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SCOPE OF COMPENSATION FOR ENVIRONMENTAL DAMAGE UNDER THE 1992 CIVIL LIABILITY CONVENTION AND THE 1992 FUND CONVENTION

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Abstract

The present international regime of compensation for pollution damage resulting from a spill of persistent oil from a sea-going vessel constructed or adapted to carry oil in bulk as cargo (normally a tanker) is based on two international Conventions adopted in 1992 under the auspices of the International Maritime Organization (IMO). These Conventions are the 1992 Civil Liability Convention and the 1992 Fund Convention. Two earlier Conventions, the 1969 Civil Liability Convention and the 1971 Fund Convention preceded these two Conventions. The 1971 Fund Convention is no longer in force.

The 1992 Conventions cover compensation for

- Costs of clean-up, including preventive measures
- Property damage
- Consequential economic loss
- Pure economic loss
- Costs of reinstatement of the environment and post-spill studies

This paper focuses on the development of the IOPC Funds' policy with regard to environmental damage over the past 25 years, either a result of decisions of the Funds' governing bodies in response to specific claims or through the establishment of Working Groups with the mandate to formulate criteria to be applied for the admissibility of such claims within the scope of the Conventions.

Introduction

Compensation for pollution damage caused by spills for persistent oil from tankers is based on two international treaties, the 1992 Civil Liability Convention and the 1992 Fund Convention. Prior to these Conventions becoming widely adopted compensation for pollution damage was based on two earlier Conventions, the 1969 Civil Liability Convention and the 1971 Fund Convention.

The Civil Liability Conventions govern the liability of shipowners for oil pollution damage. The Conventions lay down the principle of strict liability of shipowners through a system of compulsory liability insurance, which entitles victims of pollution damage to claim compensation directly from the shipowner's insurer. Shipowners are normally entitled to limit their liability to an amount that is linked to the size of the ship involved in an incident.

The Fund Conventions, which are supplementary to the 1969 and 1992 Civil Liability Conventions, establish a system for compensating victims when the compensation available under the applicable Civil Liability Convention is insufficient.

Each of the Fund Conventions established an intergovernmental organisation to administer the compensation regime it created, known as the International Oil Pollution Compensation Funds 1971 and 1992 (IOPC Funds) or the 1971 and 1992 Funds. The Organisations have a common Secretariat based in London.

At the time that the 1971 Fund Convention ceased to be in force, in May 2002, the maximum amount of compensation available per incident was 60 million Special Drawing Rights (SDR)[1] (US$87.8 million), including the amount paid by the shipowner or his insurer under

[1] The unit of account in the Conventions is the Special Drawing Right (SDR) as defined by the International Monetary Fund. In this paper the SDR has been converted into US dollars at the rate of exchange applicable on 10 December 2003, ie 1 SDR = US$1.46370.

the 1969 Civil Liability Convention. The maximum amount available under the 1992 Conventions is 203 million SDR (US$297 million).

The 1992 Fund has an Assembly composed of representatives of the all Member States. The Assembly is the supreme body governing the 1992 Fund and it holds regular sessions once a year. The Assembly elects an Executive Committee composed of 15 Member States whose main function is approve settlements of claims. From time to time the Assemblies of the two Funds have established Working Groups with the mandates *inter alia* to formulate criteria to be applied for the admissibility of such claims within the scope of the Conventions. The Funds' policy on claims for environmental damage has been reviewed a number of times by such Working Groups whose recommendations were subsequently adopted by the relevant Assembly.

Abstract quantification of environmental damage

The first incident involving the 1971 Fund, the grounding of the *Antonio Gramsci* off Ventspils, USSR in 1979, gave rise to the question of admissibility of claims for compensation for damage to the marine environment. A claim of an abstract nature for ecological damage was made by the USSR against the shipowner. Although compensation could not be sought from the 1971 Fund, the USSR being Party only to the 1969 Civil Liability Convention at that time, the claim was of considerable interest to the Fund since it competed with the claims submitted by the Swedish Government for the amount payable by the shipowner. The amount claimed had been calculated on the basis of a mathematical formula laid down in USSR legislation. In the light of this claim, the 1971 Fund Assembly unanimously adopted in 1980 a Resolution stating that 'the assessment of compensation to be paid by the International Oil Pollution Compensation Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models'.

Following the adoption of this Resolution, a Working Group established in 1980 examined the question of whether and, if so, to what extent a claim for environmental damage was admissible under the 1969 Civil Liability and 1971 Fund Conventions. The Working Group took the view, which was subsequently endorsed by the Fund Assembly, that compensation could be granted only if a claimant had a legal right to claim under national law and had suffered 'quantifiable economic loss'.

The *Patmos* incident, in the Straits of Messina, Italy in 1985 resulted in a claim by the Italian Government for unspecified environmental damage. No documentation was provided in support of the claim or the basis on which the amount claimed had been calculated. The 1971 Fund rejected this claim, which subsequently became the subject of legal proceedings.

