



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
28th session
Agenda item 3

FUND/EXC.28/6/Add.1
2 October 1991

Original: ENGLISH

INCIDENTS INVOLVING THE IOPC FUND

HAVEN

Note by the Director

1 Introduction

Since the issue of document FUND/EXC.28/6, the following developments have taken place in respect of the HAVEN incident.

2 Reports of Further Pollution

2.1 On 27 September 1991, the Director was informed by the French Government that French territorial waters and the French coastline had been affected by oil which was suspected to have originated from the HAVEN. It was stated that the National Contingency Plan with regard to operations at sea (Plan POLMAR-MER) had been reactivated on 26 September 1991. Some oil was reported to have affected municipalities in the Department of Var, west of Nice. In addition, a large oil slick had been sighted north of the coast of Corsica.

2.2 After consultations with French officials it has transpired that despite several extensive aerial surveys the existence of any offshore slicks has not been confirmed. Although a few tar balls have been found at sea and sampled, chemical analysis is still pending. Meanwhile, the Harbour Master of Genoa has dismissed the possibility of any recent significant release of oil from the wreck of the HAVEN.

2.3 Small quantities of tar bars have stranded in five municipalities near St Tropez. Samples have been taken but not yet analysed.

3 Discussions with Governments

3.1 At its 27th session the Executive Committee instructed the Director to study the various legal problems arising from an incident of this magnitude having caused pollution damage in several Fund Member States and to hold discussions with the various Governments involved concerning the possibility of facilitating a speedy settlement of the claims (document FUND/EXC.27/6, paragraph 3.7).

3.2 The Director is studying the various legal problems arising from this incident. At the invitation of the Italian Government, the Director went to Rome in early September 1991 and had fruitful discussions with representatives of the Italian Government concerning various problems involved.

Discussions have also been held with representatives of the French Government. The discussions dealt, inter alia, with the possibility of facilitating a speedy settlement of claims. The difficulty in this respect is that the total amount of the claims is not yet known. Contacts have also been made with the Government of Monaco.

4 Legal Proceedings

4.1 On 20 and 21 September 1991, the Court of first instance in Genoa held its first hearings to consider the claims arising out of this incident. The Director and the Legal Officer were present at the hearings. Further hearings will be held weekly until all the claims have been considered. The parties will be invited to submit written pleadings on the questions in dispute. It is estimated that the Court will not be able to establish the list of accepted claims ("stato passivo") until the summer of 1992.

4.2 Two issues of major importance for the IOPC Fund were raised by other parties at the first court hearings, viz the method for conversion into Italian Lira of the maximum amount payable under the Fund Convention and the admissibility of claims relating to damage to the marine environment. These two issues are dealt with below.

5 Method of Conversion of (Gold) Francs into National Currency

5.1 Under Article 4.4 of the Fund Convention, the maximum amount payable pursuant to the Civil Liability Convention and the Fund Convention is 450 million (gold) francs. This amount was increased by the IOPC Fund Assembly in stages to 900 million (gold) francs, pursuant to Article 4.6 of the Fund Convention.

5.2 The amounts in the Civil Liability Convention, as well as those in the Fund Convention, are expressed in (gold) francs (Poincaré francs). The relevant provisions are Article V.9 of the Civil Liability Convention and Article 1.4 of the Fund Convention which read as follows:

Article V.9 of the Civil Liability Convention:

The franc mentioned in this Article shall be a unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. The amount mentioned in paragraph 1 of this Article shall be converted into the national currency of the State in which the fund is being constituted on the basis of the official value of that currency by reference to the unit defined above on the date of the constitution of the fund.

Article 1.4 of the Fund Convention:

"Franc" means the unit referred to in Article V, paragraph 9 of the Liability Convention.

5.3 In 1976, Protocols were adopted to amend the Conventions. Under the Protocols, the (gold) franc was replaced as the monetary unit by the Special Drawing Right (SDR) of the International Monetary Fund. One SDR was then considered equal to 15 (gold) francs. The value in SDR is to be converted into national currency by referring to its market exchange value.

5.4 The 1976 Protocol to the Civil Liability Convention entered into force in 1981, whereas the 1976 Protocol to the Fund Convention has not yet come into force.

