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WORKING GROUP
Agenda item 2

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REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

**PROPOSAL FOR THE PAYMENT OF A MARK-UP ON CLAIMS FOR FIXED COSTS FOR EQUIPMENT USED TO
CONTROL AND PREVENT OIL POLLUTION**

Submitted by Italy, the Netherlands, Poland, Spain and the United Kingdom

Summary:

At previous meetings of the Third Intersessional Working Group consideration has been given to a proposal that it would be in the interests of shipowners, insurers and receivers to allow a modest 'mark-up' on claims for the use of certain fixed facilities providing it can be demonstrated that they had a beneficial effect in reducing pollution. This would provide a modest mark-up of costs to States maintaining specialised equipment to respond to oil pollution damage.

Action to be taken:

The Working Group is invited to consider the issues raised in this paper and the recommendations in section 8.

1 Introduction

Whilst it is reasonable to expect Contracting States to endeavour to maintain a response capability commensurate with their capabilities and the risks to their coastline, the co-sponsors of this paper believe that the IOPC Fund should provide a modest incentive to States to provide response capabilities which go beyond that which might be considered as basic provision for an oil spill clean-up operation. The proposal would provide some recompense to States that have specialised response equipment in place, which would in turn, minimise the total cost of the claims arising from an incident. This would therefore be beneficial to shipowners, insurers, Fund contributors, the local economy and the environment.

2 Background

- 2.1 At its third meeting, the 1992 Fund's Third Intersessional Working Group addressed the issue of whether a modest mark-up on fixed costs would promote the adoption of better, and more effective, pollution prevention and clean-up facilities. Document 92FUND/WGR.3/8/10 submitted by the United Kingdom and Spain proposed a 10% mark-up, on annual contract costs and/or daily costs of maintaining and deploying such resources, should be awarded in compensation, on

condition that it could be demonstrated that the use of the resources had had a beneficial effect in preventing or minimising pollution and therefore the costs of an incident.

- 2.2 The proposal received significant support. Most delegations that expressed support for the proposal considered that the inclusion of a mark-up on certain fixed costs could be incorporated into the Fund's Claims Manual without modification of the Conventions. However, the Working Group eventually decided that more details were needed, in particular in respect of the conditions for awarding an uplift.

3 Current policy

Claims for fixed costs

- 3.1 Claims may be presented against the IOPC Fund 1992 for fixed costs, that is, costs which would have arisen for the authorities concerned even if the incident had not occurred, such as normal salaries for permanently employed personnel and capital costs of vessels owned by the authorities.
- 3.2 The 1992 Fund accepts a reasonable proportion of these costs, provided they correspond closely to the clean-up period in question and do not include remote overhead charges.
- 3.3 If a public authority has purchased and maintained materials or equipment so that they are immediately available if an incident occurs, the Fund will pay compensation for a reasonable part of the purchase price of the materials and equipment actually used.

Minimum level of equipment States should have in place

- 3.4 The International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (OPRC) states that each Party, within its capabilities should establish a minimum level of pre-positioned oil spill combating equipment, commensurate with the risks involved, and programmes for its use.
- 3.5 The IOPC Fund has already adopted a Resolution, in 2001, urging all Contracting States to the 1992 Fund Protocol to become party to the 1990 OPRC, in order to benefit potential victims of oil spills, and the IOPC Fund in helping to minimise the environmental and financial impact of oil spills (see Annex II). Some Member States may, of course, have response equipment in place that will be beyond that which could form part of the resources needed to implement the OPRC Convention. The co-sponsors believe, therefore, that the fixed costs proposal contained in this paper is a logical extension to the adoption of the OPRC Resolution as it would have a similar effect as the OPRC Assembly Resolution in helping to minimise the environmental and financial impact of oil spills through the application of some incentive to maintain such specialised equipment to minimise the environmental impact of oil spills.

4 Proposal

- 4.1 Our proposal would allow for an increase of an agreed percentage on top of a claim for the deployment of specialised response equipment owned or contracted to a State, (however, simply deploying the capability would not be sufficient to justify the additional payment).
- 4.2 Many States do not own all their response equipment but contract equipment from commercial owners. Such contracts typically run over several years and at considerable expense to the public authorities. Some countries maintain specialised, high cost, response equipment in this way to be ready to respond in the event of an oil spill. The IOPC Fund Claims Manual (page 19) already allows States to claim a reasonable part of the price of equipment purchased so that it is available in the event of an incident, as well as the rate of hire of equipment.

