasonable preventive measures" be added at the end of the definition elaborated by the Legal Committee (Records 69, pages 74, 101). The United Kingdom delegation opposed the German proposal and expressed the view that claims for remote damage should be dealt with under the law of the country concerned. The German delegation questioned whether such claims would be recoverable under national law; if the Convention were not to cover such claims, they would not be recoverable. The German proposal was adopted (Records 69, pages 663–664).

2.5 The question of whether the definition proposed by the Legal Committee covered personal injury was also discussed. The Japanese delegation stated that it did not think that personal injury and loss of life should be covered, as compensation for that was already provided under the 1957 Convention relating to the limitation of liability of owners of sea-going ships. The proposal made by the Japanese delegation to exclude personal injury from the draft text was, however, rejected (Records 69, pages 663–664).

2.6 The Conference thus adopted the following definition of pollution damage in the Civil Liability Convention (Article I.6) (amendments vis-à-vis the Legal Committee draft underlined):

> "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.

2.7 The definition of "preventive measures" proposed by the Legal Committee was adopted without any amendments, reading as follows:

> "Preventive measures" means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage.

2.8 It should be noted that the work of the Legal Committee took into account work carried out by the Comité Maritime International (CMI) which had been invited by IMCO to study the matter. The scope of the definition of "pollution damage" was discussed at some length at the CMI Conference held in Tokyo in March 1969. The Japanese delegation to the CMI Conference had presented a proposal to the effect that the proposed Convention should deal only with property claims for loss or damage due to contamination and that in particular claims for loss of life or personal injury should be excluded[1]. That proposal was rejected by the CMI Conference.

3 Definitions of "Pollution Damage" and "Preventive Measures" in the 1984 and 1992 Protocols to the Civil Liability Convention

3.1 The question of whether there was a need for a new definition of "pollution damage" was discussed extensively during the preparatory work that preceded the 1984 Diplomatic Conference, both at the sessions of an informal Working Group and in the IMO Legal Committee[2]. The Legal Committee was unable to reach agreement on a new text. The Committee decided instead to forward to the Diplomatic Conference, as a point of departure for the discussions, a draft presented by the CMI which reads as follows[3]:

> "Pollution damage" means
>
> (a) costs actually incurred as a direct result of contamination outside the ship resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur;
>
> (b) economic loss actually sustained as a direct result of contamination as set out in (a);
>
> (c) actual costs of preventive measures and economic loss actually sustained as a direct result of such preventive measure.

3.2 At the International Conference, a number of proposals were made for a new definition[4]. During the discussions in the Committee of the Whole, several delegations were in favour of the present definition. Other delegations thought it preferable to elaborate a new definition which should not change the substance of the present definition as to its general scope, but only give a clearer delimitation of the scope, thus ensuring a uniform interpretation in Contracting States. It was generally considered necessary to find a wording which excluded speculative claims.

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[1] The text proposed by the Japanese delegation read: "'Pollution damage' means loss caused by damage done by contaminating property by oil escaping from the ship and precluding the cost of preventive measures."

[2] The discussions during the preparatory work on the definition of pollution damage are summarised in IMO Document LEG/CONF.6/7, pp 6-15; 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 (hereinafter referred to as "Records 84/92"), Vol I, pp 136-146.

[3] LEG/CONF.6/4, p 2; Records 84/92, Vol 1, pp 58; cf LEG/CONF.6/7, pp 12 and 14; Records 84/92, Vol I, page 144).

