INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

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APPLICABILITY OF THE FUND CONVENTION TO OIL POLLUTION DAMAGE CAUSED BY SPILLS FROM UNIDENTIFIED SOURCES

Note by the Director

1 Introduction

1.1 The Government of Portugal has submitted a claim for compensation for pollution to the coast of Portugal which occurred in December 1992. The Portuguese Government has maintained that the oil originated from a ship and that this ship was a laden tanker, although the Government has not been able to identify the vessel. The question is whether the Fund Convention applies to oil spills of this kind.

1.2 Under Article 4.1 of the Fund Convention, the IOPC Fund is obliged to pay compensation for pollution damage, inter alia, where the victim is unable to obtain compensation because "no liability arises under the Civil Liability Convention". One of the situations in which no liability would arise under the Civil Liability Convention is where the identity of the ship which caused the damage is not known, since in that case no shipowner can be held liable under that Convention. In respect of such cases, Article 4.2(b) of the Fund Convention provides, however, that the IOPC Fund will not be obliged to pay compensation if "the claimant cannot prove that the damage resulted from an incident involving one or more ships".

1.3 In view of the importance of the questions involved, the Director has considered it appropriate to submit this matter to the Assembly for consideration.

2 Consideration by the Executive Committee

2.1 The issues raised by the Portuguese Government's claim were submitted to the Executive Committee for consideration at its 35th session in the form of a study by the Director of the background to the relevant provisions of the Fund Convention (documents FUND/EXC.35/7 and FUND/EXC.35/7/Add.1).

2.2 The Executive Committee decided not to consider the Portuguese Government's claim at that session, due to lack of time (document FUND/EXC.35/10, paragraph 4.1.3).

3 The Incident

3.1 On 14 January 1993, the IOPC Fund was informed by the Government of Portugal that beaches on the west coast of Portugal had been polluted on 7 December 1992 by crude oil coming from the sea. It was stated that the oil originated from a ship which had not yet been identified.

3.2 The oil contaminated a stretch of about 20 kilometres of sandy beaches north of Figueira da Foz, some 170 kilometres north of Lisbon. Clean-up operations were carried out by the Portuguese authorities during the period 7 December 1992 - 12 February 1993. It is estimated that about 600 tonnes of oily waste were recovered.

3.3 The Portuguese Government has submitted a claim to the IOPC Fund for the costs incurred in respect of this incident. The Portuguese Government's claim amounts to Esc16 688 930 (£75 100). It has been indicated that an additional claim will be submitted in respect of certain activities.

4 Portuguese Government's Position

4.1 Samples of oil were taken by the Portuguese authorities from the beaches in question. It is understood that these samples were analysed by gas-chromatography/mass spectrometry, by ultraviolet fluorescence spectroscopy (UVF) and by UV absorbtion spectro-photometry. The analyses were conducted by the Portuguese Institute of Hydrography in Lisbon.

4.2 In support of its claim the Portuguese Government has stated, inter alia, as follows:

> The results of the analysis of samples taken on the polluted beaches show that the oil is "Maya Crude Oil". This kind of crude oil originates from the Mexican Gulf. The pollution could therefore not have been caused by oil from the Portuguese continental shelf. No other oil pollution incident was reported involving any refinery in the area during the relevant period. The pollution was therefore caused by a ship carrying the above-mentioned oil in bulk as cargo.

4.3 In January 1993 samples of the oil were collected from the beaches in question by the IOPC Fund's technical experts. An analysis of these samples was carried out, also using gas-chromatography/mass spectrometry, at Heriot-Watt University in Edinburgh (United Kingdom). The results of the analysis indicate that, although the source of the pollution was crude oil, it was most probably the result of tank washing, since the samples showed the presence of a high proportion of waxes.

5 Relevant Provisions of the Civil Liability Convention and the Fund Convention

5.1 The relevant provision of the Fund Convention in respect of this claim is Article 4.2(b) which reads:

> "The IOPC Fund shall incur no obligation to pay compensation if:
> (a) .....; or
> (b) the claimant cannot prove that the damage resulted from an incident involving one or more ships."

5.2 "Ship" is defined in the Fund Convention, by reference to Article I.6 of the Civil Liability Convention, as follows:

"'Ship' means any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo."

6 Preparatory Works to Article 4.2(b) of the Fund Convention

6.1 In the draft of the Fund Convention prepared by the Working Group of the Legal Committee of IMO (at that time IMCO) which formed the basis of the discussions at the 1971 International Conference which adopted the Fund Convention, Article 4.2 read as follows:

"The Fund shall incur no obligation under the preceding paragraph if:
(a) .....; or
(b) the identity of the ship that has caused the damage has not been established."

During the work within the Legal Committee, the United States had made a proposal to delete this sub-paragraph.

6.2 The 1971 International Conference considered several proposals to amend this paragraph, in addition to the above-mentioned proposal that it be deleted.

6.3 The Federal Republic of Germany proposed that Article 4.2(b) should be amended to read as follows:

"(b) the claimant cannot prove that the damage was caused by a particular incident of a ship."

6.4 In its submission to the International Conference, the Federal Republic of Germany stated that the proposal did not mean any change in substance but only intended to improve the wording. In the view of that delegation the proposed wording clarified that the claimant had to prove only that the oil spill was caused by the incident of a ship. According to that delegation, it would not be necessary to give evidence of the fact that the oil escaped from one identified ship, which might be difficult if two or more ships were involved in one specific accident. The delegation emphasised that it was for the claimant to prove these facts.

