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HAVEN INCIDENT

Search for a global solution

Note by the Director

1 Introduction

This document sets out the situation in respect of the search for a global solution to all outstanding issues in the *Haven* case.

2 Consideration by the Assembly at its 19th session

At its 19th session, the Assembly instructed the Director to explore, with the Italian Government and the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd (UK Club), the possibility of arriving at a global settlement in the *Haven* case which, as regards the 1971 Fund Convention, fell within the maximum amount of compensation that would be available under the 1971 Fund Convention, ie the difference between 60 million SDR and 14 million SDR, minus the amounts which the 1971 Fund had paid or might have to pay to other claimants. The Assembly emphasised that such discussions were without prejudice to the 1971 Fund's position in respect of the time bar issue. The Assembly authorised the Executive Committee to approve any global settlement within certain parameters (documents 71FUND/A.19/30, paragraph 17.11 and 71FUND/EXC.52/2, paragraph 2.3).

3 Consideration by the Assembly at its 3rd extraordinary session

3.1 At the Assembly's 3rd extraordinary session it was noted that, following the Assembly's 19th session, the shipowner/UK Club had continued to settle and pay claims as admitted in the *stato passivo*, and that the only claims in respect of which agreement had not been reached were those of Oromare and the Italian State.

3.2 The Assembly noted further that the shipowner/UK Club had undertaken to waive their claims against the shipowner's limitation fund and the 1971 Fund (Llt 1 354 768 078 plus US$224 900 plus £237 679, corresponding to a total of £884 700), if a global settlement were reached.

3.3 It was noted that the Executive Committee had been informed in February 1997 of discussions between representatives of the Italian Government, representatives of the shipowner/UK Club, and the Director on the possibility of reaching a global settlement of all outstanding issues in the *Haven* case. The Assembly noted that the Director had informed the Committee that the settlement discussed would have resulted in the 1971 Fund paying the Italian State approximately Llt 70 000 million (£25.1 million), an amount which was equivalent to the difference between 60 million SDR and the limitation amount applicable to the shipowner of 14 million SDR, less the amounts paid or payable by the 1971 Fund to other claimants. It was noted that the amount to be paid by the UK Club to the Italian State would have represented the balance of the shipowner's limitation fund (Llt 23 950 220 000) plus interest thereon (estimated at Llt 9 069 403 286) after all other claims had been settled and paid, plus a further amount to be paid *ex gratia* to the Italian State (in addition to the amount already paid *ex gratia* by the shipowner/UK Club to certain local public bodies). It was further noted that discussions had been held between the UK Club and the Director concerning the shipowner's/UK Club's right to indemnification pursuant to Article 5.1 of the 1971 Fund Convention.

3.4 The Assembly noted that, in the Director's view, a settlement along the lines set out in paragraph 3.3 above would fulfill the conditions laid down by the Assembly and the Executive Committee, namely that such a global settlement as regards the 1971 Fund would fall within the total amount that would be available under the 1969 Civil Liability Convention and the 1971 Fund Convention (ie 60 million SDR), that the 1971 Fund's payment would be made only in respect of quantifiable economic loss actually suffered by a claimant and that the 1971 Fund would not pay compensation for damage to the marine environment *per se*.

3.5 It was noted that, in the global settlement under discussion, all legal actions in the Italian courts would be withdrawn. It was also noted that the 1971 Fund's Italian lawyer had advised the Director that, once all claims had been settled and paid, it would not be possible to pursue the question of the conversion of the unit of account in the Supreme Court of Cassation, since there would no longer be any dispute. The Assembly noted that the Executive Committee had endorsed the Director's view, in the light of that advice, that, if a global settlement were concluded and became binding on all parties, the 1971 Fund should withdraw its appeal.

3.6 The Assembly noted that, since the Executive Committee's 52nd session, further discussions had been held between representatives of the Italian Government and the Director, and between the Government and the shipowner/UK Club, in respect of the elements of the settlement referred to in paragraph 3.3 above. It was noted that the Director understood that the shipowner and the UK Club had made a specific offer as regards the amount which they would be prepared to pay *ex gratia* to the Italian State.

3.7 The Director informed the Assembly that the offer of a global settlement had been considered at a governmental meeting held in Rome in March 1997, but that he understood that no decision had been taken as to whether to accept or reject the offer. It was noted that the Director understood that the Italian Government had decided to set up a commission composed of three Italian experts on international law to give an opinion as to whether, pursuant to Article 18 of the 1969 Vienna Convention on the Law of Treaties, Italy was bound to apply the 1976 Protocol to the 1971 Fund Convention in the *Haven* case although the Protocol had not entered into force when the incident occurred.

