



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1992

THIRD INTERSESSIONAL  
WORKING GROUP  
Agenda item 2

92FUND/WGR.3/11/3  
28 March 2002  
Original: ENGLISH

## REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

### COMPENSATION FOR THE COSTS OF MEASURES OF REINSTATEMENT AND POST-SPILL ENVIRONMENTAL STUDIES

**Submitted by Australia, Canada, France, Ireland, Netherlands, New Zealand, Norway, Sweden  
and the United Kingdom**

<b>Summary:</b>	The submission contains proposals for new criteria and clarification 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 4.
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### **1 Introduction**

- 1.1 The Assembly at its October 2001 session considered the proposal set out in document 92FUND/A.6/4/5 submitted by the delegations of Australia, Canada, Sweden and the United Kingdom for new criteria for the admissibility of measures for reinstatement of impaired components of the environment and for post-spill studies. There was a clear majority in favour of the proposals, however a number of delegations expressed concern that the proposal might encourage speculative environmental damage claims. It was therefore decided that the matter should be referred back to the Working Group for further consideration with the view that the Assembly should take a decision at its next regular session in 2002.
- 1.2 The purpose of this document is to address this concern by highlighting the importance of the criteria for the admissibility for environmental damage claims and emphasising the close involvement of the Fund and its Member States when determining the admissibility of claims to ensure that the existing policy of the IOPC Fund on dealing with speculative claims is maintained.
- 1.3 The extent of environmental damage caused by an oil spill and the appropriate response taken to minimise or remedy such damage depends on several factors, for instance the type and amount of oil, the characteristics of the environment in the damaged area and the potential for natural

recovery. Such factors cannot be legislated for in advance. In this document the sponsoring delegations offer, as a first step, proposals to clarify the Fund's policy on compensation for post-spill studies and reinstatement measures, and propose criteria for the admissibility of such claims through a decision by the Assembly followed by amendments to the Fund's Claims Manual.

- 1.4 In the view of the sponsoring delegations, the proposals in this paper merely represent a clarification of the broader definition of "pollution damage" implemented by the 1992 amendments to the CLC and Fund Conventions. It is most certainly not the intention of the co-sponsors to try to amend these Conventions through seeking a major shift in current Fund policy. Should more fundamental changes be considered desirable this would represent a second stage of work in the longer term.

## **2 Post-spill environmental studies**

- 2.1 The Fund already has guidelines for determining when the cost of post spill studies may be met<sup><1></sup>. These were originally agreed for the 1971 Fund Claims Manual. The sponsors believe it is necessary to determine a more structured approach for the 1992 Fund policy having regard to the wording in the 1992 Protocols on reinstatement of the environment.
- 2.2 The sponsoring delegations consider that the Fund should encourage scientifically relevant studies that assist in determining whether or not reinstatement measures are necessary and feasible, and which measures are likely to have the greatest chance of success. The sponsors believe that appropriate studies will in themselves help minimise the possibility of claims resulting from unnecessary and ineffective reinstatement measures.
- 2.3 Post-spill environmental studies will not be necessary after all spills and will normally be most appropriate after major incidents where there is evidence of significant environmental damage. However, the justification for any post-spill environmental study should be assessed on a case-by-case basis. The Fund should be invited at an early stage to participate in such an assessment.
- 2.4 If it is agreed that a post-spill environmental study is justified the Fund should then be given the opportunity of becoming involved in the planning and determination of the terms of reference for the study. In this context the Fund can play an important role in helping to ensure that any post-spill study is likely to provide reliable and usable information and that it does not unnecessarily repeat what has been done elsewhere. The Fund can also assist in ensuring that appropriate techniques and experts are employed so that the studies are carried out with professionalism, scientific rigor, objectivity and balance. It is also essential that progress with the studies is monitored and that the results are clearly and impartially documented. This is not only important for the particular incident but also for the compilation of relevant data by the Fund for future cases.
- 2.5 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 the extent of the contamination and the predictable effects. It is also important to emphasise that participation of the Fund in the design and conduct of post-spill environmental studies would not necessarily mean that claims for the costs of any subsequent measures of reinstatement would be automatically accepted. On the other hand, the fact that a post-spill study demonstrates no significant long-term effects or that no measures of reinstatement are feasible to enhance the natural recovery of the environment should not exclude compensation for the costs of the study.
- 2.6 It was suggested in the document submitted to the 1992 Fund Assembly in October 2001 that the Assembly might wish to consider whether claims for post-spill environmental studies and measures of re-instatement should only be considered by the Fund if they were generated by a person or organisation with direct ownership, control or management responsibility for the

