Compensation for pure economic loss resulting from tanker oil spills (part I)

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Economic loss sustained by somebody who has not suffered damage to his property is, at least in countries whose legal systems are based on the common law tradition, known as *pure economic loss*. In the article an overview is given of the legal situation in various countries as regards pure economic loss. The main issue discussed is, however, how compensation claims for pure economic loss have been addressed under the international regime governing liability and compensation for pollution damage resulting from tanker oil spills, namely the Civil Liability and Fund Conventions (the CLC/Fund regime). The article focuses on the development of the policy of the International Oil Pollution Compensation Funds as regards pure economic loss claims. The problems that arise as a result of national courts having the final say with respect to the interpretation of the definition of 'pollution damage' in the above-mentioned conventions are discussed. Examples are given of decisions by the Funds on pure economic loss claims, in particular in the fisheries and tourism sectors, and of how such claims have been adjudicated in national courts.

1 Introduction

Traditionally, liability for damage caused by tanker oil spills was considered mainly from the perspective of costs of clean-up of the polluted area or resource and damage to property. It became evident, however, that also economic losses suffered by individual subjects affected by an oil spill, i.e. natural or legal persons such as fishermen and other businesses in coastal areas, had to be taken into account. In fact, in many major incidents compensation claims for such losses have constituted the majority of the claims, albeit a large number of them have been for only modest amounts.

Two types of economic losses can be distinguished.

Persons whose property has been contaminated may sustain economic loss. For instance, a fisherman whose fishing gear has been contaminated may suffer loss of income as a result of his having to abstain from fishing while his polluted gear is cleaned or replaced. Such loss is normally referred to as *consequential economic loss*.

Also persons whose property has not been contaminated may, however, suffer economic loss as a result of an oil spill. For example, a fisherman whose gear did not become contaminated may have

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to abstain from fishing for a period of time because the area where he normally fishes is polluted, and a hotelier whose premises are close to a contaminated public beach may suffer loss because the number of guests decreases during the period of the pollution. Such losses are normally referred to, at least in countries whose legal systems are based on the common law tradition, as *pure economic loss*.

2 Pure economic loss in various jurisdictions

With respect to the admissibility of claims for pure economic loss there is a significant difference between states whose legal systems are based on common law, on the one hand, and states outside the common law tradition that follow the continental European approach based on the French Civil Code, on the other.

In most common law countries and in many civil law countries there has been a great reluctance to recognize claims for pure economic loss. The reason for this attitude is fear of the far-reaching consequences that acceptance of such claims could have. It has been referred to as the risk of opening "the floodgates for liability in an indeterminate amount for an indeterminate time to an indeterminate class".[1] The principle that economic loss is recoverable only if it is a consequence of physical damage is in common law countries sometimes referred to as a "bright line" test.

Experience also shows that it is difficult to establish criteria for the admissibility of pure economic loss claims. In most jurisdictions a claim for compensation is accepted only if it relates to damage to a defined and recognized legal right, such as a right of property or a right of possession, and for this reason claims that do not relate to a recognized legal right are not accepted for compensation purposes. Damage suffered by someone as a result of the loss of use of the environment due to pollution is, under this approach, not damage to a claimant's recognized legal right, in this sense, and is thus not compensated unless the claimant has a specified right of use.

In some countries, however, fishermen may have a kind of proprietary right. In Japan, fishermen in their capacity as members of a fishermen's collective organisation have a legal right to carry out fishing activities in a designated area which is equivalent to a proprietary right in that area.

The bright line test is in principle upheld in the United Kingdom;[2] in order for economic losses to be admissible for compensation they must not be secondary, derivative, relational and/or indirect.[3] It appears that the test is also applied in other common law countries, such as India and Nigeria. The courts in some common law jurisdictions, for instance Australia,[4] New Zealand[5] and Canada,[6] have however in recent years adopted a less strict position in this regard. In the United States this principle

[1] Justice Cardozo in *Ultramares Corp. V. Touche*, 255 N.Y. 170 (1931). See also Lord Denning in *Spartan Steel & Alloys Ltd v. Martin & Co. (Contractors) Ltd.* [1973] 1 QB 27 at p. 564.

[2] *Dynamo Ltd. V. Holland* [1972] S.L.T. 38 (Sct.): *Esso Petroleum Co. V. Hall Russel & Co.* [1989] I A.C. 643 UK; *Murphy v Brentwood Dist. Council* [1991] 1. A.C. 398 UK]; *Payne v. John Setchell Ltd.* [2002] B.L.R. 489 (UK). Pure economic loss should however qualify for compensation under English law if the act causing the damage results in public nuisance, which has been described as "an annoyance to *all* the king's subjects"; *Benjamin v. Storr* [1874] L.R.9.C.P.400; see Simon Rainey, To great damage and common nuisance of all liege subjects of our lady the queen: oil pollution claims and public nuisance, B. Soyer & A. Tetterborn (eds), *Pollution at Sea, Law and Liability*, Chapter 6, Informa, London 2012 p. 95.

[3] *Landcatch Ltd. v. The International Oil Pollution Compensation Fund (The Braer)* [1999] 2 Lloyd's Rep. 316; *RJ Tilbury & Sons (Devon) Ltd. v. International Oil Pollution Compensation Fund* [2003] 1 Lloyd's Rep. 123 (CA).

[4] *Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad"* (1976) 136 CLR 529; *Perre v. Apand Pty. Ltd.* (1999) 198 CLR 180.

