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HAVEN INCIDENT

CLAIMS RELATING TO DAMAGE TO THE MARINE ENVIRONMENT

Note by the Director

1 Introduction

1.1 The HAVEN incident, which occurred off Genoa (Italy) on 11 April 1991, gave rise to pollution damage in Italy, Monaco and France. It is possible that some pollution was caused also in Spain. A detailed description of the incident is given in documents FUND/EXC.28/6 and FUND/EXC.28/6/Add.1.

1.2 The incident has resulted in some 1 200 Italian claimants, including the Italian Government, presenting their claims to the Court of first instance in Genoa in the context of the limitation proceedings. The French Government, 22 French municipalities and two other public bodies in France have also submitted claims to that Court. It has not yet been possible to calculate the total amount of the claims, but it is clear that the aggregate amount of the claims greatly exceeds the amount of compensation payable under the Civil Liability Convention and the Fund Convention, viz 60 million SDR (£49 million).

1.3 As instructed by the Executive Committee at its 28th session (document FUND/EXC.28/9, paragraph 3.5.13), the Director has, in conjunction with the IOPC Fund's Italian lawyer, carried out a study of certain questions in respect of the admissibility of claims for compensation relating to damage to the marine environment. This study is set out in the present document.

2 Claims Relating to Damage to the Marine Environment

2.1 The Italian Government's claim, which totals Llt242 899 669 151 (£110 million), includes an amount of Llt100 000 million (£45 million) to cover alleged environmental damage. The document setting out the Italian Government's claim does not indicate the kind of "environmental damage" which has allegedly been sustained, nor does it give any indication as to the method used to calculate the amount claimed. The Italian Government has informed the Director that it has not been possible to describe the environmental damage because the study of the effects of the incident on the marine environment has not yet been completed. It is expected that the results of this study will be available in the autumn of 1992. The Government has also stated that the figure given in the claim is only provisional.

2.2 The Region of Liguria has requested that the figure in the Italian Government's claim relating to environmental damage, Llt100 000 million, be increased to Llt200 000 million. The Region has stated that the amount should be apportioned between the various territorial entities which have directly suffered or are suffering ecological damage.

2.3 The Provinces of Genoa and Savona have included items relating to environmental damage in their respective claims, and have indicated that the amounts of these items will be specified at a later stage.

2.4 Claims relating to environmental damage have also been presented by 14 municipalities situated west of Genoa, as set out below. None of these claims contains any description of the alleged damage and the claims setting out an amount do not explain how the amounts have been calculated.

	Llt
Celle Ligure	5 000 million
Varazze	5 000 million
Cogoleto	2 000 million
Diano Marina	10 000 million
San Bartolomeo al Mare	10 000 million
Arenzano	60 000 million
Ceriale, Laigueglia, Albissola, Borghetto S Spirito, Bergeggi, Finale Ligure, Spotorno, Vado Ligure	Amount to be specified at a later stage

2.5 One of the public bodies in France, Parc National de Port-Cros, has claimed compensation for environmental damage for an amount which will be specified at a later stage.

2.6 Some of the claims submitted by the Italian municipalities contain elements within the item "environmental damage" which may not actually relate to damage to the environment per se but to alleged loss of an economic character, such as reduction in tourism and "loss of image".

2.7 It should be noted that the French Government, which has not claimed compensation for damage to the marine environment per se, has reserved its right to claim compensation in respect of costs incurred for restoration of the marine environment, referring to Resolution N°3 adopted by the IOPC Fund Assembly concerning damage to the environment (see paragraph 4.4 below).

3 Developments in the Court Proceedings in Respect of this Issue

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

3.2 At the first Court hearing in September 1991, some of the claimants addressed a question to the IOPC Fund in respect of claims relating to damage to the marine environment which, in the view of the IOPC Fund, were not admissible under the Civil Liability Convention and the Fund Convention. The query was whether such claims could be pursued outside the Conventions, on the basis of national law.