[4] German Democratic Republic, document LEG/CONF.6/7 (Records 84/92, Vol 1, pp 142); Federal Republic of Germany 6/17 and 6/54; (Records 84/92, Vol 1, pp 295, 368); France 6/19 (Records 84/92, Vol 1, p 304); Poland 6/25 (Records 84/92, Vol 1, p 322-326); Sweden 6/30 (Records 84/92, Vol 1, p 337-338); United Kingdom 6/50 (Records 84/92, Vol 1, p 365); see also Norway 6/32 (Records 84/92, Vol 1, p 346); CMI 6/39 (Records 84/92, Vol 2, pp 47); USSR 6/41 (Records 84/92, Vol 1); International Group of P & I Associations 6/47 (Records 84/92, Vol 2, p 53); Advisory Committee on Pollution of the Sea (ACOPS) 6/59 (Records 84/92, Vol 2, page 74); Oil Companies International Marine Forum (OCIMF) 6/INF.3 (Records 84/92, Vol 2, p 110); Friends of the Earth International, 6/INF 4 (Records 84/92, Vol 2, pp 122).

3.3 After a general discussion of the issues involved in the Committee of the Whole[5], the detailed examination of the definition of "pollution damage" was referred to a Working Group[6]. The discussions of the Working Group were based on the experience of the IOPC Fund in connection with settlement of claims during the period 1979–1984. The practice of the IOPC Fund as regards the interpretation of the definition of "pollution damage" was generally accepted by the Working Group.

3.4 The important question of damage to the marine environment had given rise to several proposals at the Conference[7]. There was general agreement within the Working Group that reasonable costs for the reinstatement of the polluted environment should be considered as "pollution damage". It was also agreed that "pollution damage" should include economic loss suffered as a result of damage to the environment.

3.5 The Working Group was not able to agree on a single text, but submitted two alternative texts for consideration by the Committee of the Whole, each of which had found substantial support in the Working Group. These texts read as follows[8]:

Alternative I

"Pollution damage" means:

(a) reasonable costs actually incurred or to be incurred, and other damage or loss, including loss of profit, actually sustained as a direct result of contamination outside the ship 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) reasonable costs of preventive measures and damage or loss actually sustained as a direct result of such preventive measures.

Alternative II

"Pollution damage" means:

(a) 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; 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.

<5> LEG/CONF.6/C.2/SR.3 and SR.4 (Records 84/92, Vol 2, p 347-349, 351-359).

<6> Members: Brazil, Canada, China, Finland, France, German Democratic Republic, Federal Republic of Germany, Greece, Japan, Poland, Trinidad and Tobago, United Kingdom, United States of America. Observers: IOPC Fund and CMI.

<7> LEG/CONF.6/7 (Records 84/92, Vol 1, p 136-144); United Kingdom LEG/CONF.6/50 (Records 84/92, Vol 1, p 365), Federal Republic of Germany LEG/CONF.6/54 (Records 84/92, Vol 1, p 368), Poland LEG/CONF.6/C.2/WP.21 (Records 84/92, Vol 2, p 281).

<8> Report of the Working Group, LEG/CONF.6/C.2/2 (Records 84/92, Vol 2, p 187); Alternative I was based on a proposal by the CMI (LEG/CONF.6/39) and Alternative II on a proposal by the United Kingdom (LEG/CONF.6/50).

3.6 During the discussions of the report of the Working Group in the Committee of the Whole[9], a number of delegations supported Alternative I. They were apparently attracted by the more detailed description of the notion of "pollution damage", since it might lead to a more uniform interpretation of the concept and excluded speculative claims. It became obvious, however, that the very fact that this text was more detailed was the reason why Alternative I was not acceptable to many other delegations.

3.7 In Alternative I, certain expressions were inserted qualifying the kinds of loss or damage to be covered by the definition. Costs should be *actually incurred*, and other damage or loss should be *actually sustained.* The costs, damage or loss had to be incurred or sustained as a *direct result* of contamination arising out of the incident. The purpose of inserting the word "direct" was to introduce strict criteria for the test of causation and remoteness.

3.8 Alternative I was criticised by many delegations because, in their view, these qualifications would be of only limited assistance to the courts and would therefore not contribute to the unification of the interpretation of this definition. Words such as "actual", "direct", "incurred" and "sustained" could, in their view, lead national courts to divergent interpretations. Moreover, some delegations from civil law countries pointed out that the words "direct result" would in their jurisprudence mean immediate physical damage, excluding any consequential loss of earnings.

