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## ENVIRONMENTAL DAMAGE UNDER THE CLC 92 AND FUND 92 CONVENTIONS. REMARKS CONCERNING NEW GUIDELINES FOR PRESENTING CLAIMS FOR ENVIRONMENTAL DAMAGE

### Abstract

This article aims to discuss the notion of environmental damage under the CLC 1992 and FUND 1992 as stated in the new Guidelines for Presenting Claims for Environmental Damage prepared by the International Oil Pollution Compensation Funds. That approach is contrasted with the solution adopted in the United States of America under the OPA. Particular attention is given to the problems of compensation for lost services of the environment, as well as providing alternative environment as a restoration measure. The judgments of French and Spanish courts in the Erika and Prestige cases are discussed, raising questions as to suitability of the CLC 1992/FUND 1992 system.

**Keywords:** environmental damage, oil pollution, CLC 1992, IOPC Funds, the guidelines, lost services, alternative environment, *Erika*, *Prestige*.

### INTRODUCTION

In early 2018 the International Oil Pollution Compensation Funds issued new Guidelines for Presenting Claims for Environmental Damage<sup>1</sup> (hereinafter: Guidelines). The said document has been adopted after a long discussion as it was

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<sup>1</sup> Guidelines for presenting claims for environmental damage, 2018 Edition, available at: <https://www.iopcfunds.org/publications/iopc-funds-publications/>, last access 10.04.2018.

only the 4<sup>th</sup> version of the proposal that has been finally accepted<sup>2</sup>. This article attempts to discuss the changes introduced into the Guidelines taking an opportunity to comment on their importance and a possible outcome in the light of the recent judgments issued in France and Spain. However, firstly, the wording of the international conventions and practice of the International Oil Pollution Compensation Funds (hereinafter: IOPC Funds) concerning that particular damage caused by oil pollution will be discussed.

The pollution damage definition of the International Convention on Civil Liability for Oil Pollution Damage, 1992 (CLC 1992) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (FUND 1992) is central to the further analysis. Pursuant to the above:

“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<sup>3</sup>.

The above wording differs substantially from its predecessor, the pollution damage definition of 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC 1969), which has not included any reference to compensation for impairment of the environment and 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 and further loss or damage caused by preventive measures<sup>4</sup>.

Environmental damage, referred to also as damage to the environment *per se*, is difficult to define. It goes beyond the traditional concept of damage under tort law<sup>5</sup>. It is ecological damage, independent of, and therefore separate from,

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<sup>2</sup> Record of decisions of the October 2017 sessions of the IOPC Funds’ governing bodies, IOPC/OCT17/11/1 p. 4.4.

<sup>3</sup> Article I.6 CLC 1992.

<sup>4</sup> Article I.6 CLC 1969.

<sup>5</sup> E. H. P. Brans, *Liability for Damage to Natural Public Resources*, the Hague 2001, p. 13; J. Ciechanowicz-McLean, K. M. Klemowska, *Prawnomiędzynarodowe i cywilistyczne pojęcie szkody w środowisku*, [in:] B. Rakoczy (ed.), *Odpowiedzialność za szkodę w środowisku*, Toruń 2010, p. 24.

infringed rights of those who exploit the environment<sup>6</sup>. It is referred to in the Guidelines as “impairment of the environment” and understood as an adverse alteration to the environment leading to a deterioration or weakening of its functioning<sup>7</sup>. The primary problem that it poses, is the problem of its quantification.

Precisely, that argument has been raised to refuse compensation for environmental damage. Regardless of the fact that CLC 1969 had not explicitly excluded compensating of that type of damage, the IOPC Fund maintained to deny satisfaction of claims for environmental damage. Once the USSR had claimed compensation in connection with the Antonio Gramsci incident, estimated on basis of mathematical formula (where claim for environmental damage was calculated according to the volume of contaminated water), the IOPC Fund formulated Resolution No. 3 stating its intention that the assessment of compensation to be paid by the IOPC Fund should not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models. However, some courts of the contracting states had not felt bound by the IOPC Fund’s interpretation and granted compensation for environmental damage on basis of the CLC 1969<sup>8</sup>.

