



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

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CRITERIA FOR THE ADMISSIBILITY OF CLAIMS FOR COMPENSATION

Note by the United Kingdom Delegation

1. Introduction

1.1 This submission summarises the United Kingdom Delegation's views on the matters to be considered by the Working Group.

1.2 Recent experience convinces the United Kingdom Delegation of the need for the IOPC Fund to develop clear criteria for the admissibility of claims for compensation. Development of such criteria and their wide dissemination will assist claimants by giving greater clarity and certainty.

1.3 The Delegation trusts that the IOPC Fund will retain its general policies of seeking to avoid litigation and of settling claims quickly. We believe this to be in the best interest of the IOPC Fund and of claimants. However, it must be borne in mind that the interpretation of the terms of the Civil Liability Convention, 1969 (CLC) and the Fund Convention, 1971 (FUND) ultimately rests with the Courts of member States and any criteria that are developed must be capable of securing the support by the Courts of all member States. Experience suggests that this will be difficult to guarantee.

1.4 It must also be expected that claimants will seek to advance novel or new arguments in support of their claims. Such arguments will still need to be considered on their merits against the terms of the existing texts of the Conventions. Development of criteria cannot of itself exclude consideration of new such arguments and it would be wrong to assume that claims can be excluded from consideration simply because they do not meet any criteria we may develop.

1.5 In developing criteria it must also be borne in mind that political and public acceptance of the intergovernmental system established through the CLC and FUND Conventions rests on Governments and their citizens accepting that they will continue to have relatively quick and assured compensation for the losses suffered arising from oil pollution incidents. Any criteria that are developed must therefore be reasonable and realistic.

2. Admissibility of Claims for Compensation for Pollution Damage and Preventive Measures

2.1 The United Kingdom Delegation considers that the current practices of the IOPC Fund as regards claims for :

- (a) direct damage to property;
- (b) reasonable preventive measures taken to prevent, or minimise, direct damage to property where there is a reasonable prospect of success, and
- (c) reasonable preventive measures taken to prevent, or minimise, impairment of the environment when there is a reasonable prospect of success

are well developed and appropriate. While the Delegation considers that these practices could merit clearer codification it would question the appropriateness of developing criteria that seek to define how compensation for direct damage to property is calculated or what constitutes reasonable preventive measures to prevent, or minimise, direct damage to property or impairment of the environment. It is considered that these matters can, and should only, be decided pragmatically on a case by case basis. To do otherwise could unduly restrict the flexibility needed by the Director in negotiating with individual claimants. Our focus must be on criteria for the admissibility of claims and not on criteria for payment.

3. Pure Economic Loss and Preventive Measures Taken to Prevent or Minimise Such Loss

3.1 In this connection the United Kingdom Delegation would wish to make a distinction between pure economic loss arising :

- (a) as a consequence of direct linkage to physical damage to property, including preventive measures taken to prevent or minimise such damage, and
- (b) as a consequence of actual impairment of the environment, including preventive measures taken to prevent or minimise such impairment.

In this regard it is appropriate to consider also the questions of pure economic loss arising as a consequence of "perceived" impairment of the environment - the problem of "media pollution" - and preventive measures taken to prevent, or minimise, pure economic loss.

As a Consequence of Direct Linkage to Damage to Property

3.2 Where an industry is dependent on supplies which have been directly damaged by oil pollution and as a result supplies are either not available or curtailed it is appropriate that compensation should be paid. This represents current practice.

3.3 In assessing whether, and to what extent, compensation should be paid regard could be had to the industry's access to

alternative sources of supply. If in the normal course of events an industry could switch rapidly to other sources of supply regard should be taken of this flexibility. If on the other hand the industry does not have such flexibility it appears appropriate to continue to provide compensation to the industry until supplies can be restarted from the "polluted" source.

3.4 If an industry had expanded its capacity prior to a pollution incident on the expectation of future increased supply from a now "polluted" source and :

- (a) the reasonably expected increased supply is not available as a consequence of direct damage to property, and
- (b) the industry does not have ready access to alternative sources of supply

compensation should be paid having regard to the existence, and non use, of such expanded capacity and not solely on historic data of supplies from the "polluted" source.

3.5 The United Kingdom Delegation therefore considers that those who can demonstrate that their employment, or their commercial activities, are

- (a) directly dependent on to the supply of property which has been directly damaged by oil pollution, and
- (b) that supplies have been stopped or curtailed, and
- (c) there is no readily available alternative source of supply or alternative commercial, or employment, activity they can undertake

merit consideration for compensation. The Delegation recommends that the Working Group should consider developing criteria for such claims.