6.5 In a document submitted at the Conference by the Danish, Finnish, Norwegian and Swedish delegations, it was proposed to insert an Article 4 bis reading as follows:

"4 bis (1) The Fund shall pay compensation to a person who suffers pollution damage in a Contracting State as a result of the escape or discharge of oil from an unidentified ship if and to the extent that the total amount of damage in that Contracting State resulting from a single incident exceeds [15] million francs.

(2) For the purposes of this Article, where oil is found on or in the sea or on the sea-shore the origin of which has not been established, it shall be sufficient for the claimant to show that it is probable that the oil escaped or was discharged from an unidentified ship. The pollution damage shall be deemed to have resulted from a single incident if the claimant shows that the damage in question arose from a single occurrence or a single series of occurrences having the same origin.

(3) Claims under this Article may only be made by the government of the Contracting State in which the damage occurred acting on its own behalf and on behalf of all other persons suffering damage within that State.

(4) The distribution of any sums recovered under this Article between claimants shall be decided in accordance with the national law of the relevant Contracting State.

(5) The aggregate amount of compensation payable by the Fund under this Article in respect of any one incident shall not exceed the limit provided for in Article 4 paragraphs 4 and 6.

(6) If any difference arises in relation to the payment of compensation it shall, notwithstanding Article 7, be decided by the Court referred to in Article [ ]."

6.6 The question dealt with in Article 4, paragraph 2(b) of the proposed Convention was subject to considerable discussions in the Committee of the Whole of the International Conference. The outcome of the discussions was that the proposals made by the United States and the four Nordic delegations were rejected, whereas the proposal by the Federal Republic of Germany was adopted with some important drafting amendments. These discussions are reflected in the Official Records of the Conference published by the Inter-Governmental Maritime Consultative Organization (pages 355-361 and 384-389). The relevant parts are reproduced in the Annex to the present document.

7 Discussions at the 1971 International Conference

7.1 The decision of the 1971 International Conference which adopted the Fund Convention to relieve the IOPC Fund of the obligation to pay compensation in the cases referred to in Article 4.2(b) of the Fund Convention was a carefully considered one. With only a few exceptions, there was general agreement among the delegations at that Conference that the IOPC Fund should only be required to pay compensation for damage which was caused by a ship as defined in the Fund Convention, ie a vessel or other craft actually carrying oil in bulk as cargo.

7.2 The original draft provision on the subject, as presented to the Conference, stated that the IOPC Fund would not be obliged to pay compensation for pollution damage "if the identity of the ship that caused the damage has not been established". The delegation of the Federal Republic of Germany proposed that this provision be amended so as to provide that the IOPC Fund would not be obliged to pay compensation for damage "if the claimant cannot prove that the damage was caused by a particular incident of a ship". In an accompanying note, that delegation explained that its proposal did "not mean any change in substance, but only [intended] to improve the wording .....".

7.3 In fact the text proposed by the delegation of the Federal Republic of Germany was much more than a drafting improvement on the original draft. It addressed issues which had not been dealt with sufficiently or at all in the original draft provision. The proposed text made it clear that the IOPC Fund would be obliged to pay compensation for any particular damage only if it was proved that the oil which caused the damage had escaped or been discharged as a result of an "incident" involving "a ship", both these terms being defined in the Fund Convention (by reference to the relevant definitions in the Civil Liability Convention). It also made it clear that the burden of proving these facts was on the person claiming compensation from the IOPC Fund. The delegation of the Federal Republic of Germany stated that, unlike the original draft, its text did not require the claimant to establish the precise identity of the ship which actually caused the pollution. In the view of the German delegation, proof of the fact "that the oil escaped from one identified ship" might be difficult "if two or more ships are involved in one specific accident".

7.4 It appears that these basic elements of the provision proposed by the delegation of the Federal Republic of Germany were clearly understood by all delegations during the debates, although they were by no means acceptable to all the delegations. Several unsuccessful attempts were made to remove or modify the provision. One proposal (by the United States delegation) was to delete the

provision altogether. A proposal by the Nordic countries sought both to lighten the burden of proof on the claimant and to limit the application of the provision to major cases of pollution damage, ie damage exceeding a specified threshold.

7.5 The proposal to delete the provision was opposed by many delegations on several grounds. It was argued by some delegations that deletion of the provision would place insuperable difficulties on courts "in deciding the validity of a claim where the offending ship was not identified". Other delegations also claimed that deletion of the provision would have the effect of including within the scope of the Fund Convention damage which was not caused by ships carrying oil as cargo, such as damage originating from on- or off-shore installations. These objections were not seriously challenged by those who supported the proposal to delete the provision. Indeed, the delegation proposing the deletion (the United States delegation) noted that even after deletion of the provision, it "would still be necessary for a victim to meet the burden of proof that the oil came from a ship". This delegation also stressed that its proposal was not "intended to allow for all occurrences of oil in the sea".

7.6 Some other delegations favoured the deletion of the provision because it required a claimant to establish the identity of the ship which caused the damage, a requirement which they considered unnecessarily burdensome, especially for claimants in developing countries. It was explained, however, that while this might be a plausible objection to the original draft text, it was not valid in relation to the text proposed by the delegation of the Federal Republic of Germany which, as that delegation had pointed out, "was intended to bring out clearly that the victim must establish as the basis of his claim that the damage was occasioned by pollution emanating from a ship as defined in the Convention, without necessarily being obliged to establish the identity of the ship concerned".