[5] As regards the situation in Australia and New Zealand see R. Balkin & J.L.R.Davis, *Law of Torts*, 5th ed., Australia 2013, Chapter 13.

[6] *Bow Valley Husky (Bermuda) Ltd. v Saint Johns Shipbuilding Ltd.* [1977] 3 S.C.R. 1210; *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.* [1995] 1 S.C.R. 85; *Canadian National Railway Co. v. Norsk Pacific Steamship Co. Ltd.* [1992] 1 S.C.R. 1021; *Design Services Ltd. v. Canada* [2008] 1 S.C.R. 737. It should be noted that as regards the province of Quebec, civil liability is subject to the Civil Code of Quebec which is in line with the European continental law tradition with respect to pure economic loss. However, marine pollution damage is governed by federal law, which follows common law in this regard.

is still upheld in the general law of torts,[7] but the principle has been abandoned as regards oil pollution damage falling within the scope of the Oil Pollution Act 1990 (OPA-90).[8]

In many states outside the common law tradition the legal situation is less clear. In some of these states pure economic loss is not considered as a separate type of damage, and the courts may apply the criteria of foreseeability and remoteness or require that there is a direct link of causation between the damage and the defendant's action, and that the damage is certain and quantifiable in economic terms. This is the case in states whose legal systems are based on the principles in the French Civil Code, e.g. France,[9] Belgium, Greece, Italy, Malta, the Netherlands and Spain and states in Latin America, but also in some other European countries, such as Denmark, Norway, Poland and the Russian Federation. This seems to be the case also for Japan, the People's Republic of China, the Philippines and the Republic of Korea. The principle of causation appears to be applied also in Singapore, although that country belongs to the common law system.[10] Also the law of South Africa appears to be in line with the continental European tradition in this regard.[11]

A different position is taken in some other European countries. Under German law pure economic loss does not normally qualify for compensation, but such damage may be compensated if caused by an act contrary to a law the purpose of which is to protect the damaged interest ("Verletzung des Schutzgesetzes"), or by an immoral act ("gegen gute Sitten").[12] Pursuant to Swedish law pure economic loss is in principle compensable only if caused by a criminal act; the State or a local authority is however liable for pure economic loss caused by a wrongful act or omission in the course of, or in connection with, the exercise of public authority.[13] The same applies under Finnish law.[14] Pure economic loss does not qualify for compensation under Turkish law.

Of interest in this context is the Draft Common Frame of Reference (DCFR), a result of academic endeavours to work towards a European Civil Code, which became partly a European Union project. The DCFR, in its 2009 version, consists of a comprehensive set of principles, definitions and model rules, accompanied by explanatory comments. Book VI of the DCFR is headed "Non-contractual liability arising out of damage caused to another". The DCFR does not recognize pure economic loss as a separate type of damage but uses the general term of "legally relevant damage" (Rule 1:101). The basic conditions for liability are accountability and causation. The definition of "legally relevant

[7] *Robins Dry Dock & Repair Co. v. Flint*, 27 U.S. 303 1928 AMC (1927); *Guste v. M/V Testbank*, 752 F.2d 1019, 1985 AMC 152 (5th Circ. 1985); re *Deepwater Horizon*, 500 Fed. Appx. 355 (5th Circ. 2012); *Bertucci Contracting Co. v. Steele*, 712 F.3d 245 (5th Circ. 2013). See Vernon Valentine Palmer & Kristoffer Svendsen, The recovery of pure economic loss under the Oil Pollution Act: a unified test of causation, in *Managing the Risk of Offshore Oil and Gas Incidents*, Günther Handl & Kristoffer Svendsen (eds.), Edward Elgar Publishing 2019 p. 285.

[8] *Sekco Energy Inc. v. M/V Margaret Chouest*, 820 F. Supp. 1008, 1994. AMC 1515 (E.D. La 1993); *Petition of Cleveland Tankers*, 791. F. Supp. 669, 1992 AMC 1727 (E.D. Mich. 1992). Professional fishermen have, however, been awarded compensation for pure economic loss already before the adoption of OPA-90; *Union Oil Co. v. Oppen*, 501 F.2d 558, 1975 AMC 416 (9th Circ. 1974).

[9] The French Code Civil provides in Article 1381: "Tout fait quelconque de l'homme, qui a causé à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer." Under French jurisprudence and doctrine, it is required that the damage is a direct and certain consequence of the tortfeasor's action, and this independent of whether or not any property belonging to the plaintiff or any property which he is entitled to use has been damaged. – Boris Stark, Roland Laurent & Henri Roger, *Droit Civil, Les obligations*, tome I (5th ed. 2012) p. 59, 439.

[10] *Spandeck Engineering (S) Pte Ltd v. Defence Science & Technology Agency* [2007] 4SLR(R) 100 (SGCA).

[11] *Telematrix Pty Ltdt t/a Matric Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA); *Fourway Haulage SA (Pty) Ltd v SA National Road Agency* 2009 (2) SA 150 (SCA).

[12] Bürgerliches Gesetzbuch art. 832.2 and 826.1; Yuna Huang, *Recoverability of Pure Economic Loss Arising from Ship-Source Oil Pollution* (academic thesis), Hamburg 2011 p. 50.