The CLC 1992 pollution damage definition has been drafted in order to clarify that compensation for impairment of the environment shall be limited to the costs of reasonable measures of reinstatement actually undertaken or to be undertaken. Thus, it aims at limiting compensation for environmental damage to the actual costs of its restoration. Its supporters argue that costs of the environment’s restoration are the only accurate ones and thus, adequate measure of damage. M. Jacobsson is of the opinion that any assessment of ecological damage to the marine environment in monetary terms would require sweeping assumptions regarding relationships between different components of the environment and economic values. Therefore, any calculation of the damage suffered in monetary terms would be arbitrary and for that reason unacceptable<sup>9</sup>.

Actually, it is difficult to capture the monetary value of a particular natural resource *per se*. It is possible, however, to value services (functions) that the damaged environment rendered to humans or other species. Those services vary extensively in terms of their kind. They may be of ‘consumptive’ character, e.g.

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<sup>6</sup> M. Rémond-Gouilloud, *The Future of Compensation System as Established by the International Conventions*, [in:] C. de la Rue (ed.), *Liability for Damage to the Marine Environment*, London 1993, p. 92.

<sup>7</sup> Guidelines, p. 4.

<sup>8</sup> Italian courts’ judgments in connection with Patmos and Haven incidents: FUND/EXC.28/3; 71FUND/EXC.50/3.

<sup>9</sup> M. Jacobsson, *The International Conventions on Liability and Compensation for Oil Pollution Damage*, Oil Pollution Conference 1998: Claims and Liabilities, 17.02.1998, London: IBC UK Conference Ltd, p. 9.

logging, fishing, desalinization to create potable water and so on. They may have a non-consumptive nature as well, such as bird watching and swimming in the ocean<sup>10</sup>. There are examples of statutes attempting to value ecological damage via recourse to the concept of impaired services of the environment. Indeed, exactly that approach has been adopted by the United States of America in the Oil Pollution Act of 1990<sup>11</sup> (hereinafter: OPA).

## 1. THE AMERICAN APPROACH

According to OPA a liable person has a duty to compensate environmental damage, described in the act as damage to natural resources, encompassing:

- (1) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources;
- (2) the diminution in value of those natural resources pending restoration; plus
- (3) the reasonable cost of assessing those damages<sup>12</sup>.

Thus, the trustee (the President or the authorized representative of any State, Indian tribe, or foreign government, depending on which natural resource has been damaged<sup>13</sup>) who acts on behalf of the public, an Indian tribe, or a foreign country, has a claim not only for the costs of restoration, but also for the loss of environment during such restoration.

The primary goal of OPA is to make the environment and the whole public liable for injuries to natural resources and services resulting from the pollution. This goal is achieved through the return of the injured natural resources and services to baseline and compensation for interim losses of such natural resources and services from the date of the incident until recovery<sup>14</sup>.

Regulations under OPA require the introduction of primary and compensatory restoration measures. While the former aim at restoring the harmed environment and its services to the state, as it was before the incident, the latter are introduced to compensate for lost services pending restoration. When evaluating compensatory restoration actions, trustees must consider compensatory restoration actions

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<sup>10</sup> R. Force, *A comparison of the recovery of Compensation for Injury to Natural Resources under the 92 CLC and Fund Conventions with the U. S. Oil Pollution Act of 1990*, [in:] M. G. Faure, H. Lixin, S. Hongjun (eds), *Maritime Pollution, Liability, Policy, China, Europe and US*, Alphen aan den Rijn, 2010, p. 272.

<sup>11</sup> 33 U.S.C.A. §§ 2701–2720.

<sup>12</sup> 33 U.S.C.A. § 2706(d)(1).

<sup>13</sup> 33 U.S.C.A. § 2706(a)-(b).