3.8 The Italian delegation made the following statement (document 71FUND/A/ES.3/7, paragraph 3.1.9):

> With reference to the offer made by the shipowner/UK Club and the 1971 Fund, the Italian Government is not yet in a position to communicate exactly when it will give a formal reply since it has decided to confer upon a panel of world renowned experts the task of ascertaining the legal framework of a possible global settlement. The said panel, which is

composed of Professor Antonio La Pergola, Professor Gabriele Pescatore[1] and Professor Guiseppe Guarino, is expected to give its advice in the next two months.

3.9 The Assembly noted that the Italian Government had not given a reply to the offer for a global settlement made by the shipowner, the UK Club and the 1971 Fund. In view of this situation, it was decided that it was for the Assembly to take the decision as to whether to agree to a global settlement (document 71FUND/A/ES.3/7, paragraph 3.1.10).

3.10 The Assembly instructed the Director to continue the discussions with the Italian Government and the shipowner/UK Club concerning the possibility of arriving at a global settlement in the *Haven* case within the parameters laid down by the Assembly and the Executive Committee (document 71FUND/A/ES.3/7, paragraph 3.1.11).

3.11 The Director informed the Assembly that 28 new claims, totalling Llt 35 000 million (£12.6 million), had recently been presented in the limitation proceedings against the shipowner and the UK Club. It was noted that these claims related to losses allegedly suffered by fish traders and fishermen and that they were being examined by the 1971 Fund's lawyer and technical experts.

4 Developments in respect of the search for a global solution since the Assembly's 3rd extraordinary session

No further discussions have taken place since the Assembly's 3rd extraordinary session concerning the possibiliby of arriving at a global settlement.

5 Method of conversion of (gold) francs into Italian Lire

5.1 It will be recalled that an important legal question has arisen in the limitation proceedings, namely the method to be applied for converting the maximum amount payable by the 1971 Fund (900 million (gold) francs) into Italian Lire. The 1971 Fund had taken it for granted that the conversion should be made on the basis of the SDR, one SDR equalling 15 (gold) francs. It was maintained by some claimants, however, that the conversion should be made by using the free market value of gold, since there was no longer any official value of gold and the 1976 Protocol to the 1971 Fund Convention which replaced the (gold) franc with the SDR was not in force.

5.2 The 1971 Fund's main argument in support of its position is that the inclusion of the word "official" in the definition of the unit of account laid down in the original text of the 1969 Civil Liability Convention was made deliberately to rule out the application of the free market value of gold. The Fund has drawn attention to the fact that the judge fixed the limit of the shipowner's liability by using the SDR. The unit of account in the 1971 Fund Convention is defined by a reference to the 1969 Civil Liability Convention, and in the 1971 Fund's view this reference must be considered to refer to the Civil Liability Convention as amended by the 1976 Protocol thereto. The 1971 Fund has pointed out that the application of different units of account in the 1969 Civil Liability Convention and the 1971 Fund Convention would lead to unacceptable results, particularly as regards the relationship between the portion of liability to be borne by the shipowner and the 1971 Fund, respectively, on the basis of Article 5.1 of the Fund Convention.

5.3 The judge in charge of the limitation proceedings held that the maximum amount payable by the 1971 Fund should be calculated by the application of the free market value of gold, which gives an amount of Llt 771 397 947 400 (£277 million) (including the amount paid by the shipowner under the 1969 Civil Liability Convention), instead of Llt 102 643 800 000 (£37 million), as maintained by the 1971 Fund, calculated on the basis of the SDR. After the 1971 Fund had lodged opposition, the Court of first instance (which was composed of three judges, including the judge in charge of the limitation proceedings) upheld that decision.

<1> Professor Piero Ziccardi replaced Professor Pescatore on the panel.

5.4 The 1971 Fund appealed against this judgement. In a judgement rendered on 30 March 1996, the Court of Appeal in Genoa confirmed that the maximum amount payable under the 1971 Fund Convention should be calculated by the application of the free market value of gold. The main reasons given by the Court of Appeal were as follows:

> The 1971 Fund had maintained that, since most of the claims were time-barred *vis-à-vis* the Fund, the total amount of the claims against the Fund did not exceed 60 million SDR and that for this reason it was not necessary for the Court to take any position as to the method of conversion. The defence of time bar was rejected by the Court which held that the intervention of the 1971 Fund under Article 7.4 of the Fund Convention had the same effect as a notification under Article 7.6.
>
> The Court of Appeal took the view that the demise of the official value of gold did not allow national courts, when calculating the maximum amount payable under the 1971 Fund Convention, to substitute the SDR for the (gold) franc before the entry into force of the 1976 Protocol to that Convention. The Court also held that the entry into force of that Protocol did not apply retroactively. For this reason the Court of Appeal stated that the gold unit could be converted only at its market value.