[13] Skadeståndslagen (1972:207) (Tort Liability Act), Chapter 2, art. 2 and Chapter 3 art. 2 and 3. In the *travaux preparatoires*, which are an important factor for the interpretation of Swedish statutes, it is stated, however, that these provisions should not be interpreted *a contrario*; the courts should be entitled to decide to what extent pure economic loss should be compensated in other cases (prop. 1972:5 p. 568). The Swedish Supreme Court has in recent years in a number of cases awarded compensation for pure economic loss which had not been caused by a criminal act.

[14] A brief overview of the laws of the Nordic countries as regards pure economic loss is given in Måns Jacobsson, *Miljöfarliga sjötransporter – internationella skadeståndsregler* (title translation: Maritime transport of environmentally hazardous substances – international liability regimes), Stockholm Centre of Commercial Law, Faculty of Law, Stockholm University 2015 p. 126–28.

damage" seems to allow for compensation for pure economic loss only in rather restrictive circumstances which would probably not be relevant for ship source oil pollution damage (Rules 2:102, 2:207, 2:208 and 2:211).

3 The CLC/Fund regime

In the aftermath of the *Torrey Canyon* incident in 1967 off the south coast of England, an international regime was created under the auspices of the International Maritime Organization (IMO) for the purpose of providing compensation for pollution damage caused by spills from oil tankers. This two-tier compensation regime comprised originally the 1969 Civil Liability Convention (1969 CLC)[15] and the 1971 Fund Convention.[16] These Conventions entered into force in 1975 and 1978, respectively.

Since experience had shown that the 1969 and 1971 Conventions had certain deficiencies, in 1984 two Protocols were adopted amending the Conventions. The amended Conventions provided higher levels of compensation and a wider scope of application than the original Conventions, and contained a new definition of the concept of pollution damage. It was soon established, however, that as a result of the requirements in their entry into force conditions, the 1984 Protocols would not enter into force.[17]

Many states considered it important, however, that the substantive provisions in the 1984 Protocols could be brought in force as soon as possible. In 1992 two new Protocols amending the 1969 and 1971 Conventions were adopted which are in substance identical to the 1984 Protocols but with less strict entry into force conditions. The Conventions amended by the 1992 Protocols[18] entered into force in 1996.

Most states parties to the 1969 CLC have denounced that Convention but it remains in force for 32 states. After denunciation by the great majority of the states parties, the 1971 Fund Convention ceased to be in force in 2004, and the 1971 Fund was wound up with effect from 31 December 2014 after all pending compensation claims against that Fund had been resolved.

Experience had shown that the total amount of compensation available under the 1992 Conventions was insufficient to provide full compensation to claimants in some major incidents. For this reason, in 2003 a Protocol was adopted to the 1992 Fund Convention, establishing a Supplementary Compensation Fund that adds a third tier of compensation for pollution damage in the states parties to the Protocol.[19] Only states parties to the 1992 Conventions may become parties to the Protocol.

The 1992 CLC/Fund regime has become truly global. As at 1 December 2020 the 1992 CLC had been ratified by 141 states and the 1992 Fund Convention by 118 states. Thirty-two states were parties to the 2003 Supplementary Fund Protocol.

The system of liability and compensation under the 1969 and 1992 Civil Liability Conventions, the 1971 and 1992 Fund Conventions and the 2003 Supplementary Fund Protocol will be referred to as *the CLC/Fund regimes*.

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[15] International Convention on Civil Liability for Oil Pollution Damage, 1969 (1969 CLC).

[16] International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.

[17] The conditions for the entry into force of the 1984 Protocols implied that the Protocols would in practice enter into force only if the United States ratified them. As a result of the *Exxon Valdez* incident in Alaska in 1989 the United States adopted a comprehensive domestic legislation, the Oil Pollution Act 1990 (OPA-90), which included a compensation regime. As regards the reasons for the United States not becoming a party to the 1984 Protocols see Måns Jacobsson, The international Liability and Compensation Regime for Oil Pollution from Ships – International Solutions for a Global Problem, 2007 *Tulane Maritime Law Journal* Vol. 32 p. 11.

[18] International Convention on Civil Liability for Oil Pollution Damage, 1992 (1992 CLC) and International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992.

[19] Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992.

The CLC/Fund compensation regimes apply to pollution damage caused by spills of persistent oil from tankers. The regimes also apply to the costs of preventive measures, i.e. reasonable measures taken to prevent or minimize pollution damage.

Under the 1969 and 1992 CLC the registered owner has strict liability for pollution damage caused by oil originating from the ship. The shipowner is normally entitled to limit his liability to an amount linked to the tonnage of the ship.[20] The limitation amounts under the 1969 CLC are very low, whereas they are significantly higher under the 1992 CLC.[21] The shipowner is obliged to maintain insurance covering his liability under the applicable CLC up to the limitation amount.

The 1971 and 1992 Fund Conventions established systems providing supplementary compensation from an international fund, when the compensation available under the respective 1969 and 1992 CLC is insufficient to compensate all claimants in full.

The total amount available under the 1992 Conventions per incident is 203 million SDR (US$290 million), including the amount actually paid under the 1992 CLC. The Supplementary Fund makes a total amount of 750 million SDR (US$1 070 million) available for compensation for pollution damage in states parties to the 2003 Protocol, including the amount payable under the 1992 Conventions.[22] If the aggregate amount of the established claims exceeds the total amount available for compensation, the compensation to be paid to each claimant will be reduced proportionally. The total amount available under the 1969 and 1971 Conventions was only 60 million SDR (US$85 million).

Jurisdiction over disputes relating to compensation under the treaties lies exclusively with the domestic courts in the state or states were the pollution damage occurred. A final judgment by a competent court which is enforceable in the state where it was rendered shall be recognized and enforceable in all other states parties.