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<1> Claims Manual of the 1992 Fund, page 32 of the current version.

damaged components of the environment. The aim of such a restriction would be to ensure, as far as possible, that any such studies or measures would be of sufficient quality and relevance, and that unnecessary duplication of study components would be minimised. However, a number of delegates expressed the view that such a restriction would be contrary to the terms of the 1992 Civil Liability and Fund Conventions. With this in mind the sponsors of this paper believe that, following a spill that might warrant post-spill environmental studies or measures of reinstatement, the Fund should encourage the establishment, within the affected Member State, of a Committee or other mechanism to design and co-ordinate an agreed study programme.

### **3 Measures of reinstatement**

- 3.1 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’.*

- 3.2 Neither of the two Conventions contains any definition of “reasonable measures of reinstatement”. However the sponsors of the document consider that to qualify, any such measure should have a significant positive effect on the natural recovery of an impaired environment. Thus, a reasonable measure of reinstatement should aim to bring the damaged site back to the same ecological state that would have existed had the oil spill not occurred, or at least as close to it as possible (that is to re-establish a healthy biological community in which the organisms characteristic of that community prior to the spill are present and are functioning normally).
- 3.3 Innovative approaches to reinstatement should be encouraged, including measures taken within the general vicinity of the damaged area. This will be conditional on being able to demonstrate that the measure would actually enhance the recovery of the damaged components of the environment. It is vital to preserve this link between the measures of reinstatement and the damaged components to avoid remote and speculative claims that are inconsistent with the definition of *pollution damage* in the Conventions.
- 3.4 It is proposed that to be considered admissible, measures of reinstatement would have to fulfil all of the 1992 Fund’s existing general criteria, as well as the additional specific criteria set out in paragraph 3.6.
- 3.5 The general criteria established by the 1992 Fund for the admissibility of claims, including claims for compensation for costs for measures of reinstatement, stipulate that:
- (i) any expense/loss must actually have been incurred;
  - (ii) any expense must relate to measures which are deemed reasonable and 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 has suffered a quantifiable economic loss; and
  - (vi) a claimant has to prove the amount of his loss or damage by producing appropriate documents or other evidence.
- 3.6 The sponsors propose that, in order for measures of reinstatement to be considered “reasonable”, and therefore claims for compensation for costs of such measures to be admissible, the following

additional specific criteria should also apply. These seek to clarify those endorsed by the 1992 Fund at its first session<sup><2></sup>.

- (i) the measures should be likely to accelerate significantly the natural process of recovery of the damaged area;
- (ii) the measures should, as far as possible, seek to prevent further injury as a result of the incident;
- (iii) the measures should, as far as possible, not result in the degradation of other habitats or in adverse consequences for other natural or economic resources;
- (iv) the measures should be technically feasible; and
- (v) the costs of the measures should not be out of proportion to the extent and duration of the damage and the benefits likely to be achieved.

3.7 The Fund has also 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<sup><3></sup>. The sponsors of this document do not propose any variation in this policy.

3.8 The sponsoring delegations believe that a requirement to fulfil all the criteria in paragraphs 3.5 and 3.6, as well as the established policy in 3.7, should ensure that there will not be a flood of claims in respect of environmental damage and reinstatement measures. It would be expected that where issues of principle or matters relating to admissibility are raised by particular claims, the Executive Committee, and if necessary the Assembly, will need to consider the issues on a case-by-case basis in the normal way. Claims which do not meet all the criteria will not be accepted by the Fund.

3.9 In order to encourage a co-ordinated approach to reasonable measures of reinstatement the Assembly may wish to endorse a similar proposal to that contained in paragraph 2.6.