5.5 As instructed by the Executive Committee at its 48th session, the 1971 Fund lodged an appeal against the Court of Appeal's judgement to the Supreme Court of Cassation. The 1971 Fund submitted extensive pleadings to the Court (document 71FUND/A/ES.3/2 para 3.10).

5.6 The Italian Government has submitted pleadings in response to the 1971 Fund's appeal.

5.7 A detailed presentation of the issues involved and of the decisions and judgements by the Italian Courts is set out in document 71 FUND/A/ES.3/2

5.8 The panel of experts referred to in paragraph 3.8 above gave its opinion on 4 July 1997. An English translation thereof provided by the Italian Government is at the Annex.

5.9 The opinion of the panel of experts can be summarised as follows:

> International agreements such as the 1969 Civil Liability Convention and the 1971 Fund Convention are based on the official values of currencies and on the gold franc, the presumption being that these would maintain stability over time.
>
> Article 4 of the 1971 Fund Convention relating to the amount of compensation payable by the 1971 Fund and Article 12 governing the amount of contributions to the Fund were based on the gold franc and on the system of official parities, as was the 1969 Civil Liability Convention, to which reference is made in the 1971 Fund Convention. The system of official prices constituted an essential basis for the consent by all the parties to be bound by the 1971 Fund Convention.
>
> Since the official currency parity system in terms of the gold content of the US Dollar has been superseded, it is necessary to identify through interpretation of the 1971 Fund Convention a new unit of reference for the Convention. This could be done only by adopting a unit devoid of official character or by adopting a unit of account having an official character comparable to the gold franc.
>
> The gold content of the gold franc with its market value could not have replaced the gold franc because it did not have the official value of the gold franc. The market value of gold cannot replace the official parities between currencies, since this would produce the opposite result to the stability which the official parities were intended to produce but would have the opposite result of extreme variability of the values. No system of compensation - and this is precisely what was introduced by the 1969 Civil Liability Convention and the 1971 Fund Convention - can be based on units of reference whose value is variable and unpredictable.

Gold as a commodity is not the same thing as gold used to define the "official" value of a currency. In a certain sense it is the opposite. Once the link between the official gold content and the franc has lapsed, gold is placed on the same footing as any other commodity.

For these reasons the interpreter of the Convention must opt for an official index. Since an official unit of account, the SDR, was introduced after the abolition of the official parities between the currencies making up the system of which the gold franc formed a part, it is necessary for the interpreter to choose the SDR. This is so, not because the SDR replaced the gold franc as a result of the 1976 Protocol, which was not in force at the time of the *Haven* incident and does not therefore constitute a source of law to be used as a legal basis to resolve the *Haven* case, but because the SDR had been adopted by the International Monetary Fund as an internationally accepted unit of account after the abolition of the criterion of official parties of currencies based on gold content and in order to replace the whole system. The problem then arises as to the number of SDR to which reference should be made.

After considering Resolution N°1 adopted by the Assembly of the 1971 Fund in 1978, the opinion states that one SDR should be considered equal to 15 gold francs.

Resolution N°1 is of extreme importance since it acknowledges that it is inspired by a method of interpretation of the provision in the 1971 Fund Convention relating to the gold franc. It is stated in the Resolution that it was intended to use this interpretation until the 1976 Protocol entered into force.

The parity between 15 gold francs and one SDR corresponded to the effective value of the SDR in terms of the values of the currencies making up the SDR "basket".

An entirely different question is whether the number of SDR to be taken into account for various purposes should change over time.

There is a fundamental difference between the gold franc and the system of official parities between the currencies, on the one hand, and the parity of the SDR, on the other.

The former system was intended to stabilise official exchange rates between currencies and individual currency and commodity values. With the SDR system, it was decided to give up the aim of maintaining stability of prices. The SDR follows prices, since the SDR reflects devaluation or revaluation of currencies within the SDR basket.

In order to take account of this changed situation, the maxima of compensation and contributions were changed in both the 1969 Civil Liability Convention and the 1971 Fund Convention, as regards the Fund Convention from 60 million SDR to 135 million SDR (or in a particular case to 200 million SDR).

These higher amounts do not apply to the *Haven* incident pursuant to legal rules because they are laid down in agreements concluded after the incident or in agreements to which Italy is not a party. The question is, however, whether the same result can and should be arrived at by interpretation. This question is answered in the affirmative.

