INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

SEVENTH INTERSESSIONAL
WORKING GROUP
Agenda item 2

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CRITERIA FOR THE ADMISSIBILITY OF CLAIMS FOR COMPENSATION

ENVIRONMENTAL DAMAGE CLAIMS

Note by the Director

1 Introduction

At its 16th session, the Assembly decided that a Working Group should be set up to study the criteria for the admissibility of claims for compensation. One item of the Working Group's mandate was to consider problems relating to the admissibility of claims for environmental damage within the scope of the definition of "pollution damage" in the 1969 Civil Liability Convention and the 1971 Fund Convention and the 1992 Protocols thereto.

2 Definition of "Pollution Damage" in the Civil Liability Convention and the Fund Convention

2.1 "Pollution damage" is defined in Article I.6 of the Civil Liability Convention, which reads:

> "'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."

2.2 The 1984 Protocol to the Civil Liability Convention contains an amended wording of the definition of "pollution damage". A proviso was added to the effect that compensation for impairment of the environment (other than loss of profit from such impairment) should be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken. The definition in the 1984 Protocol reads as follows:

"'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."

2.3 The 1992 Protocol to the Civil Liability Convention contains the same definition of "pollution damage" as in the 1984 Protocol.

3 First ANTONIO GRAMSCI Incident and Resolution N°3

3.1 The question of the admissibility of claims for damage to the marine environment was dealt with by the IOPC Fund for the first time in 1980 in connection with the first ANTONIO GRAMSCI incident which occurred in the USSR in 1979. In that case, a claim of an abstract nature for compensation for ecological damage was made to the Soviet Courts by the Government of the USSR within the framework of the Civil Liability Convention. The amount claimed had been calculated according to a mathematical formula, the so-called "metodika", in accordance with Soviet legislation, under which the assessment of the damage was linked to the quantity of oil collected in USSR territorial waters. The IOPC Fund Assembly took the position that claims for non-economic environmental damage should not be accepted, and unanimously adopted a Resolution (IOPC Fund Resolution N°3) stating that "the assessment of compensation to be paid by the International Oil Pollution Compensation Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models" (document FUND/A/ES.1/13, paragraph 11(a) and Annex I). This Resolution is annexed to the present document.

3.2 Following the adoption of this Resolution, an Intersessional Working Group set up by the Assembly examined in 1981 the question as to whether and, if so, to what extent, claims for environmental damage were admissible under the Civil Liability Convention and the Fund Convention. The Working Group took the view that compensation could be granted only if a claimant who has a legal right to claim under national law had suffered quantifiable economic loss. The position taken by the Working Group was endorsed by the Assembly at its 4th session (document FUND/A.4/16, paragraph 13).

4 Second ANTONIO GRAMSCI Incident

4.1 A similar claim relating to damage to the marine environment was submitted by an Estonian authority following the second ANTONIO GRAMSCI incident which took place in Finland in 1987 and affected Finland and the USSR. The amount claimed had been calculated on the basis of the above-mentioned "metodika".

4.2 The Estonian authority's claim was discussed by the Executive Committee at its 20th session. Referring to IOPC Fund Resolution N°3, the Executive Committee expressed its objection to this claim. In the view of the Committee, claims of this kind were not admissible under the Civil Liability Convention, because the claimant had not suffered any quantifiable economic loss. The Executive Committee considered that it was likely that, since the adoption of that Resolution, some Member States had refrained from submitting claims relating to damage to the marine environment, in view of the interpretation of the notion of "pollution damage" adopted by the Assembly. The Committee instructed the Director to negotiate with the USSR authorities on the basis of this Resolution (document FUND/EXC.20/6, paragraph 3.3.3).