As a Consequence of Impairment to the Environment

3.6 The United Kingdom Delegation remains of the view that no compensation should be forthcoming for impairment to the environment per se (see paragraph 4.1 (below)), but recognises that pure economic loss can result from such impairment. The IOPC Fund has already paid compensation in respect of such loss and the Delegation agrees that this is an area which merits the development, if possible, of clear criteria.

3.7 The Delegation considers that the starting point for the development of such criteria must rest on :

- (a) proximity to the area that has been contaminated;
- (b) dependence on activities, eg beaches, within the area that has been contaminated, and
- (c) consideration of situations where a wider area than the area actually contaminated has been marketed as a

single entity, and it is difficult to distinguish between parts of the wider area.

Media Pollution

3.8 The question of the contribution of "media pollution" needs to be given careful consideration. It is relevant, particularly, to the perception of the quality of food products or the attractiveness of a tourist area. The perception of damage to the quality of food products and the attractiveness of an area may, indeed, be significantly greater than the actual effects of an incident and such perceptions may persist for a long time. The IOPC Fund has already faced claims of this type and the Working Group should develop criteria for such claims. An essential element, as in all pure economic loss claims, must be the means of clearly identifying the effects of the incident, including media coverage of the incident, as distinct from other factors which may have reduced, or otherwise influenced, demand. This is an area where the IOPC Fund's participation in independent "impact studies" could be beneficial (see paragraph 5.1.4 (below)).

Preventive Measures Taken to Prevent, or Minimise, Pure Economic Loss

3.9 The United Kingdom Delegation retains the view that it is right for the IOPC Fund to consider, and in appropriate cases pay, compensation for reasonable preventive measures taken to prevent, or minimise, pure economic loss. The Delegation recognises that this will always pose a fundamental dilemma in that the IOPC Fund could pay for such preventive measures and still have to compensate for the loss if the preventive measures fail or are only partly successful. The Delegation would recommend that the Working Group should revalidate the criteria agreed at the 35th Session of the Executive Committee (paragraphs 3.4.19 and 3.4.20 of FUND/EXC.35/10) which were developed allowing for this fundamental dilemma. Payments of this kind should be paid only if they are in addition to normal marketing activities. The Delegation notes the Executive Committee's practice of setting cash limits on the Director's delegated powers as regard payment of marketing claims.

4 Environmental Damage

4.1 As already indicated (paragraph 3.6 (above)) the United Kingdom Delegation does not consider that compensation should be paid under CLC and FUND for impairment of the environment. In this connection Her Majesty's Government notes, accepts and is legislating to give effect to, the provisions in the 1992 Protocols.

4.2 In this connection the United Kingdom would request the Working Committee to consider whether claims for damage, eg environmental damage, not accepted under CLC and FUND can be claimed "outside" the Conventions.

5 IOPC Fund Procedures

5.1 The United Kingdom Delegation welcomes the opportunity to comment on the procedures currently followed by the IOPC Fund

when considering claims. The Delegation reserves the right to make a later submission on this aspect. At this stage the Delegation would wish to make the following points :

5.1.1 Information

It is essential that information is readily available immediately after an incident advising on the procedures to be followed by claimants and the criteria against which claims will be considered. This may require revision of the Claims Handbook on completion of the work being undertaken by the Working Group.

5.1.2 Claims Offices

In the view of the Delegation the establishment of Claims Offices is a positive and welcome development. However it is important that the role of such Offices is clearly understood and that there is no confusion between the roles and responsibilities of the Offices, the IOPC Fund's advisors, the IOPC Fund Secretariat and the ultimate responsibilities of the Director.

5.1.3 Rejection or Amendment of Claims

The Delegation considers it is important that where claims are rejected or the compensation offered is less than that claimed that the IOPC Fund provides claimants with an appropriate explanation for the rejection or the reduction. This can be particularly important if negotiations undertaken between claimants and IOPC Fund Claims Offices or IOPC Fund advisors are subsequently amended on consideration by the IOPC Fund Secretariat and the Director. It has been suggested that an appeal procedure could be considered short of litigation.

5.1.3 IOPC Fund Participation and Funding of Impact Studies

Hitherto the IOPC Fund has maintained a policy of participating in, or funding, "impact" studies. The United Kingdom Delegation suggests that the Working Group should review that policy. There may be circumstances where independent studies of this nature could assist in establishing, at an early date, the likely scale of claims and thus help reduce the uncertainty following incidents.

5.1.5 The Role of Member States

In the view of the United Kingdom Delegation member States where incidents have occurred should seek to facilitate the operation of the IOPC Fund. The Delegation will suggest ways in which this could be achieved. The rights of member States to participate fully in the IOPC Fund's consideration of claims affecting their interests must be protected.

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