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REVIEW OF THE INTERNATIONAL COMPENSATION REGIME

COMPENSATION FOR ECOLOGICAL DAMAGE TO BE PAID BY THE INTERNATIONAL COMPENSATION REGIME

Submitted by the French delegation

Summary:	Further to the French memorandum sent to the IOPC Fund in 2000, this document addresses the question of compensation for ecological damage and its inclusion in the international compensation regime.
Action to be taken:	Examination and discussion of these points by the Working Group.

1. The inclusion of compensation for ecological damage conflicts with some of the principles identified in the context of the CLC/IOPC Fund international regime, especially the principle that **damage has to be suffered, and quantified in order to give rise to compensation**. Whereas in most cases, economic injury suffered by natural and legal persons may be quantified according to objective financial criteria, environmental damage poses more methodological problems when it comes to determining the price of the deterioration in the environment.

Some economic models do exist to help courts should they have to calculate compensation. The aim of this document is not, however, to explore aspects connected with assessment, which will be mentioned nevertheless (see section 8 below), but to present some arguments demonstrating the legal necessity of compensation for ecological damage.

2. **First of all agreement has to be reached on the definition of ecological damage. In its broadly accepted meaning, ecological damage comprises two elements:** first, it is the injury suffered,

owing to pollution, by economic interests (this damage is not primarily of a specific nature other than in terms of figures); secondly it is also the damage caused to the environment itself, chiefly to flora and fauna. These two elements are closely linked and indissociable, since ecological damage is not suffered immediately by the victims, but is the result of the initial harm caused to the environment and its constituent parts, air and water; victims suffer only from the consequences of this primary damage.

In this document, "ecological damage" will be understood to mean only the damage caused to the environment itself, principally to flora and fauna.

3. What are the legal foundations of the right to compensation for "ecological damage"? The law can no longer ignore this compensation, even if its implementation might give rise to some difficulties as to assessment. Even though in the Chicago Court's second judgment of 10 January 1988 in the *Amoco Cadiz* case, the judge restricted the indemnifiable damage to that which was economically quantifiable, compensation for ecological damage probably has divers legal bases which are outlined in the paragraphs below.

It must first be pointed out that **the general rule regarding compensation** is that in order for any damage, be it material or non-material, to be compensated for, there must be a link of causation. In most cases, there is not direct causal relationship between the damage and the polluting discharge; this relationship operates through the intermediary media of air and water which receive and transmit pollution. A legal writer was thus able to conclude that infringements of individuals' rights are therefore only the repercussions of a prior assault on the environment.

4. **International environmental law**. Several conventions are gradually widening the scope of the damage covered ("related interests", "amenity values", etc). Hence legal opinion accepts, on these bases, that it is now widely held that compensation for damage caused by an accident involving oil pollution includes compensation for ecological damage. Even if the quantitative method still translates ecological damage into the cost of restoration measures, attention must be drawn to the development of legal principles or at least methods of calculation.

4.1 The marine environment, particularly its biomass and the whole food chain, can no longer be regarded as a *res nullius* in any of the belts of sea where a coastal State has sovereignty and sovereign rights. In that respect, the existence of the "functional jurisdiction" of that coastal State, which is recognised by the United Nations Convention on the Law of the Sea in respect of the resources of the exclusive economic zone (EEZ) and the continental shelf, as well as rights of jurisdiction for the purpose of protecting the marine environment in these belts, illustrates the fading away of the notion of *res communis* in this domain. Since in these areas under national jurisdiction there is no question of applying the concept of *res nullius*, which is reserved for the resources of the international zone of the sea bed, a coastal State can therefore claim the right to compensation in the event of damage to a marine environment containing its marine resources, above all its biological marine resources.

4.2 Article 235, paragraphs 2 and 3, and article 304 of the United Nations Convention on the Law of the Sea do not rule out compensation for ecological damage. Although no express provision is made for it, it is not absolutely excluded in principle, since the texts of the articles in question envisage the establishment of new rules concerning responsibility and liability under international law.

5. **Community law on the environment aims to promote compensation for ecological damage.** This is apparent from the European White Paper on environmental liability of 9 February 2000, which specifies that an environmental liability regime covering damage to natural resources is necessary. To that end, the White Paper defines environmental damage, that is to say damage caused to biodiversity and damage reflected in a contamination of sites. The White Paper notes that the Lugano Convention of 1993 has some limitations and proposes that it be supplemented by a Community instrument which would clarify the application of liability for environmental damage.

6. **National law**. For many years, the national law in several countries has de facto included the possibility of compensation for ecological damage on the basis of the notion of "**maritime public property**".

6.1. To quote only the example of France, even before the establishment of an EEZ, the French Act of 28 November 1963 and the implementing Decree of 17 June 1966 had incorporated the soil and subsoil of the territorial sea in the State's maritime public property. As the State owned these assets, it was therefore entitled to claim fair compensation for damage caused to the marine environment, particularly to its flora and fauna. This measure changes the legal aspect of damage: entitlement to compensation would normally exist only if property had been damaged. In the event of ecological damage, the State may therefore request compensation, not on the basis of non-material damage, but, as it were, as the owner of the fauna and flora of the marine soil and subsoil, shore, beaches and rocks. The way in which the notion of the EEZ is understood extends this quasi proprietal approach, even if maritime public property is no longer affected.