3.9 The supporters of Alternative II were of the opinion that the original wording of the definition should be maintained as far as possible, as its interpretation had not given rise to any major difficulties. They considered that the application of the present definition had contributed to a harmonisation of law, especially on the basis of the practice of the IOPC Fund and the decisions taken by the IOPC Fund Assembly and Executive Committee. Many delegations expressed the view that there was a need for clarification of the definition only as regards damage to the marine environment. Consequently, the only amendment to the present text contained in Alternative II was the addition of a proviso to the effect that compensation for impairment of the environment, other than loss of profit from such impairment, should be limited to the cost of reasonable measures to reinstate the polluted environment. It was specified that compensation was limited to costs of reasonable measures of reinstatement and that the definition only covered costs of reinstatement *actually undertaken or to be undertaken.*

3.10 After voting, the Committee of the Whole adopted the second Alternative[10]. The text of Alternative II was adopted without vote in the Plenary of the Conference.

3.11 The definition of "pollution damage" in the 1984 Protocol to the 1969 Civil Liability Convention as finally adopted reads as follows:

> 1.6 "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.

3.12 The application of the Civil Liability Convention in its original version had shown that there were different views as to the interpretation of the concept of *"preventive measures"*. The question was whether this definition covered pre-spill preventive measures (ie measures to prevent pollution taken

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<9> LEG/CONF.6/C.2/SR.15, SR.16 and SR.17 (Records 84/92, Vol 2, p 475-483, 486-490, 493).

<10> In an indicative vote, 28 votes were cast in favour of Alternative II, and 19 in favour of Alternative I, with one abstention. The Committee of the Whole then adopted Alternative II to replace the present definition, by 35 votes to none, with three abstentions (LEG/CONF.6/C.2/SR.16 and SR.17); Records 84/92, Vol 2, p 491, 494).

before a spill occurs) and what has been referred to as "pure-threat removal situations" (ie measures that are so successful that no spill takes place). It was the general view that the definition of "preventive measures", read in conjunction with the definition of "incident", was ambiguous, and that this ambiguity should be removed. There was general agreement that the regime of compensation established by the two Conventions should cover the two situations mentioned above.

3.13 The solution chosen by the 1984 Conference was the adoption of a new definition of the notion of "incident" which reads as follows (the words added in italics):

> Incident means any occurrence, or series of occurrences having the same origin, which causes pollution damage *or creates a grave and imminent threat of causing such damage.*

3.14 Opinions were divided as to whether the threat should be qualified as "serious" or "grave and imminent". In the Committee of the Whole, the latter expression was preferred by 33 votes to 15[11].

3.15 The 1992 Protocol to the Civil Liability Convention contains the same definitions of "pollution damage", "preventive measures" and "incident" as the 1984 Protocol.

4 Interpretation of Treaties

4.1 There are several theories regarding the principles to be applied for the interpretation of international treaty instruments. One of these theories is that a treaty should be construed in accordance with the ordinary meaning of the words of the text. Another theory holds that the provisions of a treaty are to be interpreted by reference to the purpose which the treaty was intended to achieve, and that the words of the text serve only as a means of expressing that purpose.

4.2 The 1969 Vienna Convention on the Law of Treaties lays down general and specific rules concerning the interpretation of treaties. Although this Convention has not been universally ratified, it is generally considered as offering the best current statement of the law on the subject of treaties. Reference is made to Articles 31 and 32 of the Vienna Convention which deal with the interpretation of treaties. These Articles are reproduced in the Annex to this document.

4.3 From these provisions it appears that, *in addition to agreements* between the parties in connection with the conclusion of the treaty, the other major considerations which should be taken into account in interpreting provisions of a treaty include.

- any subsequent agreement between the States Parties regarding the interpretation of the treaty; and

- any subsequent practice in the application of the treaty which establishes an agreement of the States Parties regarding the interpretation of any provision of the treaty.