7.7 Similarly the proposal by the Nordic countries to replace the provision with a new Article which would reduce the burden of proof on the claimant and restrict the application of the Article to major claims (ie those above a specified threshold) did not attract sufficient support. The first part of the proposal was opposed by many delegations. The result of the inclusion of that part would have been that, where the origin of the oil causing damage had not been established, such damage would be deemed to be compensable by the IOPC Fund if the victim or victims show that it is probable that the damage resulted from one single incident involving one or more ships. The objection raised against this proposal was that it could lead to situations in which the IOPC Fund would be obliged to pay compensation for "damage which might not have been caused by a ship". It was insisted that the Fund Convention should "confine itself to the idea that it must be established that a ship was responsible for the damage" before the IOPC Fund would be obliged to pay compensation. In this context it was pointed out that the Fund Convention was "based on the idea that the Fund would not be required to compensate for damage resulting from just any kind of oil spill on the sea".

7.8 The second part of the Nordic proposal would have imposed an obligation on the IOPC Fund to pay compensation in such cases but only if the damage exceeded a certain stipulated amount. This part of the proposal was unacceptable to the majority of delegations and it was accordingly rejected by the Conference.

7.9 It was after this exhaustive consideration of all the relevant issues, and after the International Conference had rejected all other proposed alternatives, that the Conference finally adopted the text proposed by the delegation of the Federal Republic of Germany, subject to drafting refinement. As redrafted the new provision established the basic conditions which have to be fulfilled before the IOPC Fund would be obliged to pay compensation for pollution damage where the identity of the ship concerned cannot be established, namely that the claimant must prove that the damage resulted form an incident (ie an occurrence or series of occurrences) involving one or more ships (ie a sea-going vessel or other seaborne craft actually carrying oil in bulk as cargo). The reference in the proposed text to a "particular incident" was amended to "an incident involving one or more ships". This amendment was not intended to change the meaning of the provision, which is that proof must be given that the pollution originated from an incident which involved a ship or ships as defined in the Convention.

8 Director's Analysis of the Problem

8.1 In view of the wording adopted by the International Conference and the reasons given for that wording, the Director considers that the following conclusions could be drawn with regard to the obligation of the IOPC Fund to pay compensation for pollution damage in cases where there is no liability in respect of a specific ship because no such ship can be identified.

8.2 The IOPC Fund is not relieved of the obligation to pay compensation for the damage solely because the identity of the ship from which the polluting oil escaped or was discharged has not or cannot be established. It is clear that it was not the intention of the International Conference that the claimant should be required to establish the precise identity of the ship which caused the pollution. It may well be that, in the majority of cases, it will not be possible to prove that the pollution resulted from "an incident involving one or more ships" without also identifying the particular ship or ships involved. In some situations, as for example a collision involving two laden tankers, it will be fairly easy to prove the causal link between the pollution and a specific maritime incident involving one or more ships, and it would then not be necessary to establish the precise identity of the tanker whose oil actually caused the damage.

8.3 In the Director's view, it will depend on the facts of the particular case whether the IOPC Fund has an obligation to pay compensation in a given case. For the Fund to be obliged to pay compensation, it must be established by the claimant that the damage resulted from an incident, and that this incident involved a ship or ships falling within the scope of the Fund Convention, ie one or more tankers or any other sea-going craft carrying oil in bulk as cargo.

8.4 These two elements of the burden of proof on the claimant are necessarily interrelated and equally essential. This means that the claimant must prove both elements, viz that a particular incident caused the damage, and that this incident involved a ship or ships as defined in the Fund Convention (by reference to Article I.1 of the Civil Liability Convention). The relevant provision in the Fund Convention requires therefore more than that the claimant should prove that the damage was caused by a ship in the ordinary sense of the word. It requires proof that the ship concerned is a ship in respect of which the IOPC Fund has an obligation to pay compensation. This burden of proof can be discharged either by identifying the ship or ships from which the polluting oil escaped or was discharged or, at the very least, by specifying the particular incident from which the pollution is claimed to have resulted.

8.5 In the Director's view, the claimant cannot discharge the burden of proof required solely by proving that there is a strong likelihood that the damage was caused by an incident involving a ship as defined or that the damage could not have been caused other than by such a ship. To permit a claimant to obtain compensation on such grounds would appear to be contrary to the intention of the International Conference in adopting the text after careful consideration. The records of the International Conference show that the Conference specifically decided against a system under which the IOPC Fund would be obliged to pay compensation solely on the probability that the damage might have been caused by a ship as defined in the Convention.

8.6 It is worth noting that, under Article 4.2(a) of the Fund Convention, the IOPC Fund is relieved of the obligation to pay compensation for pollution caused by warships or other ships "owned or operated by a State" and used "only on Government non-commercial service" at the time of the incident. The IOPC Fund also has no obligation to pay compensation for pollution damage which is caused by bunker oil from an unladen tanker or which results from the tank washings by an unladen tanker, nor for pollution caused by oil from a vessel which is not a tanker. Whilst the Convention places the burden of proving that the pollution was caused by a warship or other state-owned ship on the Fund, no such burden of proof is imposed on the Fund in respect of spills from unladen tankers or from ships other than tankers. In any event, the Fund will not be in a position to present its defences where no details of the incident on which the claim is based are provided by the claimant. It is only after a claimant has provided some evidence that the damage covered by his claim resulted

in fact from an incident involving a ship that the IOPC Fund can reasonably be expected to determine whether it is under an obligation to pay compensation under the Fund Convention in the particular case.