The Funds are financed by contributions levied on any person who receives crude or heavy fuel oil in ports in states parties to the respective treaty instrument after carriage by sea.

Each of the three treaties established an international governmental organisation to administer the regimes, namely the International Oil Pollution Compensation Funds 1971 and 1992 and the Supplementary Fund, respectively, normally referred to collectively as the IOPC Funds. As previously mentioned, the 1971 Fund was wound up with effect from 31 December 2014.

The supreme governing organ of the 1992 Fund is an Assembly composed of representatives of all states parties to the 1992 Fund Convention. The Assembly elects an Executive Committee comprising 15 states parties, whose main function is to approve settlement of compensation claims. Should the Assembly fail to achieve a quorum at a particular session, an Administrative Council will assume the functions of the Assembly. The 1971 Fund had a similar structure. The Supplementary Fund has its own Assembly.

The organisations have a joint Secretariat in London that administers the 1992 Fund and the Supplementary Fund (and up to 2014 administered also the 1971 Fund). The Secretariat is headed by a Director who has been given extensive authority to settle and pay compensation claims without the prior approval of the Executive Committee.

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[20] The limitation amounts in the 1992 Conventions and the Supplementary Fund Protocol are expressed in the Special Drawing Right of the International Monetary Fund (IMF). The figures given in this article in US dollars have been calculated using the rate of exchange applicable on 1 December 2020, i.e. 1 SDR=US$1.429000. The amounts in the 1969 CLC and the 1971 Fund Convention were expressed in gold francs ('francs poincaré'), 15 francs corresponding to 1 SDR.

[21] Under the 1992 CLC the limitation amount is for ships up to 5 000 units of tonnage 4 510 000 SDR (US$6.4 million), increasing on a linear scale up to 89 770 000 SDR (US$128 million) for ships of 140 000 units of tonnage or over.

[22] The limits laid down in the 1992 Conventions and the Supplementary Fund Protocol may be increased by means of a simplified procedure provided for in the respective treaty ('the tacit acceptance procedure'). This procedure was used in 2001 to increase the amounts laid down in the 1992 Conventions by 50.73 per cent with effect from 1 November 2003; IMO Legal Committee Resolutions LEG.1(82) and LEG.2(82). The amounts referred to in this article are the amounts as increased by these Resolutions.

Since their establishment the IOPC Funds have been involved in some 150 incidents, and a number of them have given rise to thousands of compensation claims.[23] The total amount of compensation paid by the 1971 Fund and the 1992 Fund is GPD747 million (US$978 million). The Supplementary Fund has not been involved in any incident.[24]

4 Definition of pollution damage in the 1969 and 1971 Conventions

The definition of pollution damage in the 1969 CLC (art. I.6) reads:

> "Pollution damage" means loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures.

The concept of preventive measures is defined as follows (art. I.7):

> "Preventive measures" means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage.

These definitions are by reference included in the 1971 Fund Convention (art. 1.2).

Already shortly after the entry into force of the 1971 Fund Convention in 1978, it was recognized that the 1969 and 1971 Conventions had certain shortcomings, as evidenced by the *Amoco Cadiz* and *Tanio* incidents in France in 1978 and 1980, respectively. The major concern was that the amount available for compensation under the 1969/1971 was insufficient, but it was also argued that the definition of "pollution damage" was too ambiguous.

An important criticism as regards the definition of "pollution damage" was that it did not give any guidance as to whether consequential damage and pure economic loss were covered by the definition. The national courts would therefore have to decide whether, and to what extent, such damage was admissible for compensation under the 1969 and 1971 Conventions. Since, as mentioned above, legal traditions on this point vary considerably from one state to another, there was a considerable risk that there would be lack of uniformity in the interpretation and application of the Conventions on this point.

It was also considered that the definition did not make it clear whether damage to the natural resources of the marine environment qualified for compensation, nor was it explicitly indicated whether costs of restoration of the marine environment were compensable. These issues fall, however, outside the scope of the present article.[25]

It was decided, therefore, to undertake a revision of the 1969 and 1971 Conventions, and a Diplomatic Conference for this purpose was held in 1984.

5 Revision of the 1969 and 1971 Conventions[26]

The question of a new definition of "pollution damage" was discussed at great length during the preparatory work that preceded the 1984 Diplomatic Conference, both at sessions of an informal

[23] The *Erika* incident (France, 1999) gave rise to some 8 000 compensation claims, the *Solar 1* incident (the Philippines, 2006) resulted in some 32 000 claims and the *Hebei Spirit* incident (Republic of Korea, 2007) gave rise to some 128 000 claims.

[24] For details of the CLC/Fund regime, see Måns Jacobsson, Liability and Compensation for Ship-source Pollution, *The IMLI Manual on International Maritime Law*, Volume III, Marine Environmental Law and Maritime Security Law (Oxford University Press 2016), Chapter 9; Colin de la Rue & Charles B. Anderson, *Shipping and the Environment, Law and Practice* (2nd ed, Informa 2009) p. 81–175, 355–490.

[25] A detailed discussion of these issues can be found in Måns Jacobsson, Compensation for non-economic damage caused by pollution of the marine environment, *Journal of International Maritime Law*, Vol. 26, Issue 1 2020 p. 32.

