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## REPORT OF THE THIRD INTERSESSIONAL WORKING GROUP

### COMPENSATION OF MEASURES OF REINSTATEMENT OF IMPAIRED ENVIRONMENT AND COSTS FOR ENVIRONMENTAL IMPACT ASSESSMENTS

**Submitted by Australia, Canada, Sweden and the United Kingdom**

<b>Summary:</b>	The submission contains proposals for new criteria for the admissibility of measures of reinstatement of impaired components of the environment and for post-spill studies to be adopted by the Assembly.
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<b>Action to be taken:</b>	See paragraph 3.
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#### **1 Introduction**

- 1.1 At the second meeting of the Third Intersessional Working Group in March 2001, the Working Group considered a discussion paper submitted by a group of States which considered among other items the widening of the Fund's policy with regard to compensation for costs for reasonable measures of reinstatement of impaired environment, including post-spill studies, and to develop criteria for the admissibility of such claims. The Group suggested that amending the 1992 Civil Liability Convention and the 1992 Fund Convention for this purpose would seem superfluous. (See document 92FUND/WGR.3/5/1, in particular paragraphs 2.5–2.10, and document 92FUND/WGR/3/6, paragraphs 6.3.5–6.3.6.)
- 1.2 These ideas gained a good measure of support from other delegations. In his summing up of the discussion the Chairman of the Working Group stressed the need for those delegations wishing to pursue the issues relating to environmental damage and environmental studies to present detailed proposals for the Working Group to consider at its meeting in June 2001.
- 1.3 At the Working Group's meeting in June a number of delegations submitted documents on the issue of environmental damage. The delegation of Sweden proposed to develop a more detailed document on environmental damage for consideration by the Assembly at its October 2001 session. Several delegations supported this approach and offered their assistance in pursuing the issue.

- 1.4 The extent of environmental damage caused by an oil spill and the appropriate response taken to minimise or remediate such damage depends on several factors, for instance the type and amount of oil and the characteristics of the environment in the damaged area, as well as the potential for natural recovery. Such factors cannot be legislated for in advance but in this document the sponsoring delegations offer, as the first step, proposals to clarify the Fund's policy on compensation for reinstatement measures and post-spill studies, and present criteria for the admissibility of such claims through a decision by the Assembly followed by amendments to the Fund's Claims Manual. Other issues raised during discussions in the Working Group, having the objective of widening the Fund's policy on environmental damage, can only be achieved by amending the 1992 Civil Liability Convention and 1992 Fund Convention. In the view of the sponsoring delegations, this would represent the second stage of work on this issue, in the long-term.

## **2 Compensation for environmental damage**

### Measures of reinstatement

- 2.1 The relevant legal framework regarding measures of reinstatement is given through Article 1.6 (a) of the 1992 Civil Liability Convention, which is incorporated into the 1992 Fund Convention by reference in Article 1.2. According to the former provision "pollution damage" means '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'. Neither of the two Conventions contains any definition of "measures of reinstatement". Broadly speaking measures of reinstatement could be all measures aiming to bring the impaired environment into the state which would have existed had the damage not occurred.
- 2.2 The 1992 Fund has established general criteria that apply to the admissibility of claims, including those for compensation for costs for measures of reinstatement. These criteria stipulate that:
- (i) any expense or loss must actually have been incurred;
  - (ii) any expense must relate to measures which are deemed reasonable or justifiable;
  - (iii) a claimant's expense, loss or damage is admissible only if and to the extent that it can be considered as caused by contamination;
  - (iv) there must be a link of causation between the expense, loss or damage covered by the claim and the contamination caused by the spill;
  - (v) a claimant is entitled to compensation only if he or she has suffered a quantifiable economic loss;
  - (vi) a claimant has to prove the amount of his or her loss or damage by producing appropriate documents or other evidence.
- 2.3 The Fund has made it abundantly clear that the assessment and determination of compensation payable is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models (Resolution No 3 of the 1971 Fund Assembly, 1980; this principle has been considered to be codified through the definition of "pollution damage" in the 1992 Conventions, see the Claims Manual of the 1992 Fund, June 2000 edition, page 28).
- 2.4 In addition to the criteria set out in paragraph 2.2 the Fund has adopted the following additional criteria that apply to measures of reinstatement (agreed by the 7th Intersessional Working Group of the 1971 Fund, and endorsed by the 1992 Fund Assembly at its 1st session):
- (i) the cost of the measures should be reasonable;
  - (ii) the cost of the measures should not be disproportionate to the results achieved or the results which could reasonably be expected; and
  - (iii) the measures should be appropriate and offer a reasonable prospect of success.