9 IOPC Fund's Position in Respect of the Portuguese Incident under Consideration

In the light of the analysis of oil samples carried out on behalf of the IOPC Fund referred to in paragraph 4.3 above, the Director takes the view that it has not been shown in the particular case under consideration that the oil came from a ship as defined in the Civil Liability Convention and the Fund Convention, ie a vessel carrying oil in bulk as cargo. On the basis of his analysis of the preparatory works relating to Article 4.2(b) of the Fund Convention, the Director considers that the IOPC Fund is not obliged to pay compensation in respect of the oil spill to which the Portuguese Government's claim relates.

10 Action to be Taken by the Assembly

The Assembly is invited to:

(a) consider the information contained in this document;

(b) consider the interpretation of Article 4.2(b) of the Fund Convention in respect of spills of oil where the source of the spill has not been established; and

(c) give the Director such instructions as it may deem appropriate in respect of the Portuguese incident dealt with in the present document.

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ANNEX

Extract from the Official Records of the Conference on the Establishment of an International Compensation Fund for Oil Pollution Damage, 1971

(Inter-Governmental Maritime Consultative Organization publication)

SUMMARY RECORD OF THE SEVENTH MEETING OF THE COMMITTEE OF THE WHOLE held on Friday, 3 December 1971, at 10.00 a.m.

Pages 355 - 359

Article 4, paragraph 2, sub-paragraph (b)

The CHAIRMAN drew attention to the proposal in footnote 5 to delete the whole of sub-paragraph 2(b), a proposal which was repeated in the United States comments (LEG/CONF.2/3, page 62) and to the similar German proposal in the same document (page 51). He invited the United States representative to introduce his delegation's amendment.

Mr MASSEY (USA) said that the amendment was not as sweeping as it might at first appear. The aim of the Fund Convention was to deal with pollution damage "resulting from the escape or discharge of oil carried in bulk at sea by ships". The proposal to delete sub-paragraph 2(b) was not, therefore, intended to allow for all occurrences of oil in the sea. It would still be necessary for a victim to meet the burden of proof that the oil came from a ship.

Article 1 of the 1969 Convention contained a definition of "ship" and of "pollution damage". A victim would, therefore, have to establish that the oil came from a ship carrying oil in bulk as cargo, whether sub-paragraph 2(b) were there or not. If sub-paragraph 2(b) were retained, an additional obligation would be placed on the victim of demonstrating exactly which ship had caused the pollution damage. If two bulk carriers were in collision, compensation should not be denied merely because the victim could not say from exactly which of the two ships the polluting oil came.

Those who had already spoken in support of keeping sub-paragraph 2(b) had done so on the grounds that if it were not possible to proceed against a ship under the 1969 Convention, the Fund would have to bear the entire liability. As, in his Government's view, the aim of the Fund Convention was to fill in the gaps in the 1969 Convention, the Fund should, then, pay out in such cases.

Some speakers had stated that if sub-paragraph 2(b) were deleted, the Fund would have to be responsible for many minor oil spills and for small sums of money, thus increasing administrative costs. But small amounts of oil would almost certainly not come from a bulk carrying ship and, further, his Government would be prepared to set a limitation on the obligation for small cases of, for example, from $2,000 to $5,000, below which there should be no call on the Fund. That should reduce the number of small claims. Administrative costs would be proportionally smaller in connection with larger claims, but he did not think that retention of sub-paragraph 2(b) would help to reduce the administrative costs.

Mr FRANTA (Federal Republic of Germany), introducing his delegation's amendment to sub-paragraph 2(b) (LEG/CONF.2/3, p.51), said that no change in substance was involved. The proposed re-wording was intended to bring out clearly that the victim must establish as the basis of his claim

that the damage was occasioned by pollution emanating from a ship as defined in the draft convention, without necessarily being obliged to establish the identity of the ship concerned. The point was important in the case of incidents involving more than one ship. He was unable to accept the United States thesis that a ship was bound to be involved in every major case of oil pollution damage.

Mr BROCH (Norway) said he agreed that the United States proposal was not a radical one in the sense that application of the definitions contained in the draft convention would necessarily require claimants to establish that the oil pollution causing damage originated from a ship carrying oil in bulk as cargo. However, he feared that, if sub-paragraph 2(b) were deleted, courts dealing with damage claims would be faced with insuperable difficulties in deciding the validity of a claim where the offending ship was not identified. He was therefore opposed to the United States proposal, the more so as its adoption would certainly have the undesirable effect of involving the Fund in a large number of minor claims.

The German amendment was acceptable in principle; some reference should be inserted, however, to Article IV of the 1969 Liability Convention, which established joint liability in the case of one or more ships being involved in an incident.

Mr van Rijn van ALKEMADE (Netherlands) said he associated himself with those views. He would prefer that the provision be maintained, in order to preclude such misinterpretations as had arisen over the provisions of the 1969 Liability Convention.

Mr BRIGSTOCKE (UK) said that, for the same reasons, his delegation considered that sub-paragraph 2(b) should be retained. If needed, clarification could be achieved by introducing the text of or making reference to Article IV of the 1969 Liability Convention.

Mr NICHOLSON (Australia) said he strongly supported the United States amendment. It had not been possible in a Convention imposing liability on the shipowner to cover the case of damage caused by an unidentified ship, but such coverage could certainly be provided under the Fund.

Mr KENNEDY (Canada) said he agreed. It was to be hoped that due consideration would be given to the Netherlands point concerning possible legal difficulties in dealing with claims. Canada had experienced difficulty of the kind in applying the provisions of the 1969 Liability Convention in respect to preventive measures, and he would hope that sympathetic attention would be accorded to that matter at the appropriate time.