[26] As regards the negotiations that led to the adoption at the 1984 Diplomatic Conference of the new definition of "pollution damage" reference is made to Måns Jacobsson & Norbert Trotz, The Definition of Pollution Damage in the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention, *Journal of Maritime Law and Commerce*, Vol. 17 No 4, 1986 p. 467. – See also *Official Records of the International Conference on Liability and Compensation for Damage in connection with the Carriage of Certain Substances by Sea, 1984 and the Conference on the Revision of the 1969 Civil Liability Convention and the 1971 Fund Convention, 1992*, Vol. I p. 136–146, Vol. 2 p. 187, 347–359, 475–483, 486–491, 493 and 494.

Working Group and in the IMO Legal Committee.[27] The Legal Committee was unable to reach agreement on the text of a new definition, so it decided to forward to the Diplomatic Conference, as a point of departure for the discussions, the following draft presented by the Comité Maritime International (CMI):[28]

> 'Pollution damage' means
> (a) costs actually incurred as a direct result of contamination outside the ship resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur;
> (b) economic loss actually sustained as a direct result of contamination as set out in (a);
> (c) actual costs of preventive measures and economic loss sustained as a direct result of such preventive measures.

At the 1984 Diplomatic Conference several proposals were made for a new definition.[29] Some delegations were, however, in favour of maintaining the existing definition. In any event, it was the general understanding of the Conference that any new definition should not change the substance of the existing definition as to its general scope but should only give a clearer delimitation of the scope, thus ensuring uniform interpretation in States parties.

After a general discussion of the problems involved in the main committee of the Conference (the Committee of the Whole),[30] the detailed examination of this definition was referred to a Working Group. The discussions of the Working Group were based on the experience of the 1971 Fund in connection with the settlement of compensation claims during the period 1979–1984. The practice of the 1971 Fund as regards the interpretation of the definition of "pollution damage" was generally accepted by the Working Group.

The Working Group was not able to agree on a single text but submitted two alternative texts for consideration by the Committee of the Whole, each of which had found equal support. These texts read as follows:[31]

> Alternative I
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> "Pollution damage" means:
> (a) reasonable costs actually incurred or to be incurred, and other damage or loss, including loss of profit, actually sustained as a direct result of contamination outside the ship resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided 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;
> (b) reasonable costs of preventive measures and damage or loss actually sustained as a direct result of such preventive measures.
>
> Alternative II
>
> "Pollution damage" means:
> (a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided 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;
> (b) the costs of preventive measures and further loss or damage caused by preventive measures.

[27] The discussions during the preparatory work of the definition of pollution damage are summarized in IMO document LEG/CONF.6/7, p. 6–15.

[28] The CMI is an international non-governmental organisation established in 1897 the object of which is to contribute to the unification of maritime law. Until the establishment of the IMO Legal Committee in 1968, most maritime law conventions were drafted under the auspices of the CMI, and that organisation has made valuable contributions to the elaboration of many Conventions also after 1968.

[29] German Democratic Republic doc. LEG/CONF.6/7 p. 12; Federal Republic of Germany 6/17 and 6/54; Poland 6/25 and 6/C.2/WP 38; United Kingdom 6/50; see also Norway 6/32; Sweden 6/30; CMI 6/39; International Group of P&I Associations 6/47; Advisory Committee on Pollution of the Sea (ACOPS) 6/59.

[30] Doc. LEG/CONF.6/C.2/SR.3 and SR.4.

[31] Report of the Working Group, doc. LEG/CONF.6/C.2/WP.21.

During the discussion of the Working Group's Report in the Committee of the Whole,[32] many delegations supported Alternative I, apparently attracted by the more detailed description of the concept of pollution damage. It became obvious, however, that the very fact that this text was more detailed was the reason for it not being acceptable to many other delegations.

In Alternative I certain expression had been inserted qualifying the kind of loss or damage to be covered by the definition. Costs should be *actually incurred*, and other damage or loss should be *actually sustained*. The costs had to be incurred and the damage had to be sustained as a *direct result* of contamination arising out of the incident. The purpose of the insertion of the word *direct* was to introduce stricter criteria for the test of causation and remoteness.

Many delegations argued, however, that these qualifications would not be of much assistance to the courts and would not, therefore, contribute to the unification of the interpretation of the definition. Words such as *actual*, *direct*, *incurred* and *sustained* could in their view lead to divergent interpretations by national courts. Some delegations from continental law countries pointed out that the words *direct result* would in their jurisprudence mean immediate physical damage, excluding any consequential loss of earnings of professional tradesmen.

The delegations supporting Alternative II were of the opinion that the existing wording of the definition should be maintained to the greatest extent possible, as its interpretation had not, by and large, given rise to any major problems. They considered that the application of the existing definition had contributed to a remarkable harmonization of law, especially on the basis of the practice of the 1971 Fund and the decisions taken by the Fund's governing bodies. Many delegations expressed the view that there was a need for clarification of the definition only as regards damage to the marine environment, which the added provision in Alternative II accomplished.

After voting the Committee of the Whole adopted Alternative II,[33] and the Plenary of the Conference adopted that alternative without vote.[34]

This definition was transferred, without any discussion at the 1992 Diplomatic Conference, to the 1992 CLC and the 1992 Fund Convention (cf. section 3 above). Consequently, the definition of pollution damage in the 1992 Conventions reads (art. I.6 and 1.2, respectively):

> "Pollution damage" means
> (a) loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided 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;
> (b) the costs of preventive measures and further loss or damage caused by preventive measures.