4.4 In considering the subsequent practice of the Parties regarding the interpretation and application of the provisions in the 1969 Civil Liability Convention relating to the admissibility of claims, reference may be made to the decisions of the courts and other competent authorities in the States Parties, as well as the relevant decisions of the appropriate IOPC Fund bodies.

5 Application of the Civil Liability Convention and the Fund Convention

5.1 One of the factors to be taken into account in the interpretation of any treaty provision is the subsequent practice of the States Parties which establishes their agreement regarding the interpretation of the provision in question (Vienna Convention, Article 31.3(a) and(b)). In this regard there appears

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[11] LEG/CONF.6/C.2/SR.17 and SR.18 (Records 84/92, Vol 2, p 502-505, 506-508); the discussions during the preparatory work are summarised in LEG/CONF.6/7, pp 15-16 (Records 84/92, Vol 1, pp 145).

to be good reason to consider the decisions of the IOPC Fund Assembly and Executive Committee concerning the interpretation of the definitions of "pollution damage" and "preventive measures" as constituting agreement between the Parties to the Fund Convention on the interpretation of those terms. Accordingly any such decisions should be taken into account by national courts and other authorities in their application and interpretation of those provisions.

5.2 Evidence would seem to suggest, however, that the practice in the courts in the States Parties is far from uniform in this regard. In some States the courts seem to attach considerable importance to international jurisprudence and doctrine, whilst those in other States appear to be less willing to look beyond domestic principles and practice.

5.3 There appear to be two approaches in the determination of the criteria to apply in deciding on the admissibility of claims. One would be for the IOPC Fund to base its consideration of claims wholly on the position of the national law and the jurisprudence of the courts of the State concerned in respect of the particular claim. The other approach would be for the IOPC Fund to be guided by the principles and criteria developed within the Fund with regard to the admissibility of claims, on the basis of the interpretation of the definitions of the terms "pollution damage" and "preventive measures" as adopted by the Assembly or the Executive Committee.

5.4 As an international body operating under treaty instruments which apply to claimants in all States Parties, the IOPC Fund might find it difficult to justify the use of criteria for the admissibility of claims which differ from State to State. For this reason it could be argued that the more appropriate approach would be for the Fund to use the same criteria in respect of all claims, regardless of the State or States in which the claims arise or the courts in which the claims would be brought. In this regard it is worth noting that the IOPC Fund Assembly has expressed the opinion that a uniform interpretation of the definition of "pollution damage" is essential for the proper functioning of the regime of compensation established by the Civil Liability Convention and the Fund Convention (document FUND/A.11/20, paragraph 5.5). It may be questioned, however, whether it would be realistic for the IOPC Fund, when negotiating out-of-court settlements, to disregard the position which the competent courts might take with regard to whether or not the damage covered by the claims falls within the scope of the definition of "pollution damage".

5.5 The Executive Committee has expressed the view that although the IOPC Fund was established to pay compensation to victims of oil pollution, it was important that the Fund should exercise a certain caution in accepting claims beyond those admissible under the general principles of law in Member States (document FUND/EXC.35/10, paragraph 3.1.9).

6 Director's Analysis of the Main Problems Involved

6.1 Over the years the IOPC Fund has received claims relating to various types of damage as set out in detail in document FUND/WGR.7/3. For the purpose of the present document the following main categories can be distinguished:

Damage to property
Clean-up operations at sea or on shore and other preventive measures
Economic loss suffered as a consequence of damage to property
Economic loss suffered independent of any damage to property
Damage to the marine environment per se

6.2 The IOPC Fund has developed certain principles concerning the admissibility of claims. The question is whether and, if so, to what extent these principles need to be modified, in the light of experience. It may be argued that in respect of certain kinds of claims, the IOPC Fund's practice has been too restrictive, leading to a rejection of claims which should have been admitted. In respect of other types of claim, the IOPC Fund may have adopted an interpretation of the definition which is too extensive, leading to the acceptance of claims which should have been rejected.