Mr WHITE (Liberia) said he strongly supported the retention of the original text, mainly because its deletion would result in involving the Fund in a large number of minor claims, to the detriment of its efficient operation.

Mr QUARTEY (Ghana) said he was disappointed to find so much support for maintaining the provision. Any oil pollution wherever or however it occurred, was important in that invariably damage was occasioned. In the case of the West coast of Africa, oil slicks originating from the heavy passing tanker traffic frequently reached the shore months after the oil escape or release. How, in those circumstances, was it possible to identify the ship or ships responsible. And since there were no on- or off-shore installations in that area, tankers were undoubtedly responsible. It was a matter of simple equity that the interests of such innocent victims should be protected under the draft convention. He would therefore strongly support the deletion of sub-paragraph 2(b).

Mr SPILIOPOULOS (Greece) said his objection to the original wording of the provision was that it was purely restrictive. The amended version proposed by Germany, on the other hand, covered the vital issue by excluding damage originating from on- or off-shore installations.

Mr de VOGELAERE (Belgium) said he was unable to support the United States proposal, since deletion of the provision might lead courts to conclude that there was no need for the claimant to establish the identity of the offending ship. His delegation could accept the German amendment in principle but considered that some redrafting was needed.

Mr SUCHORZEWSKI (Poland) said that his delegation, while agreeing on the unlikelihood of its proving impossible to establish the identity of an offending ship, was inclined to favour the deletion of sub-paragraph 2(b). Under Article 4, paragraph 1(a), the Fund was obliged to intervene in all cases of oil pollution damage in respect of which no liability arose under the 1969 Liability Convention. The sole requirement on the claimant was to establish that the damage was occasioned by oil pollution. He could see no point, therefore, in specifying that the identity of the offending ship must be established. Consequently, the German proposal would also appear to be superfluous, because what it suggested was already the result of the definition of pollution damage as adopted by the 1969 Liability Convention.

Mr ECONOMU (Romania) said his delegation also was opposed to the deletion of the provision. It considered that the Fund should be called upon to intervene only in cases of large-scale pollution, and in such cases the coastal authorities should have no difficulty in identifying the ship concerned. The German amendment, if adopted, would merely complicate matters and his delegation would prefer that the original text be maintained.

Mr DATE (Japan) said that he also opposed the deletion of the sub-paragraph, for the reasons given by the Norwegian and other delegations. With regard to the German proposal, he expressed understanding to the concern of the German delegation, but he said such concern would be removed by the interpretation of the present sub-paragraph.

Mr TIGHILT (Algeria) said the issue under discussion was of importance to his country in view of the vulnerability of its coastline. It would be grossly inequitable to deny compensation merely on the ground that the offending ship could not be identified. His delegation would therefore support the deletion of the provision.

Mr AMOROSO (Italy) said it was essential that the provision should be maintained; otherwise it would be necessary to make provision for a lower limit below which the Fund would not intervene.

Mr ADEDE (Kenya) said he endorsed the position taken by Ghana. His delegation strongly supported the United States proposal and was unable to accept the arguments adduced against it.

Mr GEZELIUS (Sweden) said that the arguments advanced in favour of the deletion of sub-paragraph 2(b) had induced his delegation to change its basic position to the extent of being ready to agree to its deletion provided a lower limit for intervention of the Fund was written into the draft convention. That limit should be not less than $1 million.

Mr BLANCA (Spain) said that his delegation was in favour of deletion of the provision. On moral grounds, provision should be made for compensating all victims, irrespective of the origin of the pollution damage, since all oil pollution emanated in one way or another from the operations of oil companies. On practical grounds, however, such an extension of coverage should be accompanied by the establishment of a lower limit for Fund intervention at, say, $5,000 to $10,000.

Mr KARASIMEONOV (Bulgaria) said that sub-paragraph 2(b) as it stood was not entirely acceptable to his delegation. There was no question of insisting that in every case the offending ship must be identified. Nevertheless it should be essential to establish that pollution originated from a ship and in that respect the German amendment would, at first sight, appear to meet the requirements.

**SUMMARY RECORD OF THE EIGHTH MEETING
OF THE COMMITTEE OF THE WHOLE
held on Friday, 3 December 1971, at 3.15 p.m.**

Pages 359 - 361

Article 4 paragraph 2, sub-paragraph (b) (continued)

Mr DOUAY (France) said he regretted that Article 4 had not been so drafted as to provide, in its first paragraph, that the Fund should pay compensation whenever the shipowner was liable under the 1969 Civil Liability Convention; in its second paragraph that the Fund should operate whenever the shipowner was unable to meet his obligations; and in its third paragraph that the Fund should also operate whenever the shipowner was relieved of liability under the 1969 Convention; the arrangement of the article would then have been much simpler.

As it was worded in the draft, paragraph 2(b) contained an internal contradiction, because it related to damage caused by a ship and by an unidentified ship. That meant that in order to avail himself of the Fund the victim must prove a casual relationship between the damage and the fact that the oil came from a ship as defined in Article 1, in other words a tanker, excluding land-based installations, drilling rigs and ships other than tankers; but if it was in fact a tanker that was responsible for the pollution it would necessarily be identified.