That definition retains thus the original definition of pollution damage in the 1969 and 1971 Conventions with an added proviso aimed at clarifying to what extent damage to the marine environment qualifies for compensation.

6 Development of the IOPC Funds' policy

The IOPC Funds' claims policy has developed continuously over the years, either as a result of the Assemblies' or the Executive Committees' decisions in response to questions of principle that have arisen following specific incidents or through the establishment of Working Groups with the

[32] LEG/CONF.6/C.2/SR.15, SR.16 and SR.17.

[33] In an indicative vote, 28 votes were cast in favour of Alternative II and 19 in favour of Alternative I, with one abstention. The Committee of the Whole then adopted Alternative II by 35 votes to none, with three abstentions; LEG/CONF.6/C/SR.16 and SR.17.

[34] The Diplomatic Conference considered in addition the definition of "preventive measures", which was amended so as to cover also so-called pre-spill measures. As regards this issue, which falls outside the scope of the present article, reference is made to Jacobsson, note 26, p. 485–86.

mandate to formulate criteria for the admissibility of claims within the scope of the Conventions for consideration of the Assemblies.[35]

In 1980 the 1971 Fund Assembly established a Working Group to consider the Fund's general policy in respect of the admissibility and payment of claims. This led to the publication of the 1971 Fund's first Claims Manual, which gave advice to claimants on the presentation of claims and on what information should be provided in support of different types of claims. The focus of the first Manual was on the recovery of costs of preventive measures and clean-up, and it gave little guidance on other types of claims. The Manual has been revised a number of times in the light of developments.

Up to the early 1990s, the 1971 Fund had through its Executive Committee addressed important questions of principle as and when they arose. The 1971 Fund had, *inter alia*, accepted claims for pure economic loss as admissible in principle. Against the background of some major incidents, *the Rio Orinoco* (Canada, 1990), *Haven* (Italy, 1991), *Aegean Sea* (Spain, 1992) and *Braer* (United Kingdom, 1993), the 1971 Assembly established in 1993 a Working Group with the mandate to establish general criteria for the admissibility of claims within the scope of the 1969 and 1971 Conventions and the recently adopted 1992 Protocols to these Conventions, *inter alia* as regards pure economic loss.

The Working Group developed criteria for the admissibility of various types of claims. In the view of the Working Group the adoption of such criteria would contribute to consistency of the 1971 Fund's decisions and would also allow the claimants to foresee with a certain degree of certainty whether a particular claim would be admissible. The Working Group considered that the Fund should exercise a certain caution in accepting claims beyond those admissible under the general principles of law in member states [36]

In October 1984 the 1971 Fund Assembly considered and endorsed the Working Group's Report, including the proposed admissibility criteria. The Assembly noted that it was not always possible to lay down firm rules for the admissibility of compensation claims. The Assembly emphasized that each claim had its own characteristics and that it was necessary, therefore, to consider each claim on its merits in the light of the particular circumstances of the case. In the view of the Assembly it was essential that any criteria adopted by the IOPC Fund should allow certain flexibility, enabling the Fund to take into account new situations and new types of claims. The Assembly considered it also essential that, to the extent possible, there was consistency in the Fund's decisions on the admissibility of claims, and that this should be independent of the legal system of the member state where the damage occurred. In the view of the Assembly, the pragmatic approach followed by the IOPC Fund so far should be maintained, so as to facilitate out-of-court settlements.[37]

In 1996 the 1992 Fund Assembly adopted a Resolution to the effect that the Report of the 1971 Fund Working Group should form the basis of the 1992 Fund's criteria for the admissibility of compensation claims.[38]

Some later incidents during the 1990s contributed to further development of Fund policy, namely the *Keumdong No 5* (Republic of Korea, 1993), *Sea Prince* (Republic of Korea, 1995), *Nakhodka* (Japan, 1997), *Sea Empress* (United Kingdom, 1997), *Nissos Amorgos* (Venezuela, 1997) and *Erika* (France, 1999). Three later incidents, the *Prestige* (which occurred in 2002 off the Spanish Atlantic coast and affected Spain, France and Portugal), the *Solar 1* (the Philippines, 2006) and the *Hebei Spirit* (Republic of Korea, 2007), also gave rise to important questions of principle. Thirteen incidents

[35] For an analysis of the development of the Fund's policy for the period 1978–2003 see Joe Nichols in *The IOPC Funds' 25 years of compensating victims of oil pollution incidents*, Impact PR & Design Ltd, Canterbury, United Kingdom (2003) p. 103.

[36] Doc. FUND/WGR.7/21.

[37] Doc. FUND/A.17/35 paras 26.4–26.8; Annual Report 1994 p. 24–29.

[38] 1992 Fund Resolution No 3, doc. 92FUND/A.1/34, Annex III.

involving the 1992 Fund that occurred after 2007 have not made any significant contributions to the development of Fund policy on the admissibility of claims.[39]

7 The IOPC Funds' admissibility criteria as regards pure economic loss

The 1971 Fund Working Group had concluded that for claims for *pure economic loss* to be admissible for compensation, there should be a sufficiently close link of causation between the contamination and the loss or damage, and some factors were set out that should be taken into account in the consideration of whether this requirement was fulfilled.

The criteria for the admissibility of pure economic loss claims developed by the Working Group were included in the 1984 edition of the Claims Manual. They have been retained, with mainly editorial amendments, in subsequent editions of the Manual, the latest issued in 2019.