5.5 In 1978, at its 1st session, the Assembly adopted an interpretation of the provisions in the Fund Convention dealing with (gold) francs under which the amount expressed in francs shall be converted into SDRs on the basis that 15 francs are equal to one SDR. The number of SDRs thus found shall be converted into national currency in accordance with the method of evaluation applied by the International Monetary Fund (IOPC Fund Resolution N°1).

5.6 At its 1st extraordinary session, held in 1980, the Assembly discussed the problems caused by the lack of uniformity in Member States regarding the methods of converting the (gold) franc into national currencies. The Assembly adopted a Resolution in which it urged Governments of Member States to ensure that their national laws were brought into line with the method of conversion adopted by the Assembly in 1979 (IOPC Fund Resolution N°4).

5.7 The above-mentioned two resolutions are attached at Annexes I and II to this document.

5.8 At the first Court hearing the question was raised as to the method of conversion to be applied for calculating the maximum amount payable under the Fund Convention in Italian Lira. It was maintained by some claimants that the conversion should be made by using the free market price of gold, since the 1976 Protocol to the Fund Convention was not in force.

5.9 The IOPC Fund was invited by the Court to submit its pleadings on this point by 30 November 1991. The judge indicated that the Court would make its decision on this issue in early 1992.

5.10 The Director, together with the IOPC Fund's Italian lawyer, is preparing the pleadings to be submitted to the Court. The Director has also engaged a consultant, Dr T A Mensah, former Assistant Secretary-General and Director of Legal Affairs and External Relations Division of the International Maritime Organization, to make a study of the problems involved.

5.11 At this stage the Director would like to draw the attention of the Executive Committee to the following aspects of this problem.

5.12 The IOPC Fund has two inter-related purposes: firstly, to pay compensation to victims of pollution damage who are unable to obtain full compensation under the Civil Liability Convention and, secondly, to indemnify the shipowner for a specified portion of his liability to victims under that Convention. To achieve these objectives it is necessary to use the same unit of account and the same method of converting the unit into national currencies in the application of both the Civil Liability Convention and the Fund Convention.

5.13 The original unit of account (the (gold) franc) in the Civil Liability Convention, which was also adopted for the Fund Convention, was to be converted into national currencies on the basis of the 'official value' of gold by reference to the national currencies in question. Since the adoption of that unit, the official value of gold has disappeared from the international monetary system, and it is therefore no longer possible to convert the (gold) franc on the basis laid down in the text of the Civil Liability Convention.

5.14 In the absence of an official price of gold, it has been suggested that the gold unit should be converted into national currencies on the basis of the 'market price' of gold. However, this market price is particularly inappropriate as a basis for converting the IOPC Fund's limits into national currencies. In the first place, the market price is very volatile and continuously changes in value. Using such a changeable unit as a basis cannot produce the uniformity which was one of the main reasons for the adoption of a common unit of account for use in all Contracting States. In the second place, using the market price of gold would create absurd results in practice. For example, it would mean that the amount of indemnification to be paid to the shipowner by the IOPC Fund would be calculated on a basis different from that used for calculating the shipowner's liability to the victims under the Civil Liability Convention. The indemnification to be paid by the Fund to the shipowner constitutes a portion of the shipowner's liability under the Civil Liability Convention. Using different units and different methods of conversion for the two Conventions would create complications and could result in the shipowner receiving more or less than the portion which the 1971 Fund Convention provides.

5.15 In the opinion of the Director, these considerations demonstrate that the only appropriate method for converting the unit of account in the 1971 Fund Convention is to use the SDR method, as provided for in the 1976 Protocol to the Fund Convention and in IOPC Fund Resolution N°1.

5.16 It appears that the State of Italy, as a Member of the IOPC Fund, is bound by the decisions taken by the Assembly of the Fund in which it is stated that the SDR method should be used for converting the limits of the Fund's obligations, pending the entry into force of the 1976 Protocol to the Fund Convention. Furthermore, Italy has ratified the Protocol to the Fund Convention which provides for the SDR method. Although that Protocol is not yet in force, Italy as a Contracting State to the Protocol is under an obligation not to take any action which would defeat the object and purpose of the Protocol, which is to use the SDR method for determining the limits of the Fund's obligations (Article 18.1 of the Vienna Convention on the Law of Treaties).