4.3 The claim was pursued by the Estonian authority. At its 22nd session, the Executive Committee reiterated its objection to this claim. The Committee was of the opinion that it would be possible for the IOPC Fund to intervene in the court proceedings in the Court of Riga in order to challenge this claim on the grounds that the claim was at variance with the definition of "pollution damage" in the Civil Liability Convention, as interpreted by the IOPC Fund Assembly. The Committee recognised, however, that such an intervention would raise a number of complex legal issues. The Committee also took into account the fact that the USSR was not Party to the Fund Convention at the time of the incident. In addition, the Committee recognised that the financial consequences for the IOPC Fund of an acceptance by the Court of the Estonian authority's claim would be rather limited. For these reasons, the Executive Committee decided that the IOPC Fund should not intervene in the proceedings in the Court of Riga to challenge this claim (document FUND/EXC.22/5, paragraphs 3.2.6 and 3.2.7).

4.4 At its 12th session, the Assembly stated that the interpretation of the definition of "pollution damage", which had been adopted by the Assembly in Resolution N°3 and amplified by the endorsement of the report of the 1981 Working Group, remained the position of the IOPC Fund (document FUND/A.12/19, paragraph 8.3).

5 PATMOS Incident

5.1 A claim relating to damage to the marine environment was submitted by the Italian Government following the PATMOS incident. This claim was discussed by the Executive Committee at its 16th and 18th sessions (documents FUND/EXC.16/8, paragraph 3.3.3 and FUND/EXC.18/5, paragraph 3.2). The Executive Committee noted that the claimant had not specified the kind of damage which had allegedly been caused, nor had the claimant given any explanation of the basis on which the amount claimed had been calculated. The Committee endorsed the Director's opinion that this claim had to be rejected in accordance with Resolution N°3. On the basis of that interpretation, the IOPC Fund has opposed the Italian Government's claim in respect of damage to the marine environment (document FUND/EXC.16/8, paragraph 3.2.3).

5.2 The Court of first instance in Messina rejected the Italian Government's claim. The Italian Government had maintained that the damage was a violation of the right of sovereignty over the territorial sea of the State of Italy. The Court of first instance stated that this right was not one of ownership and could not be violated by acts committed by private subjects. In addition, the Court declared that the State had not suffered any loss of profit nor incurred any costs as a result of the alleged damage to the territorial waters, or the fauna or flora. The State had therefore not suffered any economic loss. The Court also drew attention to IOPC Fund Resolution N°3.

5.3 In the appeal proceedings the Italian Government has taken the position that this claim is for compensation for actual damage to the marine environment and for actual economic loss suffered by the tourist industry and fishermen. For this reason, the Italian Government has maintained that the claim is not in contravention of the interpretation of the definition of "pollution damage" adopted by the Assembly in that Resolution.

5.4 The claim submitted by the Italian Government was discussed again by the Executive Committee at its 20th session. The Committee reiterated the IOPC Fund's position that a claimant was entitled to compensation under the Civil Liability Convention and the Fund Convention only if he had suffered quantifiable economic loss. In view of the position of the Italian Government that this claim related to actual damage to the marine environment, the Committee referred to the interpretation of the definition of "pollution damage" laid down in Resolution N°3. With regard to the economic loss which had allegedly been suffered by the tourist industry and fishermen, the Committee expressed the opinion that compensation in respect of such damage could only be claimed by the individual having suffered the damage who, in addition, had to prove the amount of the economic loss sustained (document FUND/EXC.20/6, paragraph 3.2.3).

5.5 The Italian Government's claim in the PATMOS case was dealt with by the Court of Appeal in Messina in a non-final judgement. In that judgement the Court stated that the owner of the PATMOS, the P & I insurer and the IOPC Fund were liable for the damage covered by the claim made by the Italian Government. The Court appointed three experts with the task of ascertaining the existence, if any, of damage to the marine resources off the coasts of Sicily and Calabria consequent on the oil pollution; if such damage existed, they should determine the amount thereof or, in any case, supply any useful element suitable for the equitable assessment of the damage.