The 1976 Protocol to the 1969 Civil Liability Convention has entered into force, resulting in the amended definition of the unit of account laid down in Article V.9 of the Convention, ie referring to the SDR. The references in Articles 4.4 and 4.6 of the 1971 Fund Convention should therefore be construed as referring to the SDR and to the SDR system as a whole. Article V.9 (c) of the 1969 Civil Liability Convention (as amended by the 1976 Protocol thereto) provides that the conversion between national currencies and the SDR shall be made in such a way as to express as far as possible the same real "value" of the SDR. Subsequent provisions are based on the principle that any adjustment of the SDR

to the real values requires a change in the amount of contributions and the maximum compensation.

Article 12 of the 1971 Fund Convention makes it possible to adjust the total amount of contributions to the 1971 Fund according to the total compensation pay-out, so that there is no risk that an adjustment of the maximum amount of compensation would cause the 1971 Fund's accounts to be unbalanced.

Only by an adjustment of the maximum amounts of compensation can the SDR properly perform the same function as the gold franc and replace the gold franc by interpretation.

The principle underlying the whole system of official parities (and its use in the 1969 Civil Liability Convention and the 1971 Fund Convention) was to ensure that there was a genuine correspondence between the unit of account and the true value of goods.

It is therefore possible to replace the gold franc by the SDR for interpretation purposes inasmuch as the SDR is capable of ensuring by another route (adjustment of the number of SDR instead of stability of the value of goods) the same result as adequate correspondence between the value of the loss and the value of the compensation.

The question is then what method should be used for adjustment of the number of SDR by a strictly interpretative route.

The 1984 and 1992 Conventions provided for an adjustment of the maximum compensation by up to three times, increasing the maximum amount payable by the Fund from 60 million SDR to 135 million SDR (or in one particular case to 200 million SDR). Corresponding changes were made to Article 12 governing contributions to the Fund.

The new maximum (135 million SDR or 200 million SDR) is a significant "symptom", not contradicted by other "symptoms", that the value of the SDR maintains its original relationship to the actual extent of the damage if multiplied by a factor not exceeding 3.33.

Although the 1984 and 1992 Conventions are without effect for Italy, reference should nevertheless be made to the value fixed by these Conventions in order to resolve the issue under consideration. This is so because the value is given by an official increase originating from the same system as that in which this issue has arisen, regarding the percentage increase required to maintain the original relationship between the level of compensation and the actual loss or damage.

The question submitted to the panel was to establish only the maximum amount of compensation payable under the 1971 Fund Convention. The actual amount of compensation, which has to be contained within this maximum limit, must be the result of decisions by the 1971 Fund or of agreements between the parties.

5.10 The Italian Government has reserved its right to assess the legal grounds of the opinion on the issue of the maximum amount of compensation available.

6 Action to be taken by the Assembly

The Assembly is invited:

(a) to take note of the information contained in this document;

(b) to give the Director such instructions as it may deem appropriate in respect of the discussions with the Italian Government; and

(c) to give the Director such instructions in respect of the proceedings in the Supreme Court of Cassation on the gold issue as it may consider appropriate.

ANNEX

Ministero degli Affari Esteri

SERVIZIO DEL CONTENZIOSO DIPLOMATICO
DEI TRATTATI E DEGLI AFFARI LEGISLATIVI

THE HAVEN CASE

1. On 11th April 1991 the oil tanker, Haven, went down in the Gulf of Liguria, causing enormous damage to the sea, the coastline and the settlements.

Because of this disaster, damages became due to various corporations and individuals from the International Guarantee Fund established under the International Convention of December 1971.

The question of the maximum amount of damages has not yet been resolved. There is no agreement on the unit of account to be used, or the maximum indemnities payable.

We have been asked to provide a wholly independent and impartial opinion on this matter.

2. The legal provision governing this matter, in force at the time of the disaster, is article 4(4) and (6) of the 1971 Fund Convention (FC 71) ratified by Italy by Law no. 185 of 6.4.1977.

Pursuant to article 4(4) and (6) FC 1971 the total amount of damages payable from the proceeds of the Fund may not exceed 450 million francs. However, the General Meeting was empowered to vary this amount and raise it to

900 million francs, in the light of the experience in connection with previous events, and particularly the loss and damage caused by them, and currency fluctuations.

3. The franc to which this provision refers was defined in article V(9) of the related civil liability Convention adopted in 1969 (v. FC 71, article 1(4)).