3.10 If the clarification and new criteria for the admissibility of claims for post-spill environmental studies and reasonable measures of reinstatement outlined in this paper are accepted by the Fund, the sponsoring delegations consider it important that they are communicated to the international community through a revision of the relevant section of the 1992 Fund's Claims Manual. The proposed revised text is submitted as an Annex to this document.

#### **4 Conclusions**

The Working Group is invited:

- (a) to take note of the information and endorse the principles and suggestions outlined in this document; and
- (b) to note the intention to seek an amendment to the Claims Manual for consideration by the Assembly in October 2002.

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<sup><2></sup> Claims Manual of the 1992 Fund, page 32 of the current version.

<sup><3></sup> Resolution N°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.

## ANNEX

### 1992 Fund Claims Manual - Revised section on Environmental Damage

Oil spills can cause environmental damage, the extent and nature of which will depend on several factors, including the type and amount of oil and the characteristics of the affected area. Such damage is normally of short duration due to the great potential for natural recovery exhibited by many species of marine flora and fauna. In some circumstances it is possible to enhance the speed of this natural recovery after an oil spill through reasonable reinstatement measures. The costs of such measures will be accepted by the 1992 Fund under certain conditions.

The aim of any reasonable measures of reinstatement should be to bring the damaged site back to the same ecological state that would have existed had the oil spill not occurred, or at least as close to it as possible (that is to re-establish a healthy biological community in which the organisms characteristic of that community prior to the spill are present and are functioning normally). Innovative approaches to reinstatement, including measures taken at some distance from, but still within the general vicinity of, the damaged area may be acceptable, so long as it can be demonstrated that they would actually enhance the recovery of the damaged components of the environment. This link between the measures and the damaged components is essential for consistency with the definition of *pollution damage* in the 1992 Civil Liability and Fund Conventions (see page 9 of the current version).

In addition to satisfying the general criteria applied to the admissibility of claims for compensation under the 1992 Fund Convention (see page 19 of the current version), claims for the costs of measures of reinstatement of the environment will only be considered admissible if the following criteria are fulfilled:

- the measures should be likely to accelerate significantly 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, as far as possible, not result in the degradation of other habitats or in adverse consequences for other natural or economic resources
- the measures should be technically feasible
- the costs of the measures should not be out of proportion 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 specific reinstatement measures are to be undertaken.

Compensation is paid only for measures actually undertaken or to be undertaken, and if the claimant has sustained an economic loss that can be quantified in monetary terms. The Fund will not entertain claims for environmental damage based on an abstract quantification calculated in accordance with theoretical models. It will also not pay damages of a punitive nature on the basis of the degree of fault of the wrongdoer.

Studies are sometimes required to establish the precise nature and extent of environmental damage caused by an oil spill and to 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 the case of major incidents where there is evidence of significant environmental damage.

The Fund may contribute to the cost of such studies provided that they concern damage which falls within the definition of *pollution damage* in the Conventions, including reasonable measures to reinstate a damaged environment. In order to be admissible for compensation it is essential that any such post-spill studies are likely to provide reliable and usable information. For this reason the studies must be carried out with professionalism, scientific rigor, objectivity and balance. This is most likely to be achieved if a

committee or other mechanism is established within the affected Member State to design and co-ordinate any such studies, as well as reinstatement measures.

The scale of the studies should be in proportion to the extent of the contamination and the predictable effects. On the other hand, the mere fact that a post-spill study demonstrates that no significant long-term environmental damage has occurred or that no reinstatement measures are necessary, does not by itself exclude compensation for the costs of the study.

The Fund should be invited at an early stage to participate in the determination of whether or not a particular incident should be subject to a post-spill environmental study. If it is agreed that such a study is justified the Fund should then be given the opportunity of becoming involved in the planning and in establishing the terms of reference for the study. In this context the Fund can play an important role in helping to ensure any post-spill environmental study does not unnecessarily repeat what has been done elsewhere. The Fund can also assist in ensuring that appropriate techniques and experts are employed. It is essential that progress with the studies is monitored, and that the results are clearly and impartially documented. This is not only important for the particular incident but also for the compilation of relevant data by the Fund for future cases.

It is also important to emphasise that participation of the Fund in the planning of environmental studies does not necessarily mean that any measures of reinstatement later proposed or undertaken will be considered admissible.