<sup>14</sup> Natural Resource Damage Assessments, 15 CFR § 990.10.

that provide natural resources and services of the same type and quality, and of comparable value as those injured or, when that is impossible, actions that provide natural resources and services of a comparable type and quality as those provided by the injured natural resources (the so called resource-to-resource approach or service-to-service approach). Only when that is impossible, the trustees ought to establish the value of services not available while environment's recovery. Therefore, generally responsible parties are liable for the cost of implementing the restoration action that would generate the equivalent value, not for the calculated interim loss in value<sup>15</sup>. Only exceptionally, trustees may estimate the dollar value of the lost services and select the scale of the restoration action that has the cost equivalent to the lost value<sup>16</sup>. To do that, they employ revealed preference methods, which are a group of economic tools estimating the value of goods and services by observations of individuals' choices<sup>17</sup>. A travel cost method may serve as an example. It assumes that a particular natural resource is worth to people at least as much as they are willing to pay for the travel there. Later, such a cost of travel is multiplied by days during which the recreational site was unavailable to people. American courts held that also contingency valuation (CV) method was acceptable. It establishes the value of the damaged environment by collecting information from individuals who declare how much a particular natural resource is worth to him/her. In fact, a survey may be employed, to ask people about the value they attribute to habitat and ecosystem services<sup>18</sup>. It is controversial, as it may lead to very sizeable results. The critics of that method claim that after an oil spill the public opinion may not be objective in stating the value of the damaged site<sup>19</sup>. It has been feared that willingness-to-pay – a factor prominent in the CV methodology – can lead to overestimates, by survey respondents, as respondents do not actually pay money, and are likely to overstate their willingness-to-pay<sup>20</sup>. Those arguments, however, have been rejected and the above methodologies are acceptable as reliable. The CV method is the only one which allows to measure a value of the so-called non-use values, i.e. values of the natural resource, that serve to the society, besides its exploitation, either economically or recreationally.

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<sup>15</sup> National Oceanic and Atmospheric Agency, Preassessment Phase. The Guidance Document for Natural Resource Damage Assessment Under the Oil Pollution Act of 1990, 1996, available at: <https://darrp.noaa.gov/sites/default/.../Preassessment%20Phase.pdf>, last access: 10.04.2018, p. 1–5.

<sup>16</sup> *Ibidem*.

<sup>17</sup> National Oceanic and Atmospheric Agency, Damage Assessment, Remediation, and Restoration Program, Valuation, available at: <https://darrp.noaa.gov/economics/valuation>, last access: 10.04.2018.

<sup>18</sup> *Ibidem*.

<sup>19</sup> *State of Ohio v. United States Department of the Interior*, 880 F. 2d 432, at 206.

<sup>20</sup> *Idem*.

Those values include: an option value (which is understood as awareness of the possibility to use natural resource in the future), a bequest value (understood as knowledge of preserving the natural environment for the future generations) and an existence value (understood as awareness that some species exist)<sup>21</sup>.

Another interesting feature of OPA is the fact that it requires a responsible person to restore the polluted environment or – if that is impossible – to acquire its equivalent. That is understood as acquiring the substitution for the damaged resources with resources that provide the same or substantially similar services. For example, if a public beach was destroyed, the trustees could buy a private beach and make it public by providing public access<sup>22</sup>. In the *Kennecott* case<sup>23</sup> the US Court of Appeals held that the Congress had not clearly expressed a preference for restoration and replacement over the acquisition of equivalent resources. Thus, there was no hierarchy between remedial alternatives: restoration or providing for the equivalent environment. Importantly, the American regulations do not require an alternative environment to be in close vicinity to the damaged one.