- 4.3 Firstly, the co-sponsors believe it would be consistent with the notion of the current IOPC Fund policy on fixed costs to allow States to claim for part of the contract costs of equipment used in response to an incident and contracted by those States to be available in the event of an incident; costs which in some cases run to millions of pounds per year. Therefore, the co-sponsors of this paper propose that the text on page 21 of the Claims Manual referring to fixed costs be widened to include a % of the annual costs of specialised response equipment owned by, or contracted to, authorities as follows:

Authorities may claim compensation for so-called *fixed costs*, i.e. costs which would have arisen for the authorities concerned even if the incident had not occurred, such as normal salaries for permanently employed personnel, ~~and~~ capital costs of vessels owned by the Authorities and [%] of the annual costs of specialised response equipment owned or contracted by Authorities.

- 4.4 We then suggest that the mark-up [a % to be discussed by the Working Group and recommended to the IOPC Fund Assembly] be provided by the addition of a new paragraph that may read:

Where it is demonstrated that the deployment of specialised response equipment was technically reasonable, and where it is shown that the equipment proved to have been beneficial in preventing and/or minimising major pollution, Authorities claiming compensation for the actual use of the equipment may include a mark up of [a % to be discussed by the Working Group and recommended to the IOPC Fund Assembly].

5 Criteria for claims

- 5.1 The admissibility of claims would, of course, be determined in accordance with the general criteria laid down in the current Claims Manual (November 2002). However, we propose that the following criteria should also be fulfilled in order for a claim to be considered admissible:

- the equipment used must be for the purpose of avoiding or minimising persistent oil pollution from tankers;
- it can be demonstrated that the equipment used had a significant, beneficial effect in reducing or minimising pollution (simply deploying the capability would not be sufficient to justify the additional payment);
- the equipment used was reasonable and appropriate: i.e. not out of proportion to the extent and duration of the damage and the benefits likely to be achieved;
- the cost of the equipment used was reasonable and not disproportionate to costs that would reasonably be expected for such equipment elsewhere;
- the claim for response costs, which includes the fixed costs mark-up, does not include a claim for profit.

Annex I demonstrates how these criteria would be incorporated into the Claims Manual text.

- 5.2 It is not our intention to list the types of equipment that would qualify for a mark-up under this proposal. The technology applied to combat and prevent spills is constantly evolving so it would be difficult to provide a definitive list. It is also necessary to take into account the differing capabilities of Member States: what may seem relatively basic to one State will be considered specialised to another. The co-sponsors propose that it should be for the Fund's on-site experts, and ultimately the Executive Committee (and Assembly, if needed), to determine whether the equipment used qualifies for the proposed mark-up and whether its use was reasonable and appropriate.

- 5.3 The mark-up would only be available to public authorities eligible to claim for fixed costs as per the current Claims Manual (November 2002). The co-sponsors believe that where such equipment is used to good effect, claims against the Fund could be significantly reduced.
- 5.4 The intention is, therefore, simply to widen the policy of the IOPC Fund on so-called *fixed costs* to allow authorities to claim for a percentage of the maintenance of specialised response equipment, and to allow the IOPC Fund Executive Committee (and Assembly, if needed) to determine the admissibility of such claims in accordance with the current, and revised text, of the Claims Manual (see Annex I.)

6 Equivalence

- 6.1 An equivalent type of provision exists on an increase to the total claim with respect to efforts to prevent or minimise pollution from ships under the International Convention on Salvage, 1989; the "Salvage Convention".
- 6.2 Under Article 14 concerning special compensation, if the salvage operations prevented or minimised damage to the environment then the special compensation may be increased by up to 100% of the expenses incurred by the salvor. The salvor would ordinarily receive an award to cover his costs; this provision allowing for an additional award to encourage salvors who would otherwise stand to gain nothing. Expenses include a fair rate for equipment and personnel actually and reasonably used in the salvage operation.
- 6.3 The proposal in this paper does not go this far; it is not intended to provide profit for those involved in clean-up operations but to serve as an incentive for States to provide, or maintain, specialised response equipment by way of a small contribution towards the cost of ensuring such equipment is available.