These criteria as set out in the 2019 version read:

> Claims for pure economic loss qualify for compensation only if they are for loss or damage caused by contamination. The starting point is the pollution, not the incident itself.
>
> To qualify for compensation for pure economic loss, there must be a sufficiently close link of causation between the contamination and the loss or damage suffered by the claimant. A claim is not admissible for the sole reason that the loss or damage would not have occurred had the oil spill not happened.
>
> When considering whether the criterion of a sufficiently close link of causation is fulfilled, the following elements are taken into account:
>
> - the geographic proximity of the claimant's business activity to the contaminated area;
> - the degree to which a claimant's business is economically dependent on an affected resource;
> - the extent to which a claimant had alternative sources of supply or business opportunities;
> - the extent to which the claimant's business forms an integral part of the economic activity within the area affected by the spill.[40]
>
> Account is also taken of the extent to which claimants are able to mitigate his loss.[41]

The Funds have recognized that in view of the economic and social situation in many countries, these requirements will have to be adapted to what could reasonably be expected of a claimant in the country concerned.[42]

The IOPC Funds have over the years dealt with tens of thousands of pure economic loss claims, mainly in the fisheries, mariculture, fish processing and tourism sectors, but such claims have also related to shipping and the operation of ports.

The 1992 Fund has published Guidelines for presenting claims in the tourism sector and Guidelines for presenting claims in the fisheries, mariculture and fish processing sector (most recent editions issued in 2018 and 2019, respectively). These Guidelines supplement the Claims Manual and provide further information on what sort of information is needed to make a compensation claim. The Funds have also issued Technical Guidelines for assessing fisheries sector claims (December 2008 ed.), intended for use by the IOPC Funds' experts.

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[39] In 2000 the 1992 Fund Assembly set up a Working Group with the wider remit of assessing the overall adequacy of the 1992 Conventions. The Working Group was instrumental in the creation of the Supplementary Fund. It considered a proposal that the Fund policy should no longer require that the claimant had suffered economic loss but should allow compensation to be calculated by means of theoretical models. This proposal was not accepted, since it was considered beyond the definition of pollution damage in the 1992 Conventions. It was agreed, however, that an examination should be made of what could be achieved within the present definition as regards admissibility of claims for reinstatement of the marine environment (doc. 92FUND/WGR.3/9 p. 5); Jacobsson note 25 at p. 40. Regarding the question as to whether there should be a general revision of the 1992 Conventions, the Working Group was evenly divided. When the Assembly considered this issue, it was clear that there was insufficient support for a revision; Annual Report 2005 p. 33.

[40] Claims Manual paras 3.3.4 and 3.4.1. References to the Claims Manual in this article are to the 2019 edition.

[41] Claims Manual para 1.5.2.

[42] In 1994 the Comité Maritime International (CMI) adopted Guidelines on Oil Pollution Damage which contain criteria for admissibility of claims very similar to those developed by the IOPC Funds; de la Rue & Anderson note 24 p. 369.

In addition, the Funds have a published a booklet, Guidance for Member States, Management of Fisheries Closures and Restrictions Following an Oil Spill (2016 ed.). This booklet is intended specifically to assist governments and their agencies with responsibilities for the management of fisheries resources and safeguarding public health and sets out the issues which states may wish to consider when planning or implementing fisheries closures or restrictions.

The above-mentioned documents, which were adopted by the 1992 Fund Assembly or Administrative Council, are available on the Funds' website.[43]

Important decisions by the Funds' governing bodies were reported for the period 1978–2008 in the IOPC Funds' *Annual Reports* and for the period 2009–2013 in a yearly publication entitled *Incidents involving the IOPC Funds*. Decisions after 2013 are to be found in the Records of Decisions of the governing bodies' sessions, and summaries of incidents are published on the Incidents section of the Funds' website.

The Funds have established a database containing practically all decisions on claims and claims related issues taken by the governing bodies. The database is also available on the Funds' website.

8 Legal status of the IOPC Funds' criteria

One of the basic principles underlying the CLC and Fund Conventions is that disputes concerning the interpretation and application of the Conventions are adjudicated before the courts of the state or states where the pollution damage occurred. These courts have therefore the final say as regards the interpretation of the definitions in these treaties, for instance that of pollution damage. This means that criteria for admissibility of compensation claims adopted by the Funds' governing bodies are not binding on national courts, which may lead to differences in interpretation between jurisdictions of states parties to these treaties.

The governing bodies of the IOPC Funds have repeatedly emphasized the importance of a uniform application and interpretation of the CLC and Fund Conventions. In 2003 the Administrative Council of the 1992 Fund, acting on behalf of the Assembly, adopted a Resolution which drew attention to the importance for the proper and equitable functioning of the regime established by the 1992 Conventions that these Conventions were implemented and applied uniformly in all states parties and that claimants were given equal treatment as regards compensation in all states parties. The Resolution also emphasized the importance of national courts in states parties giving due consideration to the decisions by the governing bodies of the Funds on the interpretation and application of the Conventions.[44]

It is obviously essential that claimants are treated equally within the CLC/Fund regime, and this independent of the country were the pollution damage occurred. Since the oil industry in one Fund member state by its contributions to the Funds contributes to the financing of compensation payments for damage in other states, the admissibility criteria should, to the extent possible, be applied in the same manner in all states parties.

In fact, national courts in Fund member states have largely followed the Funds' criteria, but some decisions by national courts have given rise to serious concern, mainly as regards the admissibility of claims for environmental damage and other non-economic losses.[45]

The legal status of the Funds' admissibility criteria has been debated in relation to various incidents. In particular, the French courts addressed this issue in several cases arising from the *Erika* incident.