## 2. GUIDELINES FOR PRESENTING CLAIMS FOR ENVIRONMENTAL DAMAGE

The IOPC Funds' Guidelines state that compensable non-economic damage to the environment under the CLC 1992/FUND 1992 encompasses solely: costs of reinstatement measures and costs of post-incident studies<sup>24</sup>. In fact, the newly adopted version of the Guidelines, at the very opening, clarifies that the CLC 1992 does not provide compensation for what is sometimes referred to as 'pure' environmental damage that is, compensation for the loss of environmental services. It covers rather the costs of reinstatement of the damaged environment to restore those lost services as far as it is possible<sup>25</sup>. Restoration is understood, by the guidelines, as re-establishing a biological community in which the organisms, characteristic of that community, at the time of the incident, are present and are

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<sup>21</sup> Z. Pełowska-Dąbrowska, *Jak mierzyć niewymierne? Szkoła w środowisku na gruncie reżimów odpowiedzialności cywilnej za szkody olejowe w środowisku morskim*, [in:] B. Rakoczy (ed.), *Odpowiedzialność za szkodę w środowisku*, Toruń 2010, p. 165.

<sup>22</sup> K. Alexander, *The 2010 Oil Spill: Natural Resource Damage Assessment Under the Oil Pollution Act*, *CRS Report for Congress*, available at: <https://fas.org/sgp/crs/misc/R41396.pdf>, last access 10.04.2018, p. 7.

<sup>23</sup> *Kennecott Utah Copper v. U.S. Dept. of Interior*, 88 F. 3d 1191 (1996).

<sup>24</sup> Guidelines, p. 1.13.

<sup>25</sup> *Ibidem*, p. 1.14.

functioning normally. However, that does not mean restoring the environment to its state that existed before the spill. The Guidelines, different from the regulations under OPA, stipulate that baseline conditions are often not known. According to the Guidelines, such information is only likely to be available for areas where comprehensive surveys of resources vulnerable to oil pollution are frequently undertaken. Moreover, as environment is in constant flux, it is difficult to foresee the ecological status of the resource if there was no spill<sup>26</sup>. However, contrary to the former version, the new Guidelines do admit, that under some circumstances restoring the environment to the baseline may be relevant and feasible<sup>27</sup>. However, it stems from the Guidelines that such a solution would be acceptable only rarely, when prior to the spill there had been current data, on natural resources of the particular environment, collected. Thus, such an approach has been summarized as not practical for many reasons<sup>28</sup>.

As to the compensation for lost services pending restoration, the Guidelines deny that. They specifically state that no compensation will be granted for a claim submitted on behalf of the general public unable to use the contaminated beach<sup>29</sup>. The Guidelines argued that such compensation would not contribute to faster recovery of the environment<sup>30</sup>. No reference to service-to-service approach is made, however, the guidelines reiterate that claims, relying on an abstract quantification calculated in accordance with theoretical models, fall into this category of an inadmissible claim<sup>31</sup>. That category of unacceptable quantification methods include also the CV or stated preference methodologies<sup>32</sup>.

The problem of an alternative restoration is significantly different from the American solution. The Guidelines provide that any restoration measures should be aimed at enhancing the recovery of the damaged component of the environment<sup>33</sup>. Thus, acquiring an equivalent resource or services to the lost ones, which bears no influence on the damaged element of the environment, is not accepted. In the case of a polluted beach, buying a private one and opening it to the general public, would not be accepted as a restoration measure, as it does not, in fact, restore a damaged site. Another argument, used in the Guidelines against providing an equivalent environment, is the danger of a possible degradation of other

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<sup>26</sup> *Ibidem* p. 1.18.

<sup>27</sup> *Ibidem*.

<sup>28</sup> *Ibidem*.

<sup>29</sup> *Ibidem*, p. 5.24.

<sup>30</sup> *Ibidem*.

<sup>31</sup> *Ibidem*, p. 5.25.

<sup>32</sup> *Ibidem*.