The Italian Government maintained that the damage was a violation of the right to sovereignty of the territorial sea of the State of Italy. The Italian Court of first instance rejected the claim stating that this right was not one of ownership and could not be violated by acts committed by private citizens. The Court also held that the State had not suffered any loss. The Italian Government appealed and maintained that the daim related to actual damage to the marine environment and to actual economic loss suffered by the tourism and fishing industries. In the Government's view the claim was therefore not in contravention of the interpretation of the definition of 'pollution damage' adopted by the Assembly in its 1980 Resolution referred to above.

The Court of Appeal overturned the Court of first instance's judgement and held that the shipowner and the 1971 Fund were liable for the damage covered by the claim. The Court of Appeal appointed three experts who considered that the fishing activities had suffered some damage as a result of the fishermen having been unable to fish for a certain period. The experts stated, nevertheless, that their conclusions were only hypothetical since they had not

been confirmed by factual evidence. The Court of Appeal granted the State of Italy compensation for damage to the marine environment. However, since the total amount of the admissible claims (including the Italian Government's claim) did not reach the limitation amount applicable to the *Patmos* under the 1969 Civil Liability Convention, the 1971 Fund was not called upon to make any compensation payments and was therefore not entitled to appeal to the Supreme Court of Cassation on this issue.

Another incident in Italy, involving the *Haven* off Genoa in 1991, also gave rise to claims for environmental damage. The tanker caught fire and suffered a series of explosions, and it was estimated that over 10 000 tonnes of oil was spilled, a significant amount of which stranded on the shorelines of the Italian Riviera. Oil also impacted shorelines of the Principality of Monaco and the French Riviera.

The Italian Government submitted claims in respect of temporary damage to the environment that would recover naturally. Claims were also included in respect of irreparable damage to the environment, although it was left to the Court to quantify that damage. A number of regional and local authorities also submitted claims for environmental damage. The 1971 Fund opposed these claims on the grounds that they related to non-quantifiable elements of damage to the environment.

The Italian Court of first instance decided that the 1969 Civil Liability Convention and the 1971 Fund Convention did not exclude environmental damage. The Court held that only the State of Italy (and not local authorities) was entitled to compensation for environmental damage. The Court took the view that the environmental damage could not be quantified according to a commercial or economic evaluation and assessed the damage as a proportion, approximately 1/3, of the cost of the clean-up operations, which in the Court's view represented the damage which was not repaired by these operations.

The 1971 Fund lodged opposition against the decision. The Court had based its decision on certain provisions in an Act of 1986 that had created the Italian Ministry of Environment. The Fund maintained that the liability for environmental damage laid down in those provisions was not applicable in relation to the Fund, because that liability was based on negligence, and the compensation, according to the provisions, had to be assessed on the basis of the degree of fault of the wrongdoer, the profit achieved by the wrongdoer and the cost in respect of the restoration of the environment. The Fund argued that according to Italian case law and legal doctrine, the compensation awarded under this Act had the nature of a sanction and that the damage assessed was therefore punitive. In the Fund's view, the criteria for assessment were inconsistent with the position of the Fund under the 1971 Fund Convention. The Italian Government requested that the amount awarded for environmental damage be increased to that set out in its original claim.

In March 1999 an agreement on a global solution of all outstanding issues relating to the *Haven* incident was concluded between the Italian State, the shipowner/insurer and the 1971 Fund. Under this agreement, the parties undertook to withdraw all legal actions in the Italian courts. The courts were therefore not called upon to make a final decision on the admissibility of the claims for environmental damage. The amount subsequently paid by the 1971 Fund in compensation did not relate to environmental damage.

New definition of pollution damage

The 1992 Conventions contained a new definition of pollution damage codifying the 1980 Resolution adopted by the 1971 Fund Assembly. The relevant wording in the new definition is *'that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken'*. In view of this more precise definition it was hoped that the

difficulties encountered by the 1971 Fund in the above-mentioned incidents would not arise under the 1992 Conventions. A Working Group established in 1993 included in its mandate the development of criteria governing the admissibility of claims for environmental reinstatement measures for adoption by the 1971 and 1992 Fund Assemblies. The Working Group concluded that measures for reinstatement of the environment should fulfil the following criteria in order to be admissible for compensation.

- the cost of the measures should be reasonable;
- the cost of the measures should not be disproportionate to the results achieved or the results which could reasonably be expected; and
- the measures should be appropriate and offer a reasonable prospect of success.

The Working Group stated that the test of reasonableness laid down in the 1992 Civil Liability Convention should be the same as that adopted in respect of preventive measures, ie that the measures should be reasonable from an objective point of view in the light of the information available when the specific measures were taken. The Working Group considered that it would normally be necessary to carry out an in-depth study before any measures of reinstatement were undertaken, and that the cost of such studies should qualify for compensation provided that they fulfilled the requirements generally applied by the Fund in this regard.