5.6 The reasoning given by the Court of Appeal in this non-final judgement can be summarised as follows (document FUND/EXC.22/2, paragraph 4.9.10):

> The Civil Liability Convention of 29 November 1969 must be considered linked with the International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties (Intervention Convention) of the same date, which entitles the State to take protective measures in favour of "related interests", as defined in the Intervention Convention. This means that the State has title to sue for compensation for damage to the "related interests". In addition, the environment must be considered as a unitary asset, separate from those of which the environment is composed (territory, territorial waters, beaches, fish, etc.), and it includes natural resources, health and landscape. The right to the environment belongs to the State, in its capacity as representative of the collectivities. The damage to the environment prejudices immaterial values, which cannot be assessed in monetary terms according to market prices, and consists of the reduced possibility of using the environment. This damage can be compensated on an equitable basis, which may be established by the Court on the grounds of an opinion of experts. It cannot be maintained that the Civil Liability Convention, being a Convention of private law, may not give to the State more extensive rights than to other persons. The definition of "pollution damage" as laid down in Article I.6 of that Convention is wide enough to include damage to the environment of the kind described above.

5.7 At its 22nd session, the Executive Committee expressed its concern about this non-final judgement and reiterated the IOPC Fund's position in respect of the Italian Government's claim (document FUND/EXC.22/5, paragraph 3.1.3).

5.8 The IOPC Fund has reserved its right to appeal before the Supreme Court as to the question of principle addressed by the non-final judgement in conjunction with appeal against the final judgement to be rendered by the Court of Appeal (document FUND/EXC.22/2, paragraph 4.9.13).

5.9 It is expected that the Court of Appeal will render its judgement during 1994.

6 HAVEN Incident

6.1 The Italian Government's claim in the HAVEN case includes an item relating to alleged damage to the marine environment in the amount of Llt 100 000 million (£40 million). The claim documents do not indicate the type of environmental damage which was allegedly sustained, nor do they give any indication of the method used to calculate the amount claimed. The Italian Government has informed the IOPC Fund that it has not been possible to describe the environmental damage because the study of the effects of the incident on the marine environment has not yet been completed. The Government has also stated that the figure given in the claim was only provisional.

6.2 The Region of Liguria has requested that the amount in the Italian Government's environmental damage claim should be increased from Llt 100 000 million to Llt 200 000 million (£80 million). The Region has maintained that the compensation should be apportioned between the various territorial entities which have directly suffered ecological damage. Two provinces and 14 communes have included items relating to environmental damage in their respective claims. None of these claims

contain any description of the alleged damage and the claims which indicate an amount do not explain how these amounts were calculated.

6.3 The claims for environmental damage were considered by the Executive Committee at its 30th session, on the basis of an analysis made by the Director (document FUND/EXC.30/2), which can be summarised as follows.

> The IOPC Fund does not reject all types of claims for compensation resulting from damage to the marine environment. It accepts claims which, in accordance with the terminology used in the present document[1], relate to "quantifiable elements" of damage to the marine environment, for example:
>
> (a) reasonable costs of reinstatement of the damaged environment; and
>
> (b) loss of profit (income, revenue) resulting from damage to the marine environment suffered by persons who depend directly on earnings from coastal or sea-related activities, eg loss of earnings suffered by fishermen or by hoteliers and restaurateurs at seaside resorts.
>
> The IOPC Fund has maintained the position that claims relating to unquantifiable elements of damage to the environment cannot be admitted. In its interpretation of the Civil Liability Convention and the Fund Convention, the IOPC Fund Assembly has excluded the assessment of compensation for damage to the marine environment on the basis of theoretical models. The Intersessional Working Group which considered the matter in 1981 used similar language, viz that compensation could be granted only if a claimant had suffered quantifiable economic loss. The conclusions of the Working Group were endorsed by the Assembly. Under the 1984 Protocol, which was intended to codify the IOPC Fund's interpretation of the definition of "pollution damage" in the original text of the Civil Liability Convention, compensation for impairment of the marine environment (other than loss of profit from such impairment) shall be limited to actual costs of reinstatement. Both the Working Group and the 1984 Protocol thus exclude non-quantifiable elements of damage to the environment.
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> At the 1969 Diplomatic Conference which adopted the Civil Liability Convention two main Committees were constituted. The work of the Committee of the Whole on Public Law Articles resulted in the adoption of the Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties (Intervention Convention) and the work of the Committee of the Whole on Private Law Articles resulted in the adoption of the International Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention). The Fund Convention is also a convention in the field of civil law, set up for the purpose of paying **compensation** to victims of oil pollution damage.
>
> Both the Civil Liability Convention and the Fund Convention deal with **compensation** for oil pollution damage. This is stated in the preambles to both Conventions. With respect to the Fund Convention, this objective is also stated in the body of the Convention, eg in Articles 2.1(a), 3.1, 4.1 (introductory sentence and sub-paragraph (b)) and 4.3. In particular, pursuant to Article 4.4(a) and (b), the aggregate amount payable by the IOPC Fund in respect of any one incident is specifically related to **compensation**. It should be noted that the French texts use the expressions **"indemnisation"** and **"réparation"**, and these expressions clearly indicate the compensatory function of the Fund Convention.