<sup>33</sup> *Ibidem*, p. 4.3.

habitats or consequences for other natural or economic resources<sup>34</sup>. In fact, the new Guidelines, contrary to their previous version, do not even use an 'alternative site' expression. Instead, they mention the reinstatement of sites "at some distance from the area of damage"<sup>35</sup>. According to the Guidelines, such reinstatement is acceptable but it has to be within the general vicinity of the damaged area and only under the condition that it actually repairs the damaged element of the environment and its services. The Guidelines claim that the link between the measures and the damaged component of the environment is essential<sup>36</sup>. Such a link exists if e.g. restoration measures relate to the same habitats or the same species that have suffered damage as a result of the spill. If they do, the reinstatement measures, taken at some distance but still close to the natural resource damaged, are acceptable; however, they are subject to greater scrutiny. It seems to result from the Guidelines that they are admissible generally in cases when the reinstatement of a natural resource at the affected site is not possible. Contrary to the American approach, acquiring equivalent habitat at a different location most probably will not be considered permissible.

Since 2012, the Claims Manual - prepared by the IOPC Funds as a tool for claimants to present their claims - has been recognizing two types of the restoration measures: direct and indirect ones. The direct restoration measures are those that enhance a damaged element of the environment by actions targeting that element. The example of such measures might be nourishment or replanting of existing salt marsh in the case of marsh pollution. The indirect restoration measures are those that influence the surrounding environment and thereby enhance restoration of a damaged component. An example of indirect measures provided by the Guidelines, is rats' eradication from Langara Island in British Columbia in order to encourage the recovery of bird populations impacted by oil from the Nestucca spill<sup>37</sup>. The current version of Guidelines explains that the indirect reinstatement measures are most likely to be used in circumstances where the direct measures are not feasible and it is probable that indirect measures would allow for faster recovery<sup>38</sup>. A new example is given of a population that has already been endangered, when an oil spill constitutes an additional factor that leads to detrimental effects for the environment<sup>39</sup>. In such a situation, the measures attempting to strengthen the population by controlling its original adversaries might be admitted. However, it is still underlined that the direct restoration measures would

<sup>34</sup> *Ibidem*, p. 4.4.

<sup>35</sup> *Ibidem*, p. 5.22.

<sup>36</sup> *Ibidem*, p. 4.3.

<sup>37</sup> *Ibidem* p. 5.16.

<sup>38</sup> *Ibidem*, at. 5.17.

<sup>39</sup> *Ibidem*.

be found admissible more probably than the indirect ones<sup>40</sup>. The latter, are more likely to fail the proportionality and proximity test (costs of the measures ought to be proportionate to the extent and duration of the environmental impairment and there should be a close link between the measures and the damaged component of the environment<sup>41</sup>).

Contrary to the above, no such differentiation between the direct and indirect measures exists under the American approach. The measures that would be categorized as indirect ones, by the Guidelines, are acceptable in the United States. For example, after the oil incident in the Fort Lauderdale area in 2000 the restoration plan was adopted which would be called, under the guidelines, as the indirect measures for the primary and compensatory restoration actions. The oil spill from an unknown source<sup>42</sup> had polluted beaches of Florida near Miami, endangering sea turtles population and their habitats, causing increased hatchling mortality. In respect of the primary restoration measures, trustees proposed enforcement of turtle-friendly lightning ordinances, which had been documented earlier as effective in reducing turtle hatchling mortality. By saving hatchlings, which otherwise would have died, new hatchlings are added to the environment and the resource can be brought back to the baseline<sup>43</sup>. The studies show that disorientation upon the nest emergence is the greatest source of mortality for sea turtle hatchlings and is primarily caused by hatchlings crawling towards artificial lights and not towards the moon and the ocean<sup>44</sup>. Trustees expected that above measures would allow the sea turtles population to return to its baseline in three years, producing 2,719 hatchlings each year. Thus, actions to correct beach lighting problems have

<sup>40</sup> *Ibidem*, p. 5.12.

<sup>41</sup> *Ibidem*, p. 4.6.