In order to remove that contradiction, the text should speak of damage by persons unknown. If it had to cover all such damage, the Fund would be more like a provident fund for the compensation of victims of a multitude of minor incidents, whereas it had been understood in principle that the Fund should be set up exclusively for the compensation of the victims of large-scale incidents, so as to complete the 1969 Convention. If the Conference really wished the Fund to meet all requests for compensation for damage by persons unknown, which was another way of saying that no action would be taken against such ships and that any attempt at prevention was being abandoned, then it might just as well tear up the 1969 Convention right away.

The French delegation was anxious that sub-paragraph (b) should be retained. To deprive a person of relief in such a case would open the way to every kind of abuse since no attempt would be made even to identify the person responsible for the damage and recourse to the Fund would be automatic. His delegation was also unable to accept any compromise proposal to fix a minimum figure beyond which the Fund would come into play, since that would mean that it would be harder to obtain compensation for a minor incident than for a large-scale incident. Sub-paragraph 2(b) should not therefore be amended.

Mr MEDCRAFT (OCIMF) said it would be unfair to the oil companies to delete sub-paragraph (b); it would mean once again the companies would be asked to pay while the shipowners went scot-free.

The Committee must be careful not to encourage shipowners to discharge their oil residues without the slightest precautions once they knew for certain that the oil companies would pay for any resulting damage. It must also be remembered that, if the Fund was called on to meet a multitude of claims, the resultant costs would inevitably be reflected in the selling price of the commodity transported.

If the Conference accepted the amendment to delete sub-paragraph (b), it would be a retrograde step.

Mr PHILIP (Denmark) said that the Scandinavian delegations had prepared a compromise proposal on paragraph 2(b), and he asked that any decision on paragraph 2(b) be postponed until the new text had been distributed and discussed.

It was so decided.

The CHAIRMAN asked the representative of France if he had any objection to the amendment proposed by France to Article 4, paragraph 5, to say "... shall be distributed between claimants on a *pro rata* basis ..." (LEG/CONF.2/3/Add.1, page 139) being referred to the Drafting Committee, since it was merely a drafting amendment and apparently affected the French version only.

Mr DOUAY (France) said he could agree to that.

The CHAIRMAN asked the representative of Ghana if his amendment to add a new paragraph 7 to Article 4 (LEG/CONF.2/C.1/WP.9) ought not to be considered at the same time as the provisions of the draft dealing with the administration of the Fund.

Mr NORDENSON, Rapporteur, said that since the Ghanaian amendment raised a point of principle regarding the functions of the Fund, it would be more appropriate to consider it along with Article 2, which defined the functions of the Fund and which would come before the Committee for a decision when it had finished with Articles 4 and 5.

Mr QUARTEY (Ghana) said he could agree to that course.

SUMMARY RECORD OF THE ELEVENTH MEETING OF THE COMMITTEE OF THE WHOLE held on Tuesday, 7 December 1971, at 09.30 a.m.

Pages 384 - 389

Article 4, paragraph 2(b)

The CHAIRMAN invited the Committee to vote on the joint Danish, Finnish, Norwegian and Swedish amendment (LEG/CONF.2/C.1/WP.26), which now replaced their earlier amendment (LEG/CONF.2/C.1/WP.20). It would then vote, if necessary on the German proposal (LEG/CONF.2/3, page 53) and the United States proposal (*ibid.* footnote (5)).

Mr PHILIP (Denmark) said that in paragraph 2 of the proposed new Article 4 bis of the Scandinavian joint amendment (LEG/CONF.2/C.1/WP.26), the words "it is probable that" should be inserted between "shows that" and "the damage" in the third line from the end.

Mr ESCORIAZA (Spain) said that the procedure proposed by the Scandinavian amendment was simple and fair and he would gladly support it. The principle should be examined first, however, leaving aside for the time being the question of the figure to be inserted in the last line of paragraph (1) of the proposed new Article 4 bis.

Mr QUARTEY (Ghana) said that he would prefer paragraph 2(b) of Article 4 to be omitted, since it seemed unfair not to compensate victims merely because they could not establish the ship's identity. The compromise Scandinavian solution would be a means of compensating victims of major damage at the expense of victims of minor damage, and he could support it only if the limit in paragraph 1 of the proposed new Article 4 bis was set much lower. Many countries, like Ghana itself, might find it materially impossible to establish the identity of a ship responsible for pollution at sea, and oil sometimes took months to reach the coast. If the Fund was to be exempted from liability in such cases, it would cease to meet one of the essential purposes for which it was established. The Oil Companies International Marine Forum had stated in an information paper (LEG/CONF.2/C.1/WP.21 page 262) that from 1960 to 1970 there had been "less than 50 incidents giving rise to payments ..... in excess of $14,000"; it was therefore difficult to contend that the Fund would be overburdened unless it was exempted.

The CHAIRMAN suggested that the Committee should decide first on the principle of the Scandinavian proposal and then, if applicable, on the amount to be inserted in paragraph 1 of the proposed Article 4 bis.

Mr BRIGSTOCKE (UK) supported the Scandinavian proposal in principle.

The 15 million franc limited proposed in paragraph 1 of the new Article 4 bis was essential; a lower limit or none at all would alter the whole character of the Fund which, instead of having as its primary function the compensation of victims of major spills, would be beset by claims whenever a beach needed cleaning. Administrative costs would become enormous and affect the price of oil.

Also, some disincentive was necessary to prevent States artificially inflating their clean-up costs in order to reach the limit figure; that was why it was advisable that in the case of unidentified ships the Fund should be liable only for that part of the clean-up costs which exceeded the limit figure.