5.17 It should be noted that the question of the method to be used for conversion of the (gold) franc into national currency arose also in respect of the TANIÖ incident (France, 1980). When this incident occurred, the 1976 Protocol to the Civil Liability Convention had not entered into force. Nevertheless, the French Court established the limit of the shipowner's liability under the Civil Liability Convention by using the SDR method provided for in the 1976 Protocol to that Convention. The limitation fund was established in April 1980. Agreement was reached between the Director, on one side, and the French Government and some other claimants, on the other, to the effect that the method of conversion laid down in Internal Regulation 2 (ie that 15 (gold) francs are equal to one SDR) should be applied and that the relevant date was the day of the constitution of the limitation fund under the Civil Liability Convention. No objection to this method of conversion was raised by other claimants. The Executive Committee was informed of this development at its 6th session (documents FUND/EXC.6/3/Add.1, paragraph 4 and FUND/EXC.6/4, paragraph 4.4). No delegation indicated any objection to this solution.

5.18 The Executive Committee may wish to give the Director instructions as to the position to be taken by the IOPC Fund in the legal proceedings on this point.

6 Damage to the Marine Environment

6.1 In Italy, an Act of 8 July 1986 (N°349), which established the Ministry of the Environment, attributes the right of compensation for environmental damage to the State and to public territorial entities (regions, provinces and municipalities). Liability for such damage is based on fault. When a precise quantification of the damage is not possible, the court may determine the amount of the damage in an equitable manner, taking into account the seriousness of the fault, the cost necessary for restoration of the environment and the profit earned by the wrong-doer.

6.2 As set out in paragraph 6.2 of document FUND/EXC.28/6, the Italian Government, the region of Liguria, three provinces and some municipalities have claimed compensation for alleged damage to the marine environment. The question of admissibility of claims for damage to the marine environment was dealt with by the IOPC Fund for the first time in 1980. The IOPC Fund Assembly then took the position that claims for non-economic environmental damage should not be accepted, and unanimously adopted a Resolution (IOPC Fund Resolution N°3) stating that "the assessment of compensation to be paid by the IOPC Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models" (document FUND/A/ES.1/13, paragraph 11(a) and Annex I). This Resolution is attached at Annex III to this document.

6.3 Following the adoption of this Resolution, a Working Group set up by the Assembly examined the question as to whether, and, if so, to what extent claims for environmental damage were admissible under the Civil Liability Convention and the Fund Convention. The Working Group agreed that compensation could be granted only if a claimant who has a legal right to claim under national law had suffered quantifiable economic loss. The position taken by the Working Group was endorsed by the Assembly at its 4th session (document FUND/A.4/16, paragraph 13).

6.4 In this context it should be noted that the 1984 Protocol to the Civil Liability Convention contains an amended wording of the definition of pollution damage. A proviso was added to the effect that compensation for impairment of the environment (other than loss of profit from such impairment) should be limited to costs of reasonable measures of reinstatement actually undertaken or to be

undertaken. The new wording of the definition was not in any way intended to widen the concept. The Diplomatic Conference which adopted the 1984 Protocol based its deliberations on the policy of the IOPC Fund and the principles developed by the IOPC Fund Assembly and Executive Committee as regards the admissibility of claims and the interpretation of the definition of pollution damage as worded in the original text of the Convention. The Diplomatic Conference adopted the modified wording of this definition in order to codify the interpretation of the definition as developed by the IOPC Fund.

6.5 As set out in document FUND/EXC.28/3, a similar claim was submitted by the Italian Government in respect of the PATMOS incident. This claim was discussed by the Executive Committee at its 16th, 18th and 20th sessions (documents FUND/EXC.16/8, paragraph 3.3.3, FUND/EXC.18/5, paragraph 3.2 and FUND/EXC.20/6, paragraph 2.3). At its 20th session, the Executive Committee reiterated the IOPC Fund's position that a claimant was entitled to compensation under the Civil Liability Convention and the Fund Convention only if he had suffered quantifiable economic loss. On the basis of that interpretation, the IOPC Fund has in the PATMOS case opposed the Italian Government's claim in respect of damage to the marine environment (document FUND/EXC.28/3, paragraph 3).