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[1] For the purpose of the present document, the expression "quantifiable elements" means damage to the environment in respect of which the value of the damage can be assessed in terms of market prices; the expression "non-quantifiable elements" means damage in respect of which the quantum of the damage cannot be assessed according to market prices.

The purpose of a regime of compensation is to place the person suffering damage in the same economic situation as if the damaging act had not occurred. The conclusions of the 1981 Working Group, which were endorsed by the Assembly, are in accordance with that principle, viz that only a person who has suffered **quantifiable economic loss** is entitled to compensation under the Conventions. In the view of the Director, claims which do not relate to compensation therefore do not fall within the scope of the Conventions, for example, damages awarded under the 1986 Italian Act relating to non-quantifiable elements of damage to the environment which are of a punitive character.

In the view of the Director, it could not have been the intention of the drafters of the Fund Convention that the IOPC Fund should pay damages of a punitive character, calculated on the basis of the seriousness of the fault of the wrong-doer or the profit earned by the wrong-doer. If such damages were to fall within the scope of the Conventions, the results would be unacceptable. Should the shipowner's limitation amount be exceeded, the IOPC Fund would have to pay damages calculated by the Court on the basis of the seriousness of the **shipowner's** fault and the extent of **his** profit. In the event that the aggregate amount of the other established claims reaches the limitation amount, the inclusion of punitive damages would be without any economic consequence for the shipowner. The purpose of punitive damages awarded on the basis of such criteria is to act as a deterrent. It is obvious that there would be no such effect on the IOPC Fund.

If punitive damages of this kind were considered as falling within the scope of the Conventions, the State and other public entities might receive a large portion of the amounts available under the Conventions. In major incidents this would be to the detriment of victims who actually suffer quantifiable economic loss, such as fishermen and hoteliers, since if the aggregate amount of the established claims exceeds the total amount of compensation available under the Conventions, each claim will be reduced by the same percentage (Article V.4 of the Civil Liability Convention and Article 4.5 of the Fund Convention).

Many States have introduced a system of criminal or civil penalties for oil pollution from ships. In the Director's view, the Civil Liability Convention and the Fund Convention do not prevent Contracting States from introducing such penalties, since they do not constitute "compensation".

To the extent that claims relate to **compensation** for pollution damage, they would fall within the scope of the Conventions. However, such claims should be considered on the basis of the interpretation of the Civil Liability Convention adopted by the IOPC Fund Assembly in Resolution N°3, as amplified by the 1981 Working Group and endorsed by the Assembly. This means that claims for **compensation** in respect of unquantifiable elements of damage to the environment should be rejected, because the damage sustained is not quantifiable on the basis of a market price. Furthermore, compensation may not be assessed on the basis of an abstract quantification of damage calculated in accordance with theoretical models.

6.4 During the discussions in the Executive Committee at its 30th session, the Italian delegation stated that it did not agree with the basis of the Director's analysis of the problem nor with his conclusions. This delegation noted that Italy had ratified the Civil Liability Convention and the Fund Convention and that these Conventions were part of the Italian legal system constituting special laws. In the view of this delegation, however, the Conventions did not contain any provisions excluding or limiting the right of compensation for environmental damage. It was pointed out that pollution damage was defined in the Civil Liability Convention as any "loss or damage ..... caused by contamination resulting from the escape or discharge of oil". The Italian delegation could not agree with the Director's interpretation of the Conventions under which only quantifiable elements of damage to the marine environment were admissible. In the view of the Italian delegation, compensation was mainly governed by the 1982 Act which envisaged the possibility of compensation for damage to the marine

environment both for quantifiable and unquantifiable elements; this Act explicitly mentioned compensation for damage to marine resources, and compensation under that Act should be quantified without reference to the seriousness of the fault of the wrong-doer. The Italian delegation did not accept that compensation under the 1986 Act should be considered as a sanction.