The damage for which the Fund was to provide compensation in respect of unidentified ships had to be related to some incident, for otherwise the sum fixed as the limit would become meaningless; it might be possible for a country to add together the cost of cleaning crude oil off its beaches as a result of a number of small incidents over a long period until the aggregated cost reached the specified limit, whereupon a claim would be lodged with the Fund. Abuses of that kind would cost the Fund an enormous amount. It would be cheaper to improve port facilities and take action to avoid illicit spillage by tankers at sea.

The United States representative had argued that the abolition of paragraph 4(2)(b) would not create an intolerable burden on the Fund because of the safeguards implicit in the definition of "ship" and "pollution damage". The United Kingdom delegation was not so optimistic. One could not be certain that damage caused by a slick of crude oil which reached a beach might not be deemed to have originated from a tanker even though no "incident" was known in the vicinity. It was therefore essential for proper safeguards to be included in the Convention.

Mr SUCHORZEWSKI (Poland) was surprised that the Scandinavian proposal placed a completely unusual burden of proof on victims of minor damage. It was said that it was hardly likely that a ship which had caused damage could not be identified. Under such conditions why was there a risk that the resources of the Fund would be depleted by "ghost ships"? It was argued that the threat to the Fund was not the scale of "incidents" but their number, and so why protect the Fund with such an unusually high limit contrary to the 1969 Resolution which required that victims should receive compensation? Moreover, the Scandinavian proposal would have a paradoxical result that, if the ship was unidentified, compensation would be paid, provided the damage exceeded 15 million francs, but would not be paid if the total amount was, say 14½ million francs. There was therefore no incentive to identify a ship, except in the case of damage amounting to less that 15 million francs. He therefore could not support the Scandinavian proposal on account of the difficulties which would arise in practice from the application of the exemption limit provided for in each specific case, and on account of the particular obligations which the proposal would impose on the various governments. He was therefore in favour of deleting paragraph 2(b) of Article 4.

Mr DORAISWAMY (India) shared, on the whole, the views of the representative of the United Kingdom.

He supported the Scandinavian proposal, but requested the authors to clarify the meaning of the provisions contained in paragraph 6 of the new Article 4 bis and in the final paragraph. He stated that an exemption limit of 15 million francs seemed to him adequate but that he would also be willing to subscribe to a lower figure.

Mr HERBER (Federal Republic of Germany) said he feared that the Scandinavian proposal might result in the Fund being overburdened with claims simply for reimbursement of clean-up expenses attributable to pollution not caused by ships, for, according to the same proposal, it would not be essential to prove that pollution was caused by a ship, but simply that a ship was the "probable" cause. If the Committee confined itself to the idea that it must be established that a ship

was responsible for the damage, it was unnecessary to provide for such a complex procedure as that proposed by the Scandinavian delegations.

Mr AIT-CHAALAL (Algeria) said that he was purely and simply in favour of deleting sub-paragraph (b) of paragraph 2. If the Committee refused that proposal, his delegation would support the Scandinavian proposal, subject to the reduction of the exemption limit, as had been requested by the representative of Ghana.

Mr PIMENTEL (Portugal) also supported the Scandinavian proposal in principle, provided that the exemption limit was fixed at a figure below 15 million francs, as that would tend to reduce the number of claims for incidents attributable to unidentified ships.

Mr AMOROSO (Italy) said he would like sub-paragraph 2(b) to be retained. He was unable to support the Scandinavian proposal, for the same reasons as those given by the representative of the Federal Republic of Germany. Further, the procedure mentioned in paragraph 3 of the proposed new Article 4 bis would be contrary to a principle of the Italian Constitution, according to which everybody was entitled to bring legal action to protect one's own legitimate rights and interests.

Mr WHITE (Liberia) said that there were differences of opinion within the Committee regarding the requirements to be met by the Fund. It had been understood in 1969 that the Fund should compensate for damage resulting from specific disasters such as the Torrey Canyon incident. The Legal Committee of IMCO had prepared a system based on the idea that the Fund would not be required to compensate for damage resulting from just any kind of oil spill on the sea. But it appeared that some delegations were now of the opinion that the Fund should compensate for damage not directly connected with a serious accident at sea.

The Scandinavian proposal was unnecessary and even dangerous. In fact, if an "incident" caused damage amounting to at least 15 million francs, it was impossible that the ship could remain unidentifiable. Moreover, the proposed recovery procedure would be very lengthy which would, of course, be against the interest of the victim. It would therefore be preferable to retain sub-paragraph 2(b) of Article 4 as drafted.

Mr MASSEY (USA) said that the principle of a deductible exemption limit, as proposed by the Scandinavian delegations, was wise, since it prevented the presentation of large numbers of claims for small sums and therefore reduced the administrative burden on the competent body. Under the circumstances, however, the exemption limit was much too high for an insurance policy as represented by the Fund, to present any real interest. It would be much more reasonable to establish the limit at, say, 1 million francs, failing which the coastal States would protect their own interests by taking the required measures unilaterally.

Mr van Rijn van ALKEMADE (Netherlands) said he wished to state that his Government would have much difficulty in ratifying the Convention if the Committee was to adopt the United States proposal to delete sub-paragraph 2(b) of Article 4.

On the whole, his delegation shared the views of the United Kingdom delegation. It would support the Scandinavian proposal, provided that there was a revision of the wording, because that proposal constituted a compromise. But in any case, the exemption limit should be fairly high, at least 15 million gold francs.