6.6 In view of the position taken by the Assembly and Executive Committee on this issue, and in particular taking into account Resolution N°3 adopted by the Assembly, the Director has opposed the claims submitted in the HAVEN case in respect of damage to the marine environment. The Court has invited the parties to submit their pleadings on this issue by 15 January 1992.

6.7 At the first Court hearing, some of the plaintiffs addressed the following question to the IOPC Fund: if, as the IOPC Fund maintains, a claim for compensation for damage to the marine environment is not admissible under the Civil Liability Convention and the Fund Convention, will then, in the IOPC Fund's view, the claimant be entitled to compensation for such damage outside the Conventions, on the basis of national law?

6.8 In this context, the Director would like to draw the attention of the Executive Committee to the text of Article III.4 of the Civil Liability Convention which reads:

"No claim for compensation for pollution damage shall be made against the owner otherwise than in accordance with this Convention. No claim for pollution damage under this Convention or otherwise may be made against the servants or agents of the owner."

6.9 The Executive Committee may wish to consider the position to be taken by the IOPC Fund in respect of this issue in the HAVEN case and to give the Director such instructions as it may deem appropriate in this regard.

7 Action to be Taken by the Executive Committee

The Executive Committee is invited to:

- (a) consider the information contained in this document; and
- (b) give the Director such instructions as to the position to be taken by the IOPC Fund in the legal proceedings in the Court of Genoa in respect of:
 - (i) the method for conversion of the (gold) franc into Italian Lira; and
 - (ii) the admissibility of claims in respect of damage to the marine environment.

ANNEX I

Resolution N°1 – Unit of Account

(November 1978)

THE ASSEMBLY,

AWARE of the problems caused by the use of (gold) francs as the monetary unit in the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, and awaiting the entry into force of the Protocol of 19 November 1976 to that Convention,

ADOPTS the following method of interpretation of the franc provisions in the Convention:

Where an amount is expressed in francs in the Convention such amount shall be converted into the relevant national currency in accordance with the following rules:

- (a) the amount determined in francs shall be converted into Special Drawing Rights as defined by the International Monetary Fund on the basis that 15 francs are equal to one Special Drawing Right;
- (b) the number of Special Drawing Rights found pursuant to (a) shall be converted into the relevant national currency in accordance with the method of evaluation applied by the International Monetary Fund in effect for its operations and transactions at the date applicable under the Convention,

RESOLVES that the references to francs in the Internal Regulations be replaced by references to equivalent amounts expressed in Special Drawing Rights as soon as the Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 enters into force,

AND RECOMMENDS that Contracting States should become Parties to that Protocol as soon as possible.

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ANNEX II

Resolution N°4 - Unit of Account

(October 1980)

THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND

AWARE of the problems caused by the use of (gold) francs as the monetary unit in the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, and the lack of uniformity in Member States regarding the methods of converting this unit of account into national currencies,

CONCERNED that this lack of uniformity may seriously affect the operations of the Fund,

NOTING that the Protocol of 19 November 1976 to the Fund Convention has so far been ratified or acceded to by only four States and that the entry into force in the near future for all Members of the Fund is not likely,

URGES Governments of Member States to ensure that their national laws are brought into line with the method of conversion provided for by a resolution at the first session of the Assembly (OPCF/A.1/Res.1) and laid down in Regulation 2 of the Fund's Internal Regulations,

AND REAFFIRMS the recommendation contained in that resolution that Contracting States should become Parties to the Protocol of 19 November 1976 to the Fund Convention as soon as possible.

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ANNEX III

Resolution N°3 – Pollution Damage

(October 1980)

THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND

CONSCIOUS of the dangers of pollution posed by the world-wide maritime carriage of oil in bulk,

AWARE of the detrimental effect of the escape or discharge of persistent oil into the sea may have on the environment and, in particular, on the ecology of the sea,

CONSCIOUS of the problems of assessing the extent of such damage in monetary terms,

NOTING that under the Civil Liability Convention a claim for ecological pollution damage has been raised against the shipowner which was based on a theoretical model for assessment,

CONFIRMS ITS INTENTION that the assessment of compensation to be paid by the International Oil Pollution Compensation Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models.