6.5 The Executive Committee agreed in general with the Director's analysis of the problem as set out in paragraph 6.3 above.

7 Director's Assessment of the IOPC Fund's Position

7.1 The position of the IOPC Fund in respect of the admissibility of claims relating to damage to the marine environment can be summarised as follows:

(a) The IOPC Fund accepts claims which, in accordance with the terminology used in the present document relate to "quantifiable elements" of damage to the marine environment, for example:

(i) reasonable costs of reinstatement of the damaged environment; and

(ii) loss of profit (income, revenue) resulting from damage to the marine environment suffered by persons who depend directly on earnings from coastal or sea-related activities, eg loss of earnings suffered by fishermen or by hoteliers and restaurateurs at seaside resorts.

(b) (i) The IOPC Fund has consistently taken the position that claims relating to unquantifiable elements of damage to the marine environment cannot be admitted.

(ii) The Assembly has rejected claims for compensation for damage to the marine environment calculated on the basis of theoretical models.

(iii) Compensation can be granted only if a claimant has suffered quantifiable economic loss.

(c) (i) Damages of a punitive character, calculated on the basis of the degree of the fault of the wrong-doer and/or the profit earned by the wrong-doer, are not admissible.

(ii) Criminal and civil penalties for oil pollution from ships do not constitute compensation and do not therefore fall within the scope of the Civil Liability Convention and the Fund Convention.

7.2 It appears that the entry into force of the 1992 Protocols would not necessitate any change in the IOPC Fund's position as set out above. The definition of "pollution damage" in the 1992 Protocol to the Civil Liability Convention makes it clear that claims for damage to the marine environment per se are not admissible, but that reasonable costs incurred in reinstating the marine environment after a pollution incident are in principle admissible under the Conventions.

7.3 It is submitted that the IOPC Fund should maintain its position that claims relating to the impairment of the environment should be accepted only if the claimant has sustained a quantifiable economic loss, and that the loss must be such that it can be quantified in monetary terms.

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

7.5 The first qualification is that compensation for reinstatement of the marine environment is limited to costs 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.

7.6 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[2].

7.7 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.

7.8 The second qualification is that only costs of *reasonable* measures are recoverable. This was considered a necessary restriction. It should be noted that measures of reinstatement of 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.

7.9 In the Director's view, the measures for reinstatement must be considered reasonable from an objective point of view in the light of the information available when the specific measures were taken. It must be required that it would be technically possible to carry out the proposed reinstatement measures. There must be a reasonable degree of likelihood that the measures will achieve the results envisaged. The costs incurred must not be disproportionate to the results achieved or to the results which could reasonably be expected. Account must be taken of the capacity of the marine environment to restore itself.

7.10 In assessing whether measures for reinstatement should be considered reasonable, it might be appropriate to use criteria similar to those laid down by the Executive Committee in respect of measures taken to prevent or minimise pure economic loss (document FUND/EXC.35/10, paragraph 3.4.19). If this approach were to be taken the costs of measures for reinstatement would have to fulfil the following requirements:

(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.

8 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 admissibility of claims for compensation for environmental damage as it may deem appropriate.

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[2] *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.

ANNEX

IOPC Fund Resolution N°3 – Pollution Damage

(October 1980)

THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND

CONSCIOUS of the dangers of pollution posed by the world-wide maritime carriage of oil in bulk,

AWARE of the detrimental effect of the escape or discharge of persistent oil into the sea may have on the environment and, in particular, on the ecology of the sea,

CONSCIOUS of the problems of assessing the extent of such damage in monetary terms,

NOTING that under the Civil Liability Convention a claim for ecological pollution damage has been raised against the shipowner which was based on a theoretical model for assessment,

CONFIRMS ITS INTENTION that the assessment of compensation to be paid by the International Oil Pollution Compensation Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models.