Under article V(9), the franc is *"une unité constituée par soixante-cinq milligrammes et demi d'or au titre de neuf cent millièmes de fin"..."Le montant mentioné au paragraph 1 du présent article sera converti dans la monnaie nationale del l'Etat dans lequel le fonds doit être constitué; la conversion s'effectuera suivant la valeur officielle de cette monnaie par rapport à l'unité définie ci-dessus à la date de constitution du fonds"*

4. The official value to which this provision refers is not the value of the gold but the value of the national currencies. It therefore follows that CLC 1969 and FC 1971 were based on the understanding that there existed pre-established official values of the national currencies. The official values of the currencies were based on the Bretton Woods Agreements which established an

official gold parity of the dollar, and it was on the basis of this parity that the official values of all the individual States' currencies were determined, and hence their value in relation to the gold franc.

5. The Bretton Woods Agreements were intended to stimulate trade between different parts of the world as rapidly as possible in accordance with the volume of money made available for this purpose. Even though the Agreements did not exclude the possibility of fluctuations in the values of the currencies or inflation, the intention was to ensure that they would not occur, or if they did to ensure that they were small.

International agreements such as those underlying CLC 1969 and FC 1971 are based on the official values of currencies and the gold franc, on the assumption that they will remain stable across time.

Consistently with these assumptions, the Fund Convention (article 4(6)) provided that the maximum admissible variation in the amount of damages would be twice the basic amount; this doubling not only related to currency fluctuations and devaluation, but also to other

such factors as the experience of previous events and the damage or loss caused by them.

6. The Bretton Woods Agreements did not stand the test of time.

Trade grew far more rapidly than expected. Gold stocks soon became insufficient to finance the growth of international trade.

Instability was also caused by the inability of the United States to pay its balance of payments deficits by transferring its gold holdings.

7. In 1974 the official parity set out in the Bretton Woods Agreements was replaced by Special Drawing Rights, SDRs, without any reference to gold. Like the gold francs, the SDRs were official units of account.

However, they were quite different from the gold franc because, unlike the system of official par values of which the gold franc formed part, the SDRs were not specifically designed as a means of international monetary settlement. The SDRs were simply an official unit of account, but no longer linked to any "official values" of

national currencies.

It was implicit in the new system that the Special Drawing Rights might lose value against national currencies and the real economy. The creation of the SDRs was not just a matter of replacing one unit of account by another, but it was the practical implementation of a wholly new principle, that differed from and to a certain extent ran counter to the previous one regarding the function of the official unit of account and its relationship to the reality of international trade.

8. Have done away with the principle on which the Fund Convention was based (the official parity between currencies) the first question to be asked was whether the whole Brussels Convention of 18 December 1971 was automatically repealed with it. Both article 4, regarding the amount of damages to be paid out of the Fund, and article 12 governing the amount of contributions paid into the Fund were based on the gold franc and on the system of official parities, as was the related Convention on Civil Liability to which reference was made. The official price system had been one of the essential bases of the

agreement by all the parties to be bound by that Convention.

It would therefore not be wholly unreasonable to assume that the Fund Convention had become inapplicable as a whole.

But this was not the intention of the Parties. By their conduct, all the Parties, and not only the States but also the other entities that were required to contribute to the Fund and were bound by the assurances set out in the allied Civil Liability Convention, demonstrated the fact that they considered that both Conventions remained in force. The contributions continued to be paid, the insurance policies concluded, and damages and compensation paid out.

It follows from this conduct that the contracting Parties to both Conventions, which constitute one single system both substantively and by virtue of the formal mutual references they contain, considered that the gold franc was not essential for the application of the whole system of guarantees, whatever their original intentions may have been, and that it was the responsibility of the authority interpreting the Conventions, after taking note

of the lapse of the Bretton Woods Agreements and of the official parities, to establish which other means of payment was to replace the gold franc as the unit of account to settle the amount of contributions and damages due.

9. The problem of interpretation is complicated by the fact that the official parities linked to the relationship of the dollar, and through the dollar the franc, to gold, were designed to regulate the international monetary markets.

The Fund Convention provided a limited criterion for adjusting to fluctuations and currency devaluation only in so far as it was assumed that these fluctuations and devaluations should not occur or should only be minor as a consequence of the official parity system and its capacity to provide means of payment to match the forecast growth in trade.

After this objective had been thwarted and the official parity system had disappeared, the exact opposite scenario was envisaged. It was predicted that monetary fluctuations and variations in the relationship between

the SDRs and traded goods would occur, for both the compelling reason that it was the very existence of these fluctuations and the instability factors that had arisen had caused the Bretton Woods Agreements to be superseded, and because experience had shown that there had been a time-honoured and constant law that currencies lost valued in terms of commodities, which also applied to the currencies making up the basket underlying the SDRs.