4 Position Taken by the IOPC Fund in Previous Cases in respect of Damage to the Marine Environment

Definition of "Pollution Damage" in the Conventions

4.1 Pollution damage is defined in Article I.6 of the Civil Liability Convention, which 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."

4.2 The same definition is by reference included in the Fund Convention (Article 1.2).

4.3 In this context, reference is made to 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."

First ANTONIO GRAMSCI Incident and Resolution N°3

4.4 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 in connection with the first ANTONIO GRAMSCI incident which occurred in the USSR in 1979. In that case, a claim of an abstract nature for compensation for ecological damage was made to the Soviet Courts by the Government of the USSR within the framework of the Civil Liability Convention. The amount claimed had been calculated according to a mathematical formula, the so-called "metodika", in accordance with Soviet legislation, under which the assessment of the damage was linked to the quantity of oil collected in USSR territorial waters. The IOPC Fund Assembly 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 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" (document FUND/A/ES.1/13, paragraph 11(a) and Annex I). This Resolution is attached to the present document.

4.5 Following the adoption of this Resolution, an Intersessional 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).

Second ANTONIO GRAMSCI Incident

4.6 A similar claim relating to damage to the marine environment was submitted by an Estonian authority in connection with the second ANTONIO GRAMSCI incident which took place in Finland in 1987. Also in this case the amount claimed had been calculated on the basis of the above-mentioned "metodika".

4.7 The Estonian authority's claim was discussed by the Executive Committee at its 22nd session. Referring to IOPC Fund Resolution N°3, the Executive Committee expressed its objection to this claim. In the view of the Committee, claims of this kind were not admissible under the Civil Liability Convention, because the claimant had not suffered any quantifiable economic loss. The Executive Committee considered that it was likely that, since the adoption of that Resolution, some Member States had refrained from submitting claims relating to damage to the marine environment, in view of

the interpretation of the notion of "pollution damage" adopted by the Assembly. The Committee instructed the Director to negotiate with the USSR authorities on the basis of this Resolution (document FUND/EXC.20/6, paragraph 3.3.3).

4.8 The claim was maintained by the Estonian authority. At its 22nd session, the Executive Committee reiterated its objection to this claim. The Committee was of the opinion that it would be possible for the IOPC Fund to intervene in the court proceedings in the Court of Riga in order to challenge this claim on the grounds that the claim was at variance with the definition of "pollution damage" in the Civil Liability Convention, as interpreted by the IOPC Fund Assembly. The Committee recognised, however, that such an intervention would raise a number of complex legal issues and would be very costly. The Committee also took into account the fact that the USSR was not Party to the Fund Convention at the time of the incident. In addition, the Committee recognised that, in view of the reductions in the Finnish Government's claim and in the Estonian authority's claim, the financial consequences for the IOPC Fund of an acceptance by the Court of the Estonian authority's claim would be rather limited. For these reasons, the Executive Committee decided that the IOPC Fund should not intervene in the proceedings in the Court of Riga to challenge the latter claim. The Committee instructed the Director to inform the Court in Riga, in an appropriate way, of the IOPC Fund's position in respect of this claim and, in particular, of the principles embodied in Resolution N°3. In accordance with these instructions, the Director informed the Court of the IOPC Fund's position with regard to claims of this kind (document FUND/EXC.22/5, paragraphs 3.2.6 and 3.2.7).

4.9 At its 12th session, the Assembly stated that the interpretation of the definition of "pollution damage", which had been adopted by the Assembly in Resolution N°3 and amplified by the endorsement of the report of the above-mentioned Working Group, remained the position of the IOPC Fund (document FUND/A.12/19, paragraph 8.3).

PATMOS Incident

4.10 A claim relating to damage to the marine environment was also submitted by the Italian Government in respect of the PATMOS incident. This claim was discussed by the Executive Committee at its 16th and 18th sessions (documents FUND/EXC.16/8, paragraph 3.3.3 and FUND/EXC.18/5, paragraph 3.2). The Executive Committee noted that the claimant had not specified the kind of damage which had allegedly been caused, nor had the claimant given any explanation of the basis on which the amount claimed had been calculated. The Committee endorsed the Director's opinion that this claim had to be rejected in accordance with Resolution N°3. 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.16/8, paragraph 3.2.3).