Claim for the economic consequences of environmental damage

The *Nissos Amorgos* incident in Venezuela in 1997 gave rise to a claim related to the economic consequences of pollution damage to the marine environment. The tanker ran aground in the Maracaibo Channel in the Gulf of Venezuela spilling an estimated 3 600 tonnes of crude oil. Smaller releases of oil also occurred after the vessel reached Punta Cardon in the eastern part of the Gulf of Venezuela.

A claim was presented by six shrimp processing companies and 2 000 fishermen in respect of a reduction in catches of shrimp in Lake Maracaibo in 1998 alleging that this was due to the oil spill from the *Nissos Amorgos* the previous year. The 1971 Fund accepted that, despite the fact that fishing operations had not been interrupted, there had been a significant downturn in shrimp supplies to the processing plants. However, there had been no contemporaneous evidence linking the alleged loss to the contamination, although it was known that oil had passed through the shrimp spawning grounds. The Fund took the view that in the case of fishery losses arising some time after a pollution incident it would be unreasonable to expect such data to be available. However, laboratory experiments had demonstrated that low concentrations of oil could affect the reproduction and feeding of shellfish and the survival of shrimps. No other factors had been identified that could have led to the downturn in shrimp catches. After having examined the opinions of experts, the Fund decided that the oil from the *Nissos Amorgos* was most probably a significant contributory factor and that the claim was therefore admissible in principle. In quantifying the losses attributable to the oil pollution account was taken of normal fluctuations in catches from year to year.

Further consideration of the admissibility of claims for environmental damage

In April 2000 a Working Group established by the 1992 Fund Assembly to assess the adequacy of the international compensation system gave further consideration to the question of environmental damage.

The Working Group considered a proposal to introduce the concept of compensation for environmental damage as a violation of collective property whereby compensation would be available to a Member State on the basis of international rights under other Conventions to which it was a Party, the amount of compensation to be based on the conclusions of

environmental impact studies conducted in accordance with procedures adopted by the 1992 Fund. The Working Group also examined a proposal to change the 1992 Fund's policy on environmental damage so that compensation would no longer be limited to cases where the claimant had suffered economic loss and to allow compensation to be calculated using theoretical models.

These proposals were not accepted since it was considered that they went beyond the present definition of 'pollution damage' in the 1992 Conventions. It was agreed that an examination should be made of what could be achieved within the present definition of 'pollution damage' as regards the admissibility of claims for reinstatement of the environment and for costs of environmental impact studies. There was also support for considering the issue of environmental damage in depth in the longer term.

There was considerable support in the Working Group for the encouragement of scientifically relevant studies that assisted in determining whether or not reinstatement measures were necessary and feasible, thereby minimising the possibility of claims resulting from unnecessary and ineffective measures. Such studies would be most appropriate after major oil spills where there was evidence of significant environmental damage, although if a study demonstrated no significant long-term effects or that no reinstatement measures were feasible, this should not exclude compensation for the costs of the study.

It was considered that in order for such studies to provide reliable and usable information it was important that they were carried out with scientific rigour and balance. This could best be achieved through a committee or other body established within the affected Member State to design and co-ordinate the programme. There would be benefit in the Fund becoming involved in the planning and in establishing the terms of reference of any study, since this could help in ensuring that it did not repeat work already carried out elsewhere.

As regards reinstatement measures, the Working Group focused on the development of additional specific criteria, recognising that most major oil spills do not cause permanent damage to the marine environment due to its great potential for natural recovery. The aim of any reasonable measures of reinstatement should be to bring the damaged site back to the same ecological condition that would have existed had the oil spill not occurred, or at least as close to it as possible (that is to re-establish a biological community in which the organisms characteristic of that community at the time of the incident are present and functioning normally). Measures taken at some distance from, but still within the general vicinity of, the damaged area might be acceptable, so long as it could be demonstrated that they would enhance the recovery of the damaged components of the environment.

In addition to satisfying the general criteria applied to the admissibility of all claims for compensation under the 1992 Fund Convention, the following specific admissibility criteria were also developed in respect of reinstatement measures:

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

The 1992 Fund Assembly largely endorsed the Working Group's conclusions. A new edition of the 1992 Fund Claims Manual was published in November 2002 to reflect the 1992 Fund's position on post-spill studies and reinstatement measures.

Conclusions

Although the international compensation scheme has tended to focus on the compensation of victims of the economic consequences of oil spills, the experiences of the over the last 25 years have shown that the Member States have been willing and able to adapt the international compensation to the needs of society, in particular as regards the impact of pollution on the environment. Whilst there is probably little that can be done to extend the scope of compensation for environmental damage within the current legal framework, the existing Working Group may consider at a later stage whether the 1992 Conventions should be amended so as to widen their application in this important area.