<sup>42</sup> It is also interesting to note that OPA allows claims to be brought to the Federal Oil Spill Liability Trust Fund for payment in the absence of a known responsible party. Under the CLC 1992/FUND 1992 Conventions, such a possibility also exists, however, a claimant must demonstrate that pollution has been caused by spill of oil carried in bulk as cargo. The above requirement often proves to be too difficult for claimants, as in the case of the claim submitted by the government of Morocco for the cost of oil removal of an unknown source. Although the volume of pollution indicated that oil had come from a tanker, the expertise did not exclude that it was bunker oil. (Z. Pełowska-Dąbrowska, *Odpowiedzialność cywilna za szkody spowodowane zanieczyszczeniem olejami ze statku*, Toruń 2017, p. 100). Such a difference between the American act and the Conventions stems from the fact that OPA is a comprehensive regulation which covers liability for spill of cargo and bunker oil from a ship or facility.

<sup>43</sup> Final Damage Assessment and Restoration Plan/Environmental Assessment for the Fort Lauderdale Mystery Oil Spill, National Oceanic and Atmospheric Administration, U.S. Department of Commerce and the Florida Department of Environmental Protection, August 26, 2002, available at: [https://floridadep.gov/sites/default/files/final\\_darp\\_ea\\_8-26.pdf](https://floridadep.gov/sites/default/files/final_darp_ea_8-26.pdf), last access: 10.04.2018, p. 27.

<sup>44</sup> *Ibidem*.

been accepted as an appropriate primary restoration alternative. As under a primary restoration action, there would be a period when turtles were below their baseline level, the compensatory restoration measures had to be proposed to compensate for such an interim loss. It was estimated that additional 283 hatchlings each year, would compensate for the interim loss. Trustees decided that actions selected for the primary restoration were also appropriate to provide compensatory turtle resources and services. Thus, enhanced enforcement of turtle-friendly lightning ordinances has been adopted<sup>45</sup>.

In turn, the Guidelines, in their new version came to the conclusion that the post-incident studies and reinstatement measures would normally be most appropriate in the case of a major spill where there is an evidence of a significant environmental impact<sup>46</sup>. That statement stems mostly from the requirement of proportionality. The Guidelines require claimants to verify whether the costs of the planned measures are proportionate, both to the extent and duration of the impairment of the environment and to the benefits likely to be achieved. In cases of smaller pollution, it may appear that the cost of studies and measures exceeds the environmental damage.

Although the Guidelines hold that the CLC 1992/FUND 1992 regimes provide sufficient flexibility for innovative proposals for reinstatement measures to be made as long as they are based on sound science and established protocols, no admissible claims have been presented so far and there are no precedents upon which the guidance could be based<sup>47</sup>. That is in contrast to the American experience with multiple projects of environmental reinstatement implemented. On the other hand, there have been instances when claims for repair of the environmental damage have been denied, by the IOPC Fund, as relying on an abstract quantification calculated in accordance with theoretical models (e.g. in the case of a claim brought by the government of the Russian Federation after the break down and pollution from the Russian-registered tanker *Volgoneft 139*). That approach is not satisfactory for a number of parties. Consequently, despite channeling provisions of the CLC 1992 and FUND 1992 claimants might seek compensation under national laws which acknowledge a wider concept of the environmental damage. Moreover, national courts might apply the interpretation of Conventions, different from the IOPC Funds, to provide compensation of environmental damage or might seek to avoid the application of Article I.6 of the CLC 1992.

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<sup>45</sup> *Ibidem*, p. 30.

<sup>46</sup> Guidelines, p. 4.7.

<sup>47</sup> *Ibidem*, p. 5.14.

### 3. ENVIRONMENTAL DAMAGE IN THE RULLINGS OF FRANCH AND SPANISH COURTS

In the *Erika* judgment the French Criminal Court of First Instance in Paris held that the CLC 1992 did not deprive civil parties of pursuing compensation for damage in criminal courts<sup>48</sup>. The court recognized that under French law departments, as local communities, were eligible to claim compensation for an environmental damage. It also acknowledged the rights of an accredited environmental protection organization to obtain compensation for moral damages caused to the collective rights it ought to defend, as well as compensation for ecological damage which affected collective interests under the protection of the organization<sup>49</sup>. On the appeal, the court accepted claims for loss of enjoyment and moral damage arising from damage to the natural heritage<sup>50</sup>. Moreover, local authorities and environmental protection organizations were granted compensation for pure environmental damage which was described as “all non-negligible damage to the natural environment, i.e. notably the air, the atmosphere, water, the soil, land, the countryside, natural sites, the biodiversity and interaction between these elements, which has no repercussions on specific human interest but affects a legitimate public interest”<sup>51</sup>. That approach has been confirmed finally by the ruling of the *Cour de Cassation*<sup>52</sup>.