Damage to Property and Preventive Measures

6.3 As regards damage to property, this kind of damage does not normally give rise to any questions of principle in respect of the admissibility of claims. All legal systems recognise the principle of *restitutio in integrum* (ie compensation for reduction in value or for the necessary cost of repair). There may be practical problems, however, such as establishing whether the alleged loss was actually caused by the oil in question or assessing the quantum of the loss.

6.4 Likewise, claims relating to clean-up operations and other preventive measures (ie measures to prevent or minimise pollution damage) do not normally give rise to any questions of principle. The main problem in respect of such operations is whether the operations are reasonable and whether the costs claimed are reasonable. The IOPC Fund has taken the position that the criterion should be whether the measures are reasonable from an objective point of view in relation to the damage they were intended to prevent, in the light of all the circumstances of the case and taking into account the information available at the time when the decision to carry out the particular measure was made.

Consequential Loss

6.5 Owners or users of property which has been contaminated as a result of an oil spill may suffer consequential loss of earnings. For instance, a fisherman whose fishing gear has been polluted may lose his income during the period when he is prevented from fishing, pending the cleaning or replacement of the polluted gear. 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 accepted claims for loss of income in such situations.

Pure Economic Loss

6.6 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 an area of the sea is polluted, fishing may be 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 suffer economic loss if tourists do not come to the area because the beach has become polluted. The consequences of such loss of income may in turn spread widely through a community or area.

6.7 In most jurisdictions (in both civil law and common law systems) there has been a great reluctance to recognise claims in such cases, for fear of the far-reaching consequences of the acceptance of such claims and acknowledging the difficulty in drawing a line in a consistent manner between those claims which are compensable and those which are not. In most legal systems, a claim for compensation is generally accepted only if it arises from 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.

6.8 This requirement, viz that economic loss is only recoverable if it is attached to physical damage to the claimant's property, is sometimes referred to in common law countries (particularly in the United States) as the "bright line" test. This principle has been applied inter alia in maritime cases in the United States<12>. United Kingdom Courts have reaffirmed this principle as a crucial though not necessarily conclusive test in determining issues of recoverability of economic loss<13>. Court decisions

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<12> See Robins Dry Dock & Repair Co v Flint, 275 U.S. 303 (1927). The rule has been applied in the United States in recent cases, eg the Testbank case, 752 F. 2d (1985). The Oil Pollution Act 1989 has changed the situation in the United States in oil pollution cases.

<13> Dynamco v Holland, 1972 SLT p 38; Esso Petroleum Co Ltd v Hall Russel and Co Ltd, 1988 SLT p 872; Murphy v Brentwood District Council [1990] 3 WLR 414.

in other common law countries, such as Australia and Canada, indicate a less strict approach, although it is not possible to identify any clear principle which can be applied in substitution for the bright line test.

6.9 In many countries outside the common law system the legal situation in respect of the admissibility of claims relating to pure economic loss is unclear. In some countries the courts apply the criteria of foreseeability and remoteness, or require that the economic loss should be a direct result of the defendant's action. In other jurisdictions, there must be a direct link of causation between the damage and the defendant's action, and the damage must be certain and quantifiable in monetary terms. It appears that in some jurisdictions a claim for pure economic loss is admitted if the claimant has a licence to carry out the activity in which the loss was suffered, or if the loss was sustained in an established trade.

6.10 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, such as fishermen and fish processors, and hoteliers, restaurateurs and shopkeepers at seaside resorts. The wording of the definition of "pollution damage" in the 1992 Protocol makes it clear that claims for pure economic loss in the form of loss of profit caused by impairment of the environment are in principle admissible.

6.11 In recent cases, claims have been submitted for compensation for pure economic loss which is more remote from the physical contamination than the losses suffered by say fishermen or hoteliers. These cases have raised the question of 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.

6.12 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.