Mr QUARTEY (Ghana) stressed how important it was to produce a text which would be acceptable by as many States as possible. He supported the United States proposal to reduce the minimum amount quoted in the Scandinavian amendment: the low income countries would be unable to contribute a sum of the order of 1 million dollars to the Fund. Moreover, it emerged from the information paper submitted by the Oil Companies International Marine Forum (LEG/CONF.2/C.1/WP.21) that between 1960 and 1970 there had been less than fifty incidents giving rise to payments for clean-up and damages in excess of $14,000. Reasonable limits should, therefore, be established.

He would like to know if the Scandinavian delegations had meant that only the costs exceeding 15 million francs would be covered by the Fund.

Mr KARASIMEONOV (Bulgaria) said that he considered that the Scandinavian proposal constituted an acceptable basis for compromise and supported the suggestion of the Chairman that the Committee should proceed to a vote of principle, after which the authors of the amendment could consult with the delegations which so wished, in order to prepare a final text.

Mr DOUAY (France) reminded the meeting that it was important to bear in mind that the Fund should be complementary to the 1969 Convention, and should therefore be aimed solely at providing compensation for victims of damage resulting from oil tankers: that should be the case even if sub-paragraph 2(b) were deleted. In fact, the compromise submitted by the Scandinavian delegations might not only complicate matters on the procedural level, but might also open the door to a very wide interpretation of the notion of pollution, since it would be accepted that compensation would be paid for damage which might not have been caused by a ship. If the Fund were thus to become merely a relief fund, his Government would be obliged to reconsider its position with regard to ratifying the 1969 Convention.

The only reasonable solution would seem to be to retain sub-paragraph 2(b).

Mr NICHOLSON (Australia) noted that his delegation's idea of the role of the Fund was almost diametrically opposed to that of the Liberian delegation. Although it was in principle in favour of maintaining sub-paragraph 2(b), it would be prepared to accept the Scandinavian compromise, on condition, however, that the proposed figure was considerably reduced.

Mr ISSA (Egypt) regretted that he could support the Scandinavian proposal, as it seemed to diverge considerably from the substance of the second paragraph of the Preamble in the 1969 Convention, and paragraph 6 of the proposal was incompatible with Article VI.2 of that same Convention.

Mr PHILIP (Denmark) stated, for the benefit of the representative of India, that the sponsors of the draft amendment had only intended, when drafting Article 4 bis(6) of their text, to establish the principle of a special tribunal, without wishing to go into details of its organization and functioning. In reply to the representative of Ghana he confirmed the interpretation which the representative of the United States had given to Article 4 bis(1), namely, that the Fund would only provide compensation for victims in so far as the amount of the damage exceeded the limit established by the Conference.

The Scandinavian delegations would not oppose a separate vote, first on the principle of their amendment and then on the amount of the exemption limit provided, however, that they were assured that that amount would be above zero. The figure proposed by the representative of the United States was in their view much too low, but they would be willing to come to terms and accept, for example, a sum of 7.5 million francs.

Mr KENNEDY (Canada) supported the statement by the representative of the United States and agreed with the representative of Liberia that there seemed to be a misunderstanding regarding the conception of the Fund.

After an exchange of views, it was *decided* to proceed to an indicative vote on the draft amendment submitted by the Scandinavian delegations in document LEG/CONF.2/C.1/WP.26, the sum indicated between brackets in Article 4 bis(1) being subject to amendment.

On an indicative vote, the draft amendment submitted by the Scandinavian delegations was rejected by 18 votes to 17, with 3 abstentions.

The CHAIRMAN invited the Committee to vote on the United States proposal referred to in note 5 on page 5 of Annex I to the document LEG X/7, for the deletion of the entire sub-paragraph 2(b).

By 20 votes to 18, with one abstention, the United States proposal was rejected.

Mr PHILIP (Denmark) said he reserved the right to submit the proposal of the Scandinavian delegations again in the plenary meeting.

Mr BROCH (Norway) pointed out that the vote just taken had been only of an indicative character, so that there was nothing to stop the Committee from reconsidering the question; it might even by very useful after private consultations had allowed the various delegations to reach agreement on the figure concerned.

The CHAIRMAN recalled that the Federal Republic of Germany had proposed an amendment to sub-paragraph 2(b), which was reproduced on page 51 of the document LEG/CONF.2/3.

Mr HERBER (Federal Republic of Germany) said it was less an amendment than an improvement to be made to the original text. The latter might in fact give the impression that the claimant must prove that the damage he had suffered had been caused by a particular ship. But it was not impossible that as the result of a collision two tankers might both suffer escapes of oil, so that it would be impossible to determine which had in fact caused the damage. It was proposed, therefore, to lay down that the claimant must prove that the damage was due to a particular incident suffered by a ship.

Mr QUARTEY (Ghana) said he would like to know in that case how the word "incident" should be understood, and whether the claimant would have to furnish proofs of the nature of the incident.

Mr HERBER (Federal Republic of Germany) said his delegation considered that the word "incident" should be understood as defined in Article I.8 of the 1969 Convention; but it could not mean for instance washing out a tanker or any other normal operation of a ship.

Mr DOUAY (France) said he favoured the draft amendment as a distinct improvement to the text, for it eliminated any possibility of a "ghost ship".

Mr SUCHORZEWSKI (Poland) supported the observation of the representative of France.

Mr PERRAKIS (Greece), supported by Mr BROCH (Norway), suggested that the wording of the amendment should be revised by the Drafting Committee: it might be possible, for example, to refer to "one or more ships".

By 24 votes to 3, with 10 abstentions, and subject to drafting improvements, the draft amendment submitted by the Federal Republic of Germany was adopted.