It ought to be noted that all above judgments were rendered on the basis of French domestic law, not the CLC 1992. French courts decided that the CLC 1992 channeling provisions had not protected defendants other than a shipowner<sup>53</sup>. Specifically, the Criminal Court of the First Instance held that defendants, as the classification society or shipowner’s agent, were not the parties covered by the CLC 1992 channeling provisions. However, that unfortunate decision was changed by the *Cour de Cassation* which recognized their right to benefit from the channeling provisions in principle, but refused the same to the defendants, since it found that they had acted with willful misconduct (recklessly and with knowledge that such damage would probably result). In this way, the courts have applied French law as a legal basis to allow claims for environmental damage.

<sup>48</sup> Tribunal de Grande Instance de Paris, 11<sup>ème</sup> section, 16.01.2008, p. 234.

<sup>49</sup> 92FUND/EXC.40/4/1, p. 6.3.

<sup>50</sup> Cour d’Appel de Paris, Pôle 4 – chambre 11 E, 30.03.2010, p. 96; IOPC/JUN10/3/1, p. 4.2.4.

<sup>51</sup> M. Jacobsson, *The French Court of Cassation and the ERIKA case; some issues relating to civil liability*, “Journal of International Maritime Law” 2014, vol. 20(1), p. 25.

<sup>52</sup> Cour de cassation, criminelle, Chambre criminelle, 25 septembre 2012, 10-82.938.

<sup>53</sup> Z. Peplowska-Dąbrowska, *Odpowiedzialność za szkody wyrządzone katastrofą statku “Erika” (orzecznictwo francuskie)*, „Prawo Morskie” 2013, vol. XXIX, pp. 23–35.

Recently, the Spanish Supreme Court held the Prestige's master criminally and civilly liable for damage to the environment. In the Court's view, he was not protected by the channeling mechanism as the pollution arose from his act committed recklessly and with knowledge that the damage would probably result. Moreover, the Court found the shipowner acted with willful misconduct, denying him the right to limit his liability under the CLC 1992. Finally, it did not recognize the insurer's right to limit its liability, despite Article V.11 of the CLC 1992.

In the view of some delegations to the IOPC Funds those decisions called in question one of the pillars of the CLC 1992/FUND 1992 system – its uniform application. Despite the opinions, that decisions taken by the IOPC Funds' governing bodies constituted 'subsequent agreement' between the State parties, regarding the interpretation of the Conventions, or a 'subsequent practice' in the application of the treaty, establishing an agreement between the State parties regarding its interpretation pursuant to article 31.3 of the Vienna Convention on the Law of Treaties, numerous courts of the States Parties deviated from the IOPC Funds' line of interpretation. In fact, some of the Contracting States to the Conventions opposed to such role of the IOPC Fund, as they feared it could have been interpreted as an attempt to unduly influence courts<sup>54</sup>. It was noted that the IOPC Funds had no legal basis to challenge judgments given by courts. Thus, the IOPC Fund considered also more delicate possibilities in order to promote a uniform interpretation of the Conventions. Several options were discussed: the creation of a guidance document on the interpretation of the 1992 Conventions (1), making interpretative decision of the IOPC Funds' governing bodies (2), unified interpretation of the Conventions in the form of resolutions adopted either by the IMO Legal Committee or the IMO Assembly (3), an amendment of the terms and provisions of the CLC 1992 and Fund 1992 (4), further outreach activities as new training materials etc. (5) or measures to assist the implementation of the Conventions (6)<sup>55</sup>. So far, there has been no compromise among the Funds' Member States as to the best solution.

