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## INTERPRETATION OF THE NOTION OF "RECEIVED" IN ARTICLE 10 OF THE FUND CONVENTION

Note by the Director

### Introduction

1 At its 15th and 16th sessions, the Assembly considered the problems that had arisen due to the fact that certain storage companies in the Netherlands which had been reported by the Dutch Government as having received contributing oil argued that the interpretation of the notion of "received" in the Fund Convention applied by the IOPC Fund was incorrect and that they should not be under any obligation to pay contributions to the IOPC Fund.

2 This issue has now been decided by the competent Court in the Netherlands. The present document sets out the outcome of the Court proceedings.

### Factual Situation

3 One of the basic concepts of the system of contributions to the IOPC Fund established by the Fund Convention is that contributions are payable by the person who has "received" contributing oil after sea transport.

4 Following instructions given by other companies, both Dutch and foreign, storage companies in the Netherlands receive oil after sea transport in their tanks. The oil is stored for a period of time, the length of which may vary, and then on instruction by the other company the oil is sent by ship or other mode of transport, including pipeline, to its final destination.

### Contribution System

5 Under Article 10.1 of the Fund Convention, contributions to the IOPC Fund shall be made in respect of each Member State by any person who, in the relevant calendar year, has received in the

ports or terminal installations in the territory of that State contributing oil carried by sea to such ports or terminal installations.

6 At its 3rd session, the Assembly set up an Intersessional Working Group to consider certain matters relating, inter alia, to the interpretation of Article 10 of the Fund Convention. The Working Group considered in depth the two principal questions of when the oil has to be considered as being "received" and who is the "receiver" of such oil. The Working Group's conclusions are set out in document FUND/A/ES.1/8.

7 The report of the Working Group was considered by the Assembly at its 1st extraordinary session. With regard to the question of which person had to be included in the oil reports as the "receiver" of oil, the Assembly agreed that, within the scope of Article 10 of the Fund Convention, Member States should have a certain flexibility to adopt a practical reporting system allowing an effective and easy checking of the figures and taking into account the peculiarities of the oil movement and the local circumstances of a particular country. The Assembly emphasised that, failing payment by persons reported other than the physical receivers, the physical receivers should ultimately be liable for contributions irrespective of whether the persons reported have their place of business or residence in a Member State or not (document FUND/A/ES.1/13, paragraph 10, pages 7-8).

#### Administrative Proceedings in the Netherlands in the First Instance

8 One Dutch storage company (Paktank Nederland BV) appealed before an Administrative Court according to Dutch legislation. It requested that the Court should state that the company was not liable to pay contributions to the IOPC Fund and that the Court should therefore annul the notification made by the Government of the Netherlands which stated that the company had received contributing oil during 1991, and indicated the quantities involved.

9 It should be noted that in the Netherlands there is an Act implementing certain provisions of the Fund Convention (Act of 14 May 1981, n°294). This Act contains, inter alia, certain provisions relating to receipts of contributing oil, but mainly in the form of references to the Fund Convention. A Royal Decree of 18 August 1982 concerning reports on oil receipts (1982 n°491) was also issued which contains some provisions relating to the notion of "receipts of oil".

10 Paktank objected to being considered as a "receiver" of oil for the purpose of Article 10 of the Fund Convention. The appeal made by Paktank was considered as an objection under the applicable rules of administrative procedure and was first dealt with by the Minister of Economic Affairs. An oral hearing in that instance was held on 8 September 1992. The IOPC Fund had submitted pleadings prior to this hearing. At the hearing the IOPC Fund was represented and presented its views on the issues raised by the objection.

11 The Minister of Economic Affairs rendered his decision on 28 September 1992. In this decision the objection lodged by Paktank was rejected.

#### Director's Position as Presented to the 15th Session of the Assembly

12 The notion of "receiver" is a basic concept in the contribution system under the Fund Convention, and the Assembly has taken a position as to the interpretation of this concept. The position of the Assembly, as well as the text of the Convention itself, are based on the idea that contributions are to be paid by the actual (physical) receiver of the oil after sea transport.

13 The oil quantities reported by the Government of the Netherlands have been physically received by Paktank and three other storage companies. For this reason, the ultimate liability for payment of contributions in respect of these quantities rests with these companies, as stated by the Assembly (see paragraph 7 above). In the document presented to the Assembly at its 15th session the Director took the view that the reports submitted by the Government in respect of these companies were correct and that the IOPC Fund should therefore maintain its position that the storage companies in the Netherlands were liable to pay contributions in respect of any quantities of contributing oil actually received by them.

#### Consideration by the Assembly at Its 15th Session

14 The Assembly confirmed the position taken at its 1st extraordinary session as to the interpretation of the concept of "receiver" (document FUND/A.ES/1/13, paragraph 10, pages 7-8). In particular, the Assembly emphasised that, failing payment by persons reported other than the physical receivers, the physical receivers should ultimately be liable for contributions irrespective of whether the persons reported have their place of business or residence in a Member State or not. The Assembly also agreed with the Director that the storage companies in the Netherlands were liable to pay contributions in respect of any quantities actually received by them (document FUND/A.15/28, paragraph 21.2).