[43] www.iopcfund.org.

[44] 1992 Fund Resolution No 8 on the interpretation and application of the 1992 Civil Liability Convention and the 1992 Fund Convention, doc. 92FUND/AC.1/A/ES.7/7, Annex; Annual Report 2003 p. 23.

[45] Jacobsson note 25 at p. 45–47.

In one case, the Court of Appeal in Rennes stated that the criteria for the admissibility of claims contained in the Claims Manual could not be assimilated to agreements between states parties in the sense of Article 31.3 of the 1969 Vienna Convention on the Law of Treaties, nor to international custom in the sense of that Convention.[46] The Court held that it was for the national courts to decide on the interpretation of the term "pollution damage", but that in doing so they should take into account the terms of the 1992 Conventions, which by virtue of the French Constitution had a higher value than national law. It was stated that the criteria for the admissibility of claims, in particular the criterion not to compensate 'second degree' tourism claims (see section 10.2 in Part II of the article), were internal to the Fund.[47] The same Court of Appeal stated in another case that it was not bound by the Funds' criteria, but that these criteria could be valuable points of reference for national courts ("des points de reference utiles pour les tribunaux nationaux").[48] Commenting on the above-mentioned Resolution in a case before it, that French Court of Appeal made the point that the Resolution simply encouraged the national courts to take decisions of the governing bodies into account, recognizing that the final decision rests with national courts.[49]

In fact, French courts approached the applicability of the Funds' criteria in various ways. Some courts expressly applied the 1992 Fund's criteria,[50] some other courts made the point that the criteria were not binding on the courts but provided a useful reference,[51] and others ignored the criteria but generally reached the same conclusion as they would have reached on the basis of the criteria.[52]

As regards the *Hebei Spirit* incident, which resulted in a very large number of claims for pure economic loss being pursued in legal proceedings, the courts in the Republic of Korea followed the Funds' criteria, either directly or indirectly, in determining the admissibility of claims, with one important exception, namely as regards claims by employees having been made redundant following an oil spill incident (see section 10.3).[53]

With respect to the *Prestige* incident, which also gave rise to a large number of legal actions, the situation was different. In a judgment rendered in 2018 the Spanish Supreme Court of Cassation ignored the admissibility criteria adopted by Fund member states and made no proper assessment as to their applicability to the claims.[54] Commenting on the judgment, the IOPC Funds' Director stated that although the question of recoverability of any loss would ultimately be a matter for the courts of member states, in practice national courts were guided by and followed the criteria in the Funds' Claims Manual. He expressed the view that the Supreme Court's judgment and approach created a dangerous precedent which other courts might follow in future cases which endangered the uniform application of the 1992 Conventions in all member states.[55]

[46] Under the Vienna Convention on the Law of Treaties, for the purpose of the interpretation of a treaty account shall be taken of (a) any subsequent agreement between the states parties regarding the interpretation of the treaty or the application of its provisions, and (b) any subsequent practice in the application of the treaty which establishes agreement of the parties regarding its interpretation (art. 31.3(a) and (b)). With respect to the interpretation of Article 31.3 of that Convention reference is made to Resolution A/RES/73/202 on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the United Nations General Assembly on 20 December 2018. See also the analysis by the IMO Secretariat in IMO doc. LEG/107/9/2.

[47] Annual Report 2007 p. 85.

[48] Doc. 92FUND/EXC.42/4 para 6.3.

[49] Doc. 92FUND/EXC.26/4 para 8.1.10.

[50] Court of Appeal in Rennes and Civil Court in Paris, Annual Report 2008 p. 84 and 87.

[51] Court of Appeal in Rennes, doc. 92FUND/EXC.26/4 para 8.1.10 and Annual Report 2008 p. 85.

[52] Annual Report 2008 p. 83.

[53] Doc. IOPC/OCT19/11/1 para 3.4.14. The Korean court in charge of the limitation proceedings stated, however, that it did not consider itself bound by the 1992 Fund's Claims Manual, doc. IOPC/APR13/3/6 para 4.1.3.

[54] In 2016 the Supreme Court rendered a judgment on the liabilities for the pollution damage resulting from the incident and referred the quantification of the damages to the Civil Court in La Coruña. Appeals were made to the Supreme Court against the Civil Court's decision, and these appeals were addressed by the Supreme Court in its 2018 judgment which can be found via the Incidents section of the IOPC Funds' website in its original Spanish version. Extracts of the judgment translated into English and French are also available on the website. A summary of the judgment is provided in doc. IOPC/APR19/3/2 section 3.3.

[55] Doc. IOPC/APR19/3/2 para 4.4.

In section 10 of part II of the article examples are given of how the admissibility criteria have been applied by the Funds to specific claims, mainly in the fisheries and tourism sectors. Certain issues could relate to more than one category of claims, for instance employee-related issues, loss of income from unlicensed activities and claims based on false invoices. Examples are also given of decisions by national courts on the admissibility of compensation claims in proceedings against the Funds.[56] The majority of the examples relates to incidents occurring in the 1990s, since – as stated above – the development of the Funds' admissibility criteria mainly took place following these incidents.

(*Part II of this article will appear in the next issue of the Journal of International Maritime Law* (JIML 27 (2021) Issue 1 *forthcoming*).

[56] Further examples for the period 1978–2008 are given in de la Rue & Anderson, note 24, p. 446–475.