In the 1969 Convention, currency fluctuations and currency devaluation adjustments had been kept down to the minimum, because an international monetary system was used under which increasing available gold reserves was supposed to be able of coping with any demand to increase the money supply and hence offset any tendency towards devaluation.

Once the official currency parity system in terms of the gold content of the dollar had been superseded, it became essential to lay down rules to govern measures to adapt to devaluation because from now on it was expected that devaluations and fluctuations would certainly occur in future.

10. In order to identify the new benchmark unit for the

payment of damages due from the Fund there was, and there still is, a first option for interpretation: either to adopt a benchmark unit which is "unofficial" or whether, if in doubt, it would be better to have an "official" benchmark unit of account on a par with the gold franc. By "unofficial" benchmark unit we mean bullion or the value of traded goods, for example.

The reason for referring to bullion is that article V(6) of the 1969 CLC defined the gold franc in terms of its specific gold content. Once the gold franc had lost its "official" function, the possibility was envisaged of referring to the value of the gold content that the franc was supposed to have.

However, nothing could be more mistaken. The gold franc had been adopted as a benchmark value for its "official" parity with the dollar, for which an official gold content had also been established.

But the system did not depend solely on these unique par values, but on the fact that an "official parity" had been set for every currency. Just as the whole system of official parities was designed to stabilise the economies, it also indirectly stabilised the price of gold on the

currency markets.

The gold content with its related market value could not replace the gold franc for the convincing reason that the gold franc had no official value. It should also be borne in mind that there has never been an "official gold value" as is often wrongly believed. Conversely, there did exist a system of official currency parities, of which the gold parity was one component.

The market value of gold could therefore not replace the official parities between currencies because it did not have the function of establishing the official parity between currencies, and if anything, it produced the opposite result to stability, namely, the extreme variability of the par values.

No guarantee system - and that is exactly what was introduced by the two Conventions, CLC 1969 and the FC 1971 - can be based on benchmark units whose value is variable and unpredictable.

Another compelling consideration to be borne in mind is that any change in the gold value of commodities is wholly irrelevant, in institutional and real terms, to the hydrocarbons transport sector and to any loss or damage

that it might cause.

Having removed the linkage between the official gold content of the franc and, before this of the dollar, gold is now on the same footing as any other commodity. This is why it is quite arbitrary to use gold as the basis, because no objective reason could justify preference for gold rather than for tin, copper or silver, platinum or better still crude oil whose transport by sea forms the basis of the system of guarantees introduced by both international conventions referred to above.

Gold as a "commodity" is not the same thing as gold used to set the "official" value of a currency. To a certain extent, it is its opposite.

11. Similar reasons that have been used in relation to goal also apply to the linkage with the value of commodities and/or the cost of living. The value of commodities may only be used provided that there is some official method set to calculate it. In every country, whenever current prices are used for legal purposes, there exists some prior legal instrument defining the "basket" of commodities to which reference is made and the ways in

which the prices are to be calculated on the basis of them (Chamber of Commerce bulletins, the official prices in other countries, prices ascertained on some specific commodity Exchange, etc). The contracting States could well have used similar systems for the purposes of operating the Fund. Since they did not do so, the interpreter cannot do it for them, working out a system of his own to identify the level of worldwide prices.

12. In view of the foregoing remarks, faced with the alternative of adopting an informal benchmark index or an official index, the interpreter has to opt for the latter. And since an official unit of account -- the Special Drawing Right -- was introduced after the abolition of official parities between the currencies making up the system of which the gold franc formed part, the interpreter must necessarily refer to these.

After the abolition of official parities between currencies, based on the dollar and on the franc and their respective gold content, governments realised that at all events they still needed some officially recognised benchmark unit. Not wishing to consider that the whole

system had been abolished, they adopted the twin Protocols of 19 November 1976 replacing the gold franc with Special Drawing Rights in both the Civil liability and Fund Conventions.

While waiting for governments to ratify these Protocols, and independently of their current effectiveness, the general meeting of the Fund adopted a resolution shortly afterwards (15 November 1978) establishing that for the purposes of implementing CF 1971 the gold franc would be replaced by Special Drawing Rights by way of interpretation, with a parity of 15 gold francs to one Special Drawing Right.

Doubts have been raised as to whether the 1976 Fund Protocol is applicable or not to this particular case because, even though Italy had acceded to it under Law 39 of 25 January 1983, it had not yet come into effect on the date of the Haven accident since it had not been acceded to by a sufficient number of States at that date.