15 The Assembly noted with satisfaction that the Minister of Economic Affairs of the Netherlands had rejected the objection made by Paktank. The Director was instructed to pursue the IOPC Fund's position if this company were to appeal against this decision to the Administrative Court (document FUND/A.15/28, paragraph 21.3).

#### Proceedings Before the Administrative Court of Appeal

16 Paktank appealed against the decision of the Minister of Economic Affairs to the Administrative Court of Appeal ("College van Beroep voor het Bedrijfsleven" - Court of Appeal for the Business Sector). An oral hearing on the appeal was held on 14 January 1994. The IOPC Fund had submitted pleadings prior to the hearing. At the hearing the IOPC Fund was represented and presented its views on the issues raised by the appeal.

17 The Administrative Court of Appeal rendered its decision on 25 February 1994. In this decision the appeal lodged by Paktank was rejected.

18 The reasons given by the Court for its decision can be summarized as follows:

Paktank's primary argument is that Paktank cannot be regarded as the legal receiver of the oil, nor as the actual receiver, since it only holds the oil involved on behalf of others.

Paktank stored 12 497 033 tonnes of oil on behalf of its clients in its installations established in the Netherlands. Hence it is established that Paktank actually received this oil. The fact that Paktank did not hold the oil involved on behalf of itself is of no importance, since the Fund Convention does not link the obligation to pay contributions to the persons who "possess" the oil involved, but designates, in neutral and general words, any person who "receives" oil as the one under the obligation to pay contributions.

Paktank's second argument is that the wording in Article 10 of the Fund Convention, "each person, who ... has received contributing oil", does not refer to the actual receiver.

Article 31.1 of the Vienna Convention on the Law of Treaties stipulates that a convention must be interpreted in good faith in accordance with the usual meaning of the terms of the Convention in the context and in the light of the subject matter and intention of the Convention. It appears from the preamble that the purpose of the Fund Convention is to supplement the Civil Liability Convention. The latter Convention provides that the owner of the oil transporting vessel is liable.

Against this background, the Court deems it plausible that, had it been the intention of the Contracting Parties to designate the oil companies and oil traders as the ones obliged to pay contributions, they would not have restricted themselves to the general indication in the preamble that the economic consequences of oil pollution damage should in part be borne by "the persons who have financial interests in the transported oil", but they would expressly have defined in the text that these companies and/or traders were under the obligation to pay contributions. Thus it follows that, apparently, the Contracting Parties deliberately opted for a wider, more general description to designate the person who is obliged to pay contributions, namely "any person who (...) received contributing oil". It must likewise be assumed that the Contracting Parties realised from the very beginning that in this wide and generally formulated circle of persons obliged to pay contributions were also included persons who stored oil for other persons and were only the mere actual receivers.

In view of the provisions of Article 31.4 of the Vienna Convention, the use of the verb "to receive" in Article 10 of the Fund Convention would have to be understood in the special restricted meaning maintained by Paktank, namely to receive in the legal sense only, if it were to be clear that this was the intention of the Contracting Parties. Such an intention has, however, not been established.

It must be concluded therefore that, on the basis of the general rules laid down in Article 31 of the Vienna Convention in respect of the interpretation of conventions, the phrase "persons who are obliged to contribute to the Fund in pursuance of Article 10 of the Convention", as referred to in Article 5.2 of the Act, is to include the actual receiver of the contributing oil, even if he does not hold this oil on behalf of himself.

It follows that the Minister, by designating as the person who received contributing oil the person who has taken in storage such contributing oil, whether or not received for another party, did not step beyond the boundaries of the circle of persons who are under the obligation to pay contributions, whose names and addresses the Minister is to notify the Director of the IOPC Fund pursuant to Article 5.2 of the Act.

The conclusion is that, since neither argument maintained by Paktank can lead to the result desired by it and furthermore, there is no other reason to set aside the disputed decision whilst applying the provisions of Article 5 of the Act on Administrative Procedure in the Business Sector, the appeal must be rejected.

19 Paktank may not appeal against the Court's decision.

#### Storage Companies' Position In Respect of the Reports on Oil Receipts for 1992

20 Paktank and one other storage company in the Netherlands had filed objections to the report of the Ministry of Economic Affairs of the Netherlands in respect of the quantities of contributing oil received by them in 1992. They proposed that the question in respect of the 1992 oil receipts should be kept pending until the question of the 1991 receipts had been decided by the Courts. The Minister of Economic Affairs agreed to this procedure.

21 It should be noted that three other storage companies in the Netherlands shared the views of Paktank and paid the 1992 annual contributions based on the 1991 oil receipts under protest. Paktank and two of the other companies made similar reservations to the IOPC Fund in respect of the payment of the 1993 annual contributions based on the 1992 oil receipts.

22 On the basis of the decision of the Administrative Court of Appeal, the Minister of Economic Affairs decided on 18 March 1994 not to consider the objections of Paktank and the other storage companies relating to the 1992 oil receipts. The companies have not appealed against the Minister's decision.

**Action to be Taken by the Assembly**

23 The Assembly is invited to take note of the information contained in this document.

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