INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

THIRD INTERSESSIONAL
WORKING GROUP
Agenda item 2

92FUND/WGR.3/11/4/Add.1
24 April 2002
Original: ENGLISH

REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

ENVIRONMENTAL DAMAGE

Submitted by Japan and the Republic of Korea

Summary:	Further to the document submitted by Japan and the Republic of Korea (92FUND/WGR.3/11/4), the purpose of this document is to discuss the issue of environmental damage further in response to the document submitted by Australia, Canada, France, Ireland, Netherlands, New Zealand, Norway, Sweden and the United Kingdom (92FUND/WGR.3/11/3).
Action to be taken:	The Working Group is invited to take note of the information contained in this document and to have a further discussion on the issue of environmental damage.

1 Introduction

Japan and the Republic of Korea wish to express their appreciation to the nine countries involved in the preparation and submission of the document (92FUND/WGR.3/11/3), which, the sponsors of this document believe, can be a basis of the discussion as to how the issue of environmental damage is going to be discussed. The sponsoring countries also wish to contribute to the discussion on this matter by trying to make constructive suggestions at the meeting of the Working Group, although the following discussion is not exhaustive from their point of view.

2 Discussion

2.1 General Statement

2.1.1 The hard work and the efforts made by the sponsors of the document (92FUND/WGR.3/11/3) are highly appreciated. After the examination of it, however, it still seems that the requirements described and the criteria proposed therein are, in general, a little too ambiguous to apply to specific claims for determining the admissibility of such claims. The sponsors have a great

concern about the possibility that the scope of admissible environmental damage would be substantially widened by this proposal without a sufficient scrutiny or an appropriate analysis of the link between the current criteria and the past specific claims.

2.1.2 The sponsors believe that the Fund, all the Contracting States and the other parties involved in this international system, are in agreement on the point on which no excessive measures of reinstatement should be admitted. In order to prevent unscreened inappropriate claims from being admitted, the specification of each criterion and the clarification of the important points described in the revision of the Claims Manual are necessary.

2.2 Innovative Approach

2.2.1 The terminology of "innovative approach" is not clear although the definition of the term is laid down in the proposal. Should the notion include the possibility of admitting the provision of an alternative proximate site as a measure of reinstatement, it would be a great deviation from the present policy of the Funds, which has not admitted such a claim as to the past incidents.

2.2.2 Another problem would be that, since in the Innovative Approach the amount of information on the appropriateness of the measure is the more limited on its innovative nature, it would not be able to exclude the possibility that one would take inappropriate measures on the basis of insufficient information, alleging that the measures taken were reasonable at the time, although they were not.

2.2.3 Although the sponsors do not commit themselves on this approach at this stage, it should be noted that an approach should be based upon established scientific knowledge which is widely and undisputedly accepted, for example, in the academic world.

2.3 The proposed new criteria for environmental damage for the Claims Manual

2.3.1 The first to be confirmed is that the proposed criteria are additional to the current general criteria and cannot function in the direction of widening the definition of the Conventions. The relationship between the general criteria and the section on Environmental Damage must be construed as such.

2.3.2 As to the proposed new criteria, there seems to remain much room for ambiguity as a whole. For example,

(i) In addition to the use of the auxiliary verb "should", the use of the adverbial phrases, "(be) likely to" and "as far as possible," makes the meaning of the criteria vague.

(ii) The introduction of the new concept of "significant acceleration (of the natural process of recovery)" does not succeed in describing clear-cut distinction between "admissible" and "inadmissible".

(iii) The concept of "(being) technically feasible" could admit too many reinstatement measures unless some other conditions are provided.

It would be inappropriate to retain this uncertainty in applying these criteria to specific claims.

2.3.3 Since the sponsors believe, as stated in 2.1.2, that the common understanding would be that no excessive measures of reinstatement should be admitted, in order to proceed with the discussion further, they propose a requirement that the cost of the measures of restoration of the environment in the affected area to its pre-existing condition be without grossly disproportionate expenditures.

2.3.4 Moreover, it should be pointed out that the following paragraph in the current Claims Manual, which is omitted in the proposed revision, must be retained because it has been an established and widely accepted concept among the Contracting States:

In most cases a major oil spill will not cause permanent damage to the environment, as the marine environment has a great potential for natural recovery. There are also limits to what man can actually do in taking measures to improve on the natural process.

2.4 Post-spill Studies

2.4.1 Post-spill studies, although theoretically important in considering the issue of environmental damage, do not seem ripe to be dealt with as admissible.

2.4.2 The first reason is that the purpose or the nature of such a study is not clear. The document (92FUND/WGR.3/11/3) provides in the ANNEX that "(post-spill studies) … will normally be most appropriate in the case of major incidents…" Fundamentally, whether or not such a study is necessary does not necessarily depend upon the scale of the incidents. It is not appropriate to think that only in case of major incidents would a post-spill study be necessary or to recognize that a major incident should necessarily be followed by the post-spill study.

2.4.3 Another reason is that the question as to in which case the cost for a post-spill study should be paid has not been discussed to the full extent. According to the document (92FUND/WGR.3/11/3), the fact that a study demonstrates no significant long-term effects should not exclude compensation for the cost of the study. It should not be acceptable, however, for such a study to be admissible, because, basically, the risk in case of non-productiveness as a result of a study should be accepted by those who make the study. At least, specific contribution by the study to the measures taken would be necessary for such a study to be admitted.

3 Conclusions

3.1 Although it is found that the issue of environmental damage is intensively discussed in the document, the proposal of the revision of the Claims Manual still includes so many ambiguities that it would be extremely hard to apply the proposed criteria to specific claims.

3.2 In order for this proposal to be actually useful, the revised section and each criterion in the Claims Manual in the proposal should be based upon the analysis of actual treatment of the claims of the past incidents, also referring to other judicial decisions of a court or to academically established theories.

3.3 Since it is no easy task to deal with the issue of environmental damage, it should be considered with prudence and deliberation.

4 Action to be noted

The Working Group is invited:

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

(b) to have a further discussion on the issue of environmental damage.