7 Legalities

The co-sponsors of this paper believe this is a policy issue that can be settled by agreement of the Assembly without the need for changing the text of the 1992 Protocols.

8 Recommendation

The co-sponsors consider that the proposal in this paper could lead to improved responses to major oil spills and a reduction in the overall cost of such incidents to the IOPC Fund. The co-sponsors invite the Working Group to consider the proposal contained in this paper, and an appropriate percentage to be included in the square brackets, and note the intention to seek an amendment to the Claims Manual for consideration by the Assembly in October 2003.

ANNEX I

Proposed Revised text of IOPC Fund 1992 Claims Manual

Page 21

Authorities may claim compensation for so-called *fixed costs*, ie costs which would have arisen for the authorities concerned even if the incident had not occurred, such as normal salaries for permanently employed personnel, ~~and~~ capital costs of vessels owned by the authorities and [%] of the annual costs of specialised response equipment owned or contracted by Authorities.

Mark-up on fixed costs

Where it is demonstrated that the deployment of specialised response equipment was technically reasonable, and where it is shown that the equipment proved to have been beneficial in preventing and/or minimising major pollution, Authorities claiming compensation for the actual use of the equipment may include a mark-up of [a % to be discussed by the Working Group and recommended to the IOPC Fund Assembly].

In addition to satisfying the general criteria applied to the admissibility of claims for compensation under the 1992 Fund Convention (see Pages 17 and 18), claims for a mark-up on fixed costs should additionally fulfil the following criteria if they are to be considered admissible:

- the equipment used must be for the purpose of avoiding or minimising persistent oil pollution from tankers.
- it can be demonstrated that the equipment used had a significant, beneficial effect in reducing or minimising pollution, (simply deploying the capability would not be sufficient to justify the additional payment.);
- the equipment used was reasonable and appropriate: i.e. not out of proportion to the extent and duration of the damage and the benefits likely to be achieved;
- the cost of the equipment used was reasonable and not disproportionate to costs that would reasonably be expected for such equipment elsewhere;
- the claim should not include any profit margin.

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ANNEX II

RESOLUTION ON THE INTERNATIONAL CONVENTION ON OIL POLLUTION PREPAREDNESS, RESPONSE AND CO-OPERATION (OPRC) 1990 AND THE PROTOCOL ON PREPAREDNESS, RESPONSE AND CO-OPERATION TO POLLUTION INCIDENTS BY HAZARDOUS AND NOXIOUS SUBSTANCES, 2000 OPRC (HNS) PROTOCOL

THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND 1992,

NOTING that the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 ("OPRC") came into force in 1995, and that 59 States have ratified or acceded to the Convention,

ALSO NOTING that the Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000 OPRC (HNS) Protocol will not come into force until 12 months after ratification by not less than 15 States,

NOTING FURTHER that no States are yet party to the 2000 OPRC (HNS) Protocol,

RECOGNIZING the need for some States to identify existing resources that could form part of the resources needed to implement the 1990 OPRC and 2000 OPRC (HNS) Protocol,

RECOGNIZING FURTHER that some States may not have all the resources needed to effectively implement the OPRC and 2000 OPRC (HNS) Protocol,

BELIEVING it is desirable for coastal States to have in place effective measures and co-operative arrangements to deal with oil spill incidents wherever they may occur,

FURTHER BELIEVING that wider and speedy implementation of both the 1990 OPRC and the 2000 OPRC (HNS) Protocol would benefit potential victims of oil spills and the IOPC Fund in helping to minimize the environmental and financial impact of oil spills,

1. URGES all Contracting States to the 1992 Fund Protocol that have not yet done so to ratify, or to accede to, the 1990 OPRC;
2. ENCOURAGES States Parties to the OPRC to also become party to the 2000 OPRC (HNS) Protocol, with the aim of promoting speedy implementation;
3. FURTHER ENCOURAGES States not parties to the 1990 OPRC to put in place effective contingency plans for oil pollution prevention and response to the best of their abilities.