## CONCLUSION

The Guidelines are a non-binding document based on the text of the CLC 1992 as interpreted by the IOPC Funds. Thus, in relation to the issues of compensating lost services or alternative environments, they present a restrictive approach. In fact, the new version seems to express a desire to strengthen that statement. In

<sup>54</sup> IOPC/OCT11/4/4, p. 6.22.

<sup>55</sup> IOPC/OCT17/11/1, p. 4.5.6.

relation to compensation for lost environmental services it is underlined, at the opening of the Guidelines, that the Conventions do not provide that. For clarity, the new version explains what is understood by lost services, i.e. the services that support the plants and animals that live within it and to the humans who depend on the sea and shoreline for their livelihoods, recreation and enjoyment<sup>56</sup>. Whereas, in relation to the issue of alternative environment, the new Guidelines do not even use that expression, clarifying that only the measures taken at some distance from the area of damage, but still in its general vicinity, are admissible and under the condition that they actually repair a damaged element of the environment and its services. Moreover, the new Guidelines seem to throw more light on what is considered to be an acceptable indirect reinstatement measure. However, claims for costs of such measures would still be under severe scrutiny, specifically since there are no examples of such claims being admitted.

On the other hand, there is a growing number of national legislations recognizing claims for 'pure' environmental damage. This divergence will call into question the Conventions' suitability, since citizens of many Contracting States to the Conventions recognize the value of environment, besides its economic or recreational use. That will have to lead to the revision of the environmental damage concept under the CLC 1992/FUND 1992. Otherwise, it is likely that more courts of the Contracting States will attempt to apply national laws instead of the Conventions in order to compensate for such claims. The above-mentioned rulings prove that a scenario, in which channeling provisions of the CLC 1992 are interpreted in a way allowing to avoid the Convention's definition of damage and to apply broader understanding of an environmental damage in domestic law, is possible. Such a practice would substantially undermine the predictability and efficacy of the CLC 1992/FUND 1992 system<sup>57</sup>.

SZKODA W ŚRODOWISKU NA GRUNCIE KONWENCJI CLC 1992  
ORAZ FUND 1992. ROZWAŻANIA NA TLE NOWYCH WYTYCZNYCH  
DOTYCZĄCYCH FORMUŁOWANIA ROSZCZEŃ  
O NAPRAWIENIE SZKODY EKOLOGICZNEJ

**Słowa kluczowe:** szkoda w środowisku, zanieczyszczenie olejami, CLC 1992, Międzynarodowy Fundusz, wytyczne, utracone wartości środowiska, alternatywne środowisko, *Erika*, *Prestige*.

<sup>56</sup> Guidelines, p. 1.14.

<sup>57</sup> See M. Jacobsson, *The French...*, p. 28 who writes about a danger of creation of parallel compensation system for oil spill.

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## Abstrakt

Artykuł ma na celu omówienie pojęcia szkody w środowisku na gruncie konwencji CLC 1992 oraz FUND 1992 w oparciu o nowe wytyczne dotyczące formułowania roszczeń o naprawienie szkody ekologicznej, opracowane przez Międzynarodowe Fundusze. Podejście konwencyjne skonfrontowane jest z rozwiązaniami przyjętymi w Stanach Zjednoczonych Ameryki na gruncie ustawy OPA. Szczególna uwaga poświęcona jest problemowi kompensacji utraconych wartości środowiska do czasu przywrócenia go do stanu sprzed zanieczyszczenia oraz obowiązku wprowadzenia środowiska alternatywnego jako środka wynagrodzenia szkody ekologicznej. Autorka wskazuje na orzeczenia sądów francuskich oraz hiszpańskich w sprawach *Erika* oraz *Prestige*, które mogą poddawać w wątpliwość aktualność systemu kompensacji szkód olejowych CLC 1992/FUND 1992.