6.13 In connection with recent incidents, the Executive Committee has emphasised that the Civil Liability Convention and the Fund Convention apply only to "damage caused by contamination". The Committee has examined whether particular claims could be considered as relating to "damage caused by contamination". The relationship between a particular loss and the "contamination" gives rise to difficult questions of causation. Although it might be possible to reach an agreement on the interpretation of the concept of causation, experience has shown that it is difficult to reach a satisfactory result by reference only to the principle of causation. The proposal at the 1984 International Conference to require that the loss should be the "direct result of contamination" was rejected on grounds of the difficulties involved in achieving a consistent interpretation.

6.14 In the view of the Director, it would be valuable if the IOPC Fund could develop general criteria concerning the admissibility of claims for pure economic loss. The difficulty would be to find criteria which meet various requirements. The criteria should contribute to consistency in the IOPC Fund's decisions as to the admissibility of claims, enabling claimants to foresee with some degree of certainty whether a particular claim would be admissible. At the same time the criteria should allow a certain flexibility, enabling the IOPC Fund to take into account new situations and new types of claim.

6.15 Further consideration of the concept of causation, such as the development of "proximate" cause, may assist in drawing the line between the claims which are compensable and those which are not, but additional suggestions have included references to general principles of remoteness and foreseeability of damage. More specifically, it has been suggested that the geographic proximity between the claimant's activity and the contamination may be relevant. It has also been suggested that it might be appropriate in some cases to take into account the degree to which a claimant is economically dependent on an affected resource or the extent to which his business forms an integral part of the economic activity in the contaminated area. There are doubtless other criteria which the IOPC Fund could develop in order to promote consistency in the treatment of claims.

Measures to Prevent Pure Economic Loss

6.16 The IOPC Fund has traditionally accepted claims relating to physical operations to prevent or minimise pollution damage, such as deploying booms and spraying dispersants. In some recent cases, claims have been submitted in respect of the cost of activities to prevent or minimise pure economic loss, such as tourism promotion and the marketing of fish products. The Executive Committee noted that it was likely that the drafters of the Civil Liability Convention had not foreseen that activities of this latter kind should fall within the definition of "preventive measures". The Committee accepted, however, that "preventive measures" were defined as "any reasonable measures taken by any person to prevent or minimize pollution damage" and that this definition did not distinguish between various kinds of pollution damage (document FUND/EXC.35/10, paragraphs 3.4.15, 3.4.16 and 3.4.18).

6.17 The Executive Committee took the position that measures to prevent or minimise pure economic loss which would fall within the definition of "pollution damage" as interpreted by the IOPC Fund should be considered as preventive measures, provided that they fulfilled the following requirements (document FUND/EXC.35/10, paragraph 3.4.19):

(a) the costs of the proposed measures were reasonable;

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

(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.

6.18 The Executive Committee has also considered whether the IOPC Fund should accept claims of this type only after the activities have been carried out and the results can be assessed, or whether the Fund should accept to pay for a proposed programme of such activities. The Committee decided that the IOPC Fund should, in principle, not consider such claims until the activities have been carried out. The Committee noted, however, that the claimant in many cases does not have sufficient economic resources to carry out such activities unless the IOPC Fund makes funds available. The Committee has authorised the Director to make advance payments in two cases up to a certain maximum amount (documents FUND/EXC.34/10, paragraph 3.4.20 and FUND/EXC.37.3, paragraphs 4.2.8 and 4.2.9).

Environmental Damage

6.19 As mentioned above, questions relating to environmental damage are dealt with in document FUND/WGR.7/4.

7 Action to be Taken by the Working Group

The Working Group is invited to:

(a) take note of the information contained in this document; and

(b) make such recommendations to the Assembly in respect of the issues dealt with in this document as the Working Group may deem appropriate, in particular as regards claims for pure economic loss and preventive measures taken to prevent or minimise such loss.

* * *

ANNEX

The 1969 Vienna Convention on the Law of Treaties

Article 31

General rule of interpretation

1 A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2 The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3 There shall be taken into account, together with the context;

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4 A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31.

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.