The measures should be reasonable from an objective point of view in the light of the information available when the specific measures are taken (1992 Fund Claims Manual, June 2000 edition, page 28).

- 2.5 The sponsors of this document are of the opinion that the general criteria for the admissibility of claims adopted by Fund (see paragraph 2.2) as well as the principle that claims relating to 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, should be retained.
- 2.6 The sponsors are also of the opinion that any “reasonable” measures (i.e. measures that meet the criteria established by the Fund) that will help accelerate the natural recovery of components of the environment that have been impaired by an oil spill should, in principle, be considered admissible. Such measures should aim to bring the damaged site back to the same state that would have existed had the oil spill not occurred, or at least as close as possible to the *status quo ante* (that is to re-establish a healthy biological community in which the organisms characteristic of that community are present and are functioning normally). Innovative approaches should be encouraged, including measures taken at some distance from (but still within the general vicinity of) the damaged area, so long as it can be demonstrated that they would actually enhance the recovery of the damaged components of the environment. It is vital to preserve this link between the measures and the damaged components to avoid remote and speculative claims that are inconsistent with the definition of pollution damage in the Conventions.
- 2.7 The sponsors propose that an admissible claim for compensation for costs for measures of reinstatement should fulfil the following criteria:
- the measures should be likely to accelerate the natural process of recovery;
  - the measures should, as far as possible, seek to prevent further injury as a result of the incident;
  - the measures should not result in the degradation of other habitats or in adverse consequences for other natural or economic resources;
  - the measures should be technically feasible; and
  - the costs of the measures should be proportionate to the extent and duration of the damage and the benefits likely to be achieved.

The assessment should be made on the basis of the information available when the reinstatement measures are planned or undertaken.

- 2.8 The Assembly may wish to consider whether the Fund should limit its considerations of claims to those from any person or organisation (or any person or organisation acting with their consent) with a direct ownership, control or management responsibility for the impaired environment.

#### Post-spill studies

- 2.9 The sponsoring delegations consider that the Fund should encourage scientifically justified studies that quantify or verify pollution damage and determine whether or not reinstatement measures are necessary and feasible. Such studies will not be necessary after all spills and will normally be most appropriate in major incidents involving the loss of large quantities of oil. Given the legal framework, such studies cannot be a prerequisite for compensation of pollution damage.
- 2.10 It is essential that any post-spill studies provide comprehensive, reliable and usable information for identifying and assessing the impact of the oil spill on ecosystems, habitats and populations, including general biodiversity. For this purpose, the studies must be carried out with professionalism, rigor, objectivity and balance.

- 2.11 The sponsoring delegations deem it appropriate that the Fund be involved in the planning of post-spill environmental studies from an early stage of the process. Thus the Fund should participate in the determination of whether or not a particular incident should be subject to a post-spill study and in establishing the terms of reference for the study. In this context the Fund could also play an important role in avoiding unnecessary study components that simply repeat what has been done elsewhere. The Fund also has a role to play in ensuring that appropriate techniques and experts are employed, that progress with the studies is monitored and that the results are clearly and impartially documented. This would be of importance for the subject case but would also allow the Fund to compile data from studies for future cases.
- 2.12 The sponsors of this document concur with the present policy of the Fund that the scale of the studies should not be out of proportion to extent of the contamination and the predictable effects. On the other hand, the mere fact that the post-spill study demonstrates that no pollution damage has occurred or that no measures of reinstatement are reasonable for the recovery of the environment, should not exclude compensation for such studies.
- 2.13 The Assembly may wish to make the same considerations with respect to claims for costs for post-spill studies as suggested in paragraph 2.8.
- 2.14 Finally the sponsors consider that the participation of the Fund would not necessarily mean that measures of reinstatement later undertaken would be accepted by it.

### **3 Conclusions**

The Assembly is invited:

- (a) to take note of the information and endorse the principles and suggestions outlined in this document; and
  - (b) to agree that the Claims Manual be amended accordingly.
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