4.11 The Court of first instance in Messina rejected the Italian Government's claim. The Italian Government had maintained that the damage was a violation of the right of sovereignty over the territorial sea of the State of Italy. The Court of first instance stated that this right was not one of ownership and could not be violated by acts committed by private subjects. In addition, the Court declared that the State had not suffered any loss of profit nor incurred any costs as a result of the alleged damage to the territorial waters, or the fauna or flora. The State had therefore not suffered any economic loss. The Court also drew attention to IOPC Fund Resolution N°3.

4.12 In the appeal proceedings the Italian Government has taken the position that this claim relates to actual damage to the marine environment and to actual economic loss suffered by the tourist industry and fishermen. For this reason, the Italian Government has maintained that the claim is not in contravention of the interpretation of the definition of "pollution damage" adopted by the Assembly in that Resolution.

4.13 The claim submitted by the Italian Government was discussed again by the Executive Committee at its 20th session. The 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. In view of the position of the Italian Government that this claim relates to actual damage to the marine environment, the Committee referred to the interpretation of the

definition of "pollution damage" laid down in Resolution N°3. With regard to the economic loss which had allegedly been suffered by the tourist industry and fishermen, the Committee expressed the opinion that compensation in respect of such damage could only be claimed by the individual having suffered the damage who, in addition, had to prove the amount of the economic loss sustained (document FUND/EXC.20/6, paragraph 3.2.3).

4.14 The Italian Government's claim in the PATMOS case was dealt with by the Court of Appeal in Messina in a non-final judgement. In that judgement the Court stated that the owner of the PATMOS, the UK Club and the IOPC Fund were liable for the damage covered by the claim made by the Italian Government. The Court appointed three experts with the task of ascertaining the existence, if any, of damage to the marine resources off the coasts of Sicily and Calabria consequent on the oil pollution; if such damage existed, they should determine the amount thereof or, in any case, supply any useful element suitable for the equitable assessment of the damage.

4.15 The reasoning given by the Court of Appeal in this non-final judgement can be summarised as follows (document FUND/EXC.22/2, paragraph 4.9.10):

> The Civil Liability Convention of 29 November 1969 must be considered linked with the International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties (Intervention Convention) of the same date, which entitles the State to take protective measures in favour of "related interests", as defined in the Intervention Convention. This means that the State has title to sue for compensation for damage to the "related interests". In addition, the environment must be considered as a unitary asset, separate from those of which the environment is composed (territory, territorial waters, beaches, fish, etc.), and it includes natural resources, health and landscape. The right to the environment belongs to the State, in its capacity as representative of the collectivities. The damage to the environment prejudices immaterial values, which cannot be assessed in monetary terms according to market prices, and consists of the reduced possibility of using the environment. This damage can be compensated on an equitable basis, which may be established by the Court on the grounds of an opinion of experts. It cannot be maintained that the Civil Liability Convention, being a Convention of private law, may not give to the State more extensive rights than to other persons. The definition of "pollution damage" as laid down in Article I.6 of that Convention is wide enough to include damage to the environment of the kind described above.

4.16 In respect of a non-final judgement of this kind, a party may, under Italian law, *either* make an immediate appeal to the Supreme Court *or* reserve the right to appeal as to the question of principle addressed by the non-final judgement in conjunction with appeal against the final judgement to be rendered by the Court of Appeal. The Director decided to reserve the IOPC Fund's right to appeal before the Supreme Court. As for the reasons for the Director's decision, reference is made to document FUND/EXC.22/2, paragraph 4.9.13. The owner of the PATMOS and the UK Club took the same decision.