6.2 **The case law of the Supreme Court of the United States comes to practically the same conclusion by using a different legal basis, since the State is the "trustee" of natural resources.** An examination of American case law shows that virtually all pollution cases dealt with in the United States, ie all the main settlements, have included ecological damage. This was true of the *Exxon Valdez* case in 1989, where environmental damage was assessed in the light not only of the total costs of reinstating the environment, but also of the loss in value of the environment during reinstatement and of the costs incurred for the assessment of damage. Without going into the details of the sums paid, purely as far as principles are concerned, American law clearly applied that of compensating for ecological damage in this case.

Both the French and American legal systems accept that the State can go to court to claim compensation for damage it has suffered owing to harm done to the marine environment.

7. **Scope of the principle of compensation**. The principle of compensation signifies that the victim of injury must, in principle, be restored to the situation before the act causing the damage took place. This principle includes compensation for ecological damage proper, because the three constituent parts of such damage include the costs of reinstatement and, in particular, expenditure on restocking.

8. Further thought should be given to the determination of the conditions leading to compensation from the IOPC Fund and **the methods of assessing damage**.

According to the present rules laid down by the Civil Liability Convention and the Fund Convention, indemnifiable damage must result from "pollution damage" and "preventive measures". **So this definition embraces environmental damage, which is not therefore unknown to the CLC and the IOPC Fund.** But claims for compensation for such damage are not accepted unless the applicant has suffered damage which can be quantified in monetary terms. Up until now, it has been the rule that, according to the IOPC Fund, compensation should not be determined on the basis of an abstract quantification of damage using theoretical models (as is the case in the United States with the Oil Pollution Act of 1990 (OPA 90)), but must take into account only the costs of measures for reinstating the environment, which have been or will actually be taken.

Already on these bases, a broad interpretation of compensation may be contemplated for, in law, a victim of damage must, in principle be restored to the original condition he would have been in if the wrongful act had not occurred. Since compensation must therefore be equivalent to the damage suffered (within the limit of the maximum amount of compensation available), it comprises some comprehensive components that must be interpreted in accordance with new economic models. The latter would be expressed in "classical" legal language as the costs of reinstatement (expenditure on cleaning and restocking), losses of earnings of various kinds and losses of enjoyment. The notion of "restocking" must be strictly interpreted, in view of the possible existence of certain rare species or species protected by international texts.

Without going into the details here, it will be noted that recent advances in economics and econometrics now make it possible to develop methods of assessing non-marketed goods, which are no longer really abstract, as they were a few years ago (the *Antonio Gramsci* case is often quoted in this connection). In the first judgment of 3 June 1987 in the *Amoco Cadiz* case, the court recognised the existence of redressable ecological damage, although no compensation was awarded in its final decision on the grounds that the Court was not convinced of the advisability of ecological compensation and/or it was not convinced that if compensation were awarded to the French parties, the work would be really carried out.

The American Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (1980) and the "superfund" created by it strengthen this approach, even if criticism has been voiced about the operating methods of this fund. Similarly, while the **"contingent valuation"** technique has given rise to much debate around the time of the *Exxon Valdez* case, the report of the National Oceanic and Atmospheric Administration (NOAA) marked a significant stage in the **taking into consideration of damage to non-marketed goods in the United States**, in that it concludes that this technique is valuable and goes still further by drawing up a guide to good practice in contingent valuation.

The advances of economics referred to above now provide courts with experts' reports which were not pertinent enough at the time of the *Amoco Cadiz* case. Although even before the *Haven* case, the Italian Court of Appeal in Messina rendered a final judgement in the *Patmos* case (judgement of 24 December 1993), the basis on which it assessed ecological damage, ie reasonableness, seems to contain too many unknown quantities. **The use of the technique of the environmental impact study**, introduced in many countries' legislation, offers a particularly firm base for the assessment of ecological damage over several years.

9. The extension of the compensation regime under the CLC/IOPC Fund system if ecological damage were to be interpreted more broadly is sometimes presented as a threat to "real victims" because it would allegedly restrict and dilute the amounts paid. It is sometimes suggested that a risk of abuse could lead to excesses and American case law on the Final Rule on Natural Resource Damage Assessment is quoted.

This argument is not, however, really relevant financially or legally speaking.

Financially speaking, if the raising of the IOPC Fund compensation limit is accepted, this would at least partly answer the argument that there is a risk of conflict between the different categories of damage.

As for the risk of dilution, the arguments set out in the foregoing paragraphs have tried to show that the source of damage first harms the environment qua vector of a whole set of economic injuries. Under international law, the rights of coastal States over all the resources situated in their adjacent belts of sea make it possible to link the harm suffered to the exercise of rights similar to those of ownership.

10. The question also arises of the identity of the victim of environmental damage. As previously noted, the State, in its capacity of the exclusive owner or manager of all the environmental resources of the marine areas over which it exercises sovereignty or jurisdiction, would certainly be the legal person best suited to represent the community vis-à-vis an international compensation regime for this type of damage.

Conclusion

There can be no denying that any extension of cover for environmental damage creates a risk of conflict with that for purely economic damage. Nevertheless, if in other fora the international community recognises a right to compensation for environmental damage, member States should ensure that amounts of compensation sufficient to satisfy this right exist under the CLC/IOPC Fund Conventions.