The following arguments make no reference to this issue, assuming that the 1976 Fund Protocol is not a source of law that may be used as a legal basis to settle this case.

Indeed, the understanding here is that this case can be solved exclusively by way of interpretation.

13. Having ascertained the fact that after the abolition of the system of official parities, of which the gold franc was the expression, the 1971 Convention nevertheless remained in force, the interpreter must necessarily decide which other unit must be used to replace the gold franc in order to give continuity to the Convention and make it applicable.

Special Drawing Rights replaced the gold franc not because they were introduced by the 1976 Protocols but because they had been adopted in the Agreements on the International Monetary Fund as an internationally accepted unit of account after the abolition of the criterion of official currency par values on gold content, and in order to replace the whole system.

14. Having ascertained, by way of interpretation and exclusively on the basis of the 1971 Fund Convention, that Special Drawing Rights had replaced the gold franc for the purposes of settling mutual obligations between the

Parties, the problem that then arises is the number of Special Drawing Rights to which reference should be made.

And this question arises in terms of three different aspects: a) which original par value is to be used; b) whether that par value should remain fixed and stable in time, and c) whether the amount of Special Drawing Rights to be considered should change across time.

In Resolution No. 1 of November 1978, the General Meeting of the Fund set the parity of the SDR at 15 gold francs. At the same time it was agreed to change all the maxima in accordance with this basic parity.

Resolution No. 1 of November 1978 is an extremely important document. It declares that it is based upon a "method of interpretation" of the clauses of the Convention dealing with the franc, and that it was intended to use this interpretation until the 1976 Protocols became effective. The Resolution adopted by the General Meeting of the Fund therefore seems to confirm the position adopted here, namely, that the replacement of the gold franc by Special Drawing Rights was not the result of any change in the rules, but by way of interpretation.

Secondly, it is important to note that the par value

of 15 gold francs to 1 SDR was not the result of any prescription laid down by a source of law, but was the actual value of the Special Drawing Right in terms of the values of the currencies making up its "basket" in terms of the gold franc. This demonstrates two things: the base value used to set the parity was the actual current value of the SDR; secondly, having established the initial gold franc parity of the Special Drawing Right, the gold franc had no longer any function to play within the system created by the two Conventions, CLC 1969 and FC 1971.

The fact is that any reference to the gold franc disappeared from every text subsequently drafted by the two CLC and FC institutions.

We have therefore implicitly answered the second question, namely, whether the parity of 15 gold francs to 1 Special Drawing Right should remain unchanged in time. The answer is certainly in the affirmative, consistently with the assumption that the only purpose of setting the parity established by interpretation in Resolution No. 1/71 was to set a par value for the purposes of implementing the provisions and rules of the Convention, which set the amount of the contributions and indemnities.

15. The third question is another matter altogether: whether the number of Special Drawing Rights to be considered for whatever purpose should vary with the passing of time.

Here, what is important is the fundamental difference between the gold franc and the system of the official parities between individual currencies, on the one hand, and the parity of the SDR on the other.

The system of official parities between currencies had been intended, and was expected, to stabilise official exchange rates between currencies and individual currency and commodity values. Any variation from this stability had been forecast and was accepted only in terms of a ratio of one to two (see article 4(6) FC).

With Special Drawing Rights, on the other hand, it was decided *a priori* to give up the aim of creating price stability. Indeed, the SDRs were required to follow prices, because they were to reflect the devaluations or revaluations between the currencies in the basket. In other words, the relationship between the SDR and commodities was the reverse of the relationship between

commodities and the gold franc. In the previous system, commodity prices were expected to be stabilised by virtue of the system of official par values and the gradual increase in gold stocks. Now it was the SDRs that were required to follow the commodity price trends.

Having reversed the relationship, a second important aspect became apparent: since the system of official par values had failed to achieve its expected overall stabilisation effect, commodities were revalued as a whole in terms of the currency system, which was considered as a whole, according to the age-old currency devaluation law mentioned earlier.

In order to take account of this phenomenon (which, in theory, should never have occurred in a system of official parities, but which was in fact unavoidable having removed the brake that the system of official parity values had been supposed to apply) the following CLC and FC Conventions changed the maxima of both the contributions and the indemnities. The changes were not enormous, but they were nevertheless very high.

In the FC, according to current provisions, the maximum indemnity under the original article 4(6) has

risen from 60 million SDRs to 135 million SDRs or, in one particular case, as high as 200 million SDRs.