4.17 At its 22nd session, the Executive Committee expressed its concern about this non-final judgement and reiterated the IOPC Fund's position in respect of the Italian Government's claim (document FUND/EXC.22/5, paragraph 3.1.3).

4.18 Extensive pleadings were submitted to the Court experts by the parties. These pleadings are summarised in document FUND/EXC.24/2, paragraphs 4.1.13 and 4.1.14.

4.19 The Court experts published their report in March 1990. They concluded that, except in respect of fishing activities, there was a lack of data for the purpose of evaluating the economic impact on other activities and that a precise assessment of the damage was impossible. In the view of the experts, the evaluation should be carried out by the Court. The experts quantified the damage to the fishing activities at not less than Llt1 000 million (document FUND/EXC.24/2, paragraph 4.15).

4.20 The parties exchanged further pleadings after the publication of the report of the Court experts.

4.21 In October 1991, the Court of Appeal requested clarification from the experts. The judgement of the Court of Appeal is expected to be rendered towards the end of 1992 at the earliest.

The 1984 Protocol to the Civil Liability Convention

4.22 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 definition in the 1984 Protocol reads as follows:

> "'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."

4.23 The new wording of the definition in the 1984 Protocol to the Civil Liability Convention 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.

5 Discussions at the 28th session of the Executive Committee

5.1 At its 28th session, the Executive Committee considered the claims relating to damage to the marine environment in respect of the HAVEN incident. In particular, the Committee discussed the question raised at the above-mentioned hearing in the Court of first instance in Genoa (see paragraph 3.2 above), on the basis of document FUND/EXC.28/6/Add.1, paragraphs 6.1 – 6.9. This discussion is summarised in document FUND/EXC.28/9, paragraphs 3.5.10 – 3.5.13.

5.2 The Executive Committee noted that in the legal proceedings in Genoa the question had been raised whether claims relating to damage to the marine environment which were not admissible under the Civil Liability Convention and the Fund Convention, as a consequence of IOPC Fund Resolution N°3, could be made against the shipowner outside the Conventions.

5.3 During the discussion on this issue some delegations questioned whether it fell within the competence of the IOPC Fund to express any opinion on this matter, since it did not directly relate to the operations of the Fund. It was pointed out, on the other hand, that the IOPC Fund, having opposed the claims submitted in the HAVEN case in respect of the environmental damage, should in its pleadings indicate the reasons for its opposition; it might be difficult to submit well reasoned pleadings in support of the IOPC Fund's position without dealing with this question.

5.4 Several delegations stated that in view of the importance of this issue, which had been drawn to their attention only shortly before the session, they were not prepared to take any decision at that session.

5.5 The Executive Committee decided that this important matter would have to be considered further at an extra session to be held later in 1991. The Director was instructed to prepare a study of this issue, in consultation with the IOPC Fund's Italian lawyer, for consideration by the Committee at that session.

5.6 In the context of the Assembly's consideration of the report of the Executive Committee on its 28th session, the Indonesian delegation stated that it was not in favour of the IOPC Fund accepting claims relating to damage to the marine environment arising out of the HAVEN incident to the extent that such claims were at variance with the principles laid down in Resolution N°3. This delegation pointed out that in the EL HANI incident, which occurred in Indonesia in 1987, the Indonesian Government approached the Director concerning the possibility of claiming compensation for damage to the marine environment. The Indonesian Government was then informed of the principles laid down in that Resolution and decided therefore not to submit any claim in this respect (document FUND/A.14/23, paragraph 8.6).

6 Italian Legislation

6.1 The Civil Liability Convention and the Fund Convention have been implemented into Italian legislation by the Act of 27 May 1978 (N°508) and thus form part of Italian law. In case of conflict between the provisions of the Conventions and any other Italian statute, the provisions of the Conventions prevail, since the Conventions are "special laws". For this reason, the question of admissibility of claims arising out of the escape of persistent oil from laden tankers should be decided on the basis of the Conventions.

6.2 It has been maintained that since the definition of "pollution damage" in the Civil Liability Convention (in its original version) does not explicitly deal with environmental damage, Italian domestic legislation relating to protection of the environment should be taken into account. Two Statutes have been referred to in this connection, viz the Act of 31 December 1982 (N°979) containing provisions for the protection of the sea (the "1982 Act"), and the Act of 8 July 1986 (N°349) which established the Ministry of the Environment (the "1986 Act"). These Acts have been interpreted by various courts and have also been subject to discussion in Italian legal doctrine.

6.3 The 1982 Act deals inter alia with the basis of liability and establishes joint strict liability for the shipowner and the master in respect of the escape of any substances which may not be released into the sea. Under the 1982 Act, the persons liable should indemnify the State for its costs for cleaning the water and the beaches as well as for damage caused to the marine resources. There is no jurisprudence concerning the meaning of the expression "damage to the marine resources" in the 1982 Act, nor is this question dealt with in Italian legal doctrine. It has been argued that the 1982 Act has been abrogated, at least partly, by the 1986 Act, although there are views to the contrary.

6.4 The 1986 Act vests the right to take action relating to compensation for environmental damage in the State and in public territorial entities (regions, provinces and municipalities). Liability for such damage is based on fault. When 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 of the wrong-doer, the cost necessary for restoration of the environment and the profit earned by the wrong-doer as a consequence of his behaviour (Article 18.6).

6.5 In Italian jurisprudence and legal doctrine, there is consensus that the environment is an autonomous immaterial asset, different from the assets which constitute it (coasts, territorial waters, etc). The protection of the environment in turn protects the enjoyment of the environment by society as a whole (eg the citizens' enjoyment of fishing, swimming and sailing) as well as the health of the citizens.

6.6 According to Italian jurisprudence and doctrine relating to the 1986 Act, damage to the environment may have quantifiable and non-quantifiable elements<1>. Costs for cleaning sea water and beaches are quantifiable elements of such damage. These costs are incurred not only to prevent

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<1> For the purpose of this study, the expression "quantifiable elements" means damage to the environment in respect of which the value of the damage can be assessed in terms of market prices; the expression "non-quantifiable elements" means damage in respect of which the quantum of the damage cannot be assessed according to market prices.

damage to individual assets, but also to enable citizens to enjoy the environment. Damage may also relate to the non-enjoyment or reduced enjoyment of the environment by society; these elements are non-quantifiable. Damage of this kind is considered by the Constitutional Court and by the Court of Cassation as financial, although it does not result in a loss of value of the assets included in the balance sheets of the State and public territorial entities nor in a liability in such balance sheets. It has been emphasised in Italian legal doctrine that acceptance of such damage as being financial implies an extension of the traditional concept of financial damage.

6.7 The distinction between quantifiable and non-quantifiable elements of damage to the marine environment is implicit in the 1986 Act. The aspect of environmental damage which refers to "the cost necessary for restoration" relates to damage which is quantifiable, whereas the criteria referring to "the seriousness of the fault of the wrong-doer" and "the profit earned by the wrong-doer as a consequence of his behaviour damaging the environmental assets" relate to damage which is not quantifiable.

6.8 As a result of the inclusion in the 1986 Act of the two last criteria, Italian jurisprudence and legal doctrine hold consistently that the defendant's obligation to pay damages in respect of the unquantifiable elements of damage to the environment under that Act is a sanction which acts as a deterrent with the aim of preventing damage to the environment. One author states that this sanction is very close to a criminal sanction. In this context reference should be made to a judgement by the Supreme Court of Cassation (United Sections) in 1989 (Cass SU 25 January 1989, n440 in Diritto Maritimo 1990, 303) in which it is stated that "the liability is one of public law and the order of the Court to pay has the nature of a sanction" (page 310).

6.9 As indicated above, the right to bring legal action for damages in respect of damage to the environment is under the 1986 Act vested in the State of Italy and in other public territorial entities (regions, provinces and municipalities). According to Italian legal doctrine, such claims of the State and other entities are not based on the violation of a "subjective right" ("diritto soggettivo"), but on the exercise of public authority ("pubblico potere").