These values do not apply to the Haven case as a result of legal rules, because they either come from instruments post-dating the Haven disaster or from Conventions to which Italy is not a Party.

The question to be answered, therefore, is whether, in the absence of any legal rules, the same result can and must be attained by way of interpretation.

16. The answer to this question is in the affirmative for a number of concurrent principles. They are the following:

a) Resolution No. 1 adopted by the General Meeting of the Fund on 1 November 1978 set a gold franc/SDR equivalence on the basis of the real values at the time. Consequently, according to the interpretative principle, after the stabilising effect of the official exchange rates had failed, reference should be made to the real values;

b) as far as the unit of account was concerned, the 1971 FC referred to the definition given in article 5(9) of the allied CLC. Subsequently, although the 1976 FC

failed to receive ratification by the required number of States, the CLC Protocol did come into force, and was ratified in Italy by Law no. 39/83.

Article 5(9) of this Protocol was replaced by another provision that ignored the gold franc and referred to SDRs. The references in article 4(4) and (6) of the FC must therefore be construed today as referring to SDRs and to the provisions governing SDRs as a whole. In this regard, two principles become relevant: the principle referred to in article V(9(c)) CLC, which provides that the conversion between national currencies and SDRs must be effected in such a way that they express the highest possible real "value" of the SDR, and the principle which subsequent provisions enshrined, namely, that the adjustment of the SDRs to the real values implies a change in contributions and maximum indemnities;

c) thirdly, indemnities are adjusted to the actual loss or damage caused under an internationally recognised principle that exists in the legislation of every developed country, albeit the limits on methods may vary from one legislation to another;

d) article 12 of the 1971 Convention provides a

mechanism which makes it possible to adjust the contributions to the Fund according to the total indemnities paid out, to avoid any likelihood that the adjustment of the maxima could produce disequilibria in the Fund's accounts;

e) a further consideration, which brings us back to the approach underlying the whole of this position paper, is that it is only by adjusting the maximum indemnities that the SDRs can properly perform the same function as the gold franc and replace the gold franc by way of interpretation.

The system of official parities was based on the principle that the ratio between the value of the unit of account and the value of the currencies must be kept constant. This was expected to be achieved on the assumption that it was possible to make financial resources available to international trade in proportion to the rate of growth of international trade. The system of official parities was replaced precisely because it transpired was that it was unable to achieve that objective. But it also demonstrated the fact that the underlying principle of the whole system (and hence its

use in the CLC and FC) had been to ensure a real matching between the unit of account and the real values of commodities.

The SDR can therefore replace the gold franc by way of interpretation, as occurred without any dispute after the official parities had been abolished, as was formally resolved in Resolution No. 1 of November 1978 adopted by the General Meeting of the Fund, in so far as they could achieve the same result of ensuring sufficient matching between the amount of the damage and the amount of the indemnity, albeit by another route (adjusting the amount of SDRs rather than the stability of the value of the commodities).

17. There is only one further question to be answered: What criterion should be used for adjusting the value of the SDRs adopting a strictly interpretive approach?

The adjustment method must necessarily be the one which is naturally consistent with the system in terms of which the question must be answered and which is adopted by that same system.

For indemnities in respect of damage resulting from the transport of hydrocarbons, the 1984 and 1992

Conventions adjusted the amount up to threefold, raising the total damages payable by the Fund from 60 to 135, and from 60 to 200 million SDRs in one particular case.

Corresponding changes have also been made to article 12, governing contributions to the Fund.

Italy did not accede to the two Conventions of 1984 and 1992, but that is not the issue here. The new amount of the indemnity (increased from 60 to 135 or to 200 million SDRs) is a significant 'symptom' which is not belied by any other 'symptoms' that the value of the SDR maintains its original ratio to the actual amount of the loss or damage if it is multiplied by a maximum factor of 3.33.

Even though the two conventions are not binding on Italy, reference must nevertheless be made to the value given in the 1994 and 1992 Conventions to settle the question at issue here, because the value is given by an official increase stemming from the same system in relation to which the question is raised, regarding the percentage increase required to keep the original proportion between the indemnity and the actual loss or damage.

Any other criterion for evaluation purposes must be excluded because it would not be official, and would fall outside the system, and would therefore be arbitrary.

18. The question put to us was to establish only the maximum amount of the indemnity payable in respect of the loss and the damage.

The actual amount of the indemnity, which has to be kept within that maximum limit, is the result of decisions taken by the Fund or agreements between the parties.

We are at your entire disposal for any further clarification, thanking you for the confidence placed in us.

With kindest regards

Rome, 4 July 1997