6.10 Any amounts recovered in an action relating to environmental damage may be used by the State at its discretion. There is no provision in Italian law which obliges the State to use such amounts for any specific purpose. The State could use an amount recovered in respect of environmental damage sustained in the Ligurian Sea for the benefit of the tourist industry in the Alps or in Sicily, or for any other purpose, even if it had no link with the environment.

6.11 In the HAVEN incident, there is probably a duplication of claims in respect of damage to the environment, due to the fact that such claims have been submitted both by the State of Italy and by the Region of Liguria and certain provinces and municipalities. It appears, however, that payment could only be awarded to the State and that the other public entities are only entitled to support the State in the court proceedings. In fact, the 1986 Act provides that an action can be pursued by the territorial entities but that damages should be paid to the State.

7 Competence of the IOPC Fund in this Matter

7.1 As indicated above, certain delegations queried, at the 28th session of the Executive Committee, whether it fell within the competence of the IOPC Fund to express any opinion as to whether claims relating to damage to the marine environment which were not admissible under the Civil Liability Convention and the Fund Convention could be made against the shipowner outside the Convention. Accordingly, the Director would like to submit the following elements for consideration by the Executive Committee.

7.2 In the preamble to the Civil Liability Convention it is stated that the Contracting States desired to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation. The Fund Convention, which is supplementary to the Civil Liability Convention, includes by reference the substantive provisions of the Civil Liability Convention. Under

Article 18.14 of the Fund Convention, the Assembly shall perform such other functions (viz other than those specifically allocated to it under the Convention) necessary for the proper operation of the IOPC Fund. The fact that the Assembly adopted Resolution N°3 relating to damage to the marine environment shows, in the Director's view, that the Assembly considered itself competent to take a formal decision on the interpretation of the notion of "pollution damage". In addition, the Assembly has expressed the view that a uniform interpretation of the definition of "pollution damage" is essential for the functioning of the regime of compensation established by the Conventions (document FUND/A.11/20, paragraph 5.5). It is submitted, therefore, that it would be appropriate for the IOPC Fund to express an opinion on the matter raised at the court hearing in respect of the admissibility of claims for damage to the marine environment. Since the Executive Committee has the task of taking decisions in respect of claims against the IOPC Fund, pursuant to Article 26.1(b)(ii) of the Fund Convention, the Committee would be the competent body to address this issue.

8 Director's Analysis of the Problem

8.1 As already mentioned, the claimants have not specified the kind of environmental damage which has allegedly been sustained, nor have they given any indication as to the methods used to calculate the amount claimed. Likewise, they have not given any clear indication in respect of the legal basis of the claims, except that some claimants have referred to the 1986 Act and the Italian Government has also referred to the 1982 Act. For this reason, it is not possible for the Director to set out, at this stage, in any detail how the IOPC Fund's pleadings should be drafted. The content of these pleadings will obviously depend on the arguments developed by the claimants. The Director is therefore limiting his analysis to an abstract examination of the legal situation in Italy in respect of the claims relating to environmental damage in the HAVEN case.

8.2 As stated above, the Civil Liability Convention and the Fund Convention form part of Italian legislation and prevail over any other Statute in the case of conflict. The question of whether a particular claim in the HAVEN case should be admitted or rejected should therefore be decided on the basis of these Conventions. The interpretation of the Conventions has been left to the national courts of Contracting States. However, when interpreting the provisions of the Conventions, the courts should take into account any internationally accepted interpretation of a particular provision. In this context reference should be made to the Vienna Convention on the Law of Treaties. Under that Convention (Article 31), a treaty should be interpreted in the light of its object and purpose. Furthermore, there should also be taken into account any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, as well as any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

8.3 The question of the admissibility of claims relating to damage to the marine environment has been addressed within the IOPC Fund in several previous cases, as set out in paragraph 4 above. It should first be noted that the IOPC Fund does not reject all types of claims for compensation resulting from damage to the marine environment. The IOPC Fund accepts claims which, in accordance with the terminology used in the present document, relate to "quantifiable elements" of damage to the marine environment, for example:

(a) reasonable costs of restoration of the damaged environment; and

(b) loss of profit (income, revenue) resulting from damage to the marine environment suffered by persons who depend directly on earnings from coastal or sea-related activities, eg loss of earnings suffered by fishermen or by hoteliers and restaurateurs at seaside resorts.

8.4 On the other hand, the IOPC Fund has consistently taken the position that claims relating to unquantifiable elements of damage to the environment cannot be admitted. In its interpretation of the Civil Liability Convention and the Fund Convention, the IOPC Fund Assembly excluded the assessment of compensation for damage to the marine environment on the basis of theoretical models. The Intersessional Working Group used similar language, viz that compensation could only be granted if a claimant had suffered quantifiable economic loss. As stated above, the conclusions of the Working

Group were endorsed by the Assembly. Under the 1984 Protocol, which was intended to codify the IOPC Fund's interpretation of the definition of "pollution damage" in the original text of the Civil Liability Convention, compensation for impairment of the marine environment (other than loss of profit from such impairment) shall be limited to actual costs of reinstatement. Both the Working Group and the 1984 Protocol thus exclude non-quantifiable elements of damage to the environment.

8.5 The Civil Liability Convention is a convention in the field of civil law, a fact apparent from its title. At the 1969 Diplomatic Conference which adopted that Convention two main committees were constituted, one to deal with matters of public law and the other to deal with matters of private law (Committee of the Whole on Public Law Articles and Committee of the Whole on Private Law Articles, respectively). The work of these two committees resulted in the adoption of two separate conventions, the Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties (Intervention Convention) and the International Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention), respectively. For this reason, the statement by the Court of Appeal in the PATMOS case concerning a link between these Conventions (paragraph 4.15 above) is not of any relevance, in the Director's view, to the question of the admissibility of claims relating to damage to the environment. The Fund Convention is also a convention in the field of civil law, set up for the purpose of paying ***compensation*** *to victims of oil pollution damage.*

8.6 It should be noted that in the Italian legal system there is a significant difference in character between, on the one hand, claims relating to damage to the environment submitted by the State and by other public territorial entities, pursuant to the 1986 Act, and, on the other, claims submitted by other claimants (individuals and legal persons). As mentioned above, claims by the State and other public entities are based on the exercise of public authority, whereas private claimants base their claims on "subjective rights".

8.7 Both the Civil Liability Convention and the Fund Convention deal with **compensation** for oil pollution damage. This is stated in the preambles to both Conventions. With respect to the Fund Convention, this objective is also stated in the body of the Convention, eg in Articles 2.1(a), 3.1, 4.1 (introductory sentence and sub-paragraph (b)) and 4.3. In particular, pursuant to Article 4.4(a) and (b), the aggregate amount payable by the IOPC Fund in respect of any one incident is specifically related to **compensation**. It should be noted that the French texts use the expressions **"indemnisation"** and **"réparation"**, and these expressions clearly indicate the compensatory function of the Fund Convention.

8.8 The purpose of a regime of compensation is to place the person suffering damage in the same financial situation as if the damaging act had not occurred. The conclusions of the above-mentioned Working Group, which were endorsed by the Assembly, are in accordance with that principle, viz that only a person having suffered **quantifiable economic loss** is entitled to compensation under the Conventions. In the view of the Director, claims which do not relate to compensation therefore do not fall within the scope of the Conventions, for example, damages awarded under the 1986 Act relating to non-quantifiable elements of damage to the environment which are of a punitive character. Since claims of this kind do not relate to compensation, such claims might be pursued outside the Conventions, on the basis of national law, as the first sentence of Article III.4 of the Civil Liability Convention, which prohibits claims for compensation against the shipowner outside that Convention, does not apply.

8.9 In the view of the Director, it could not have been the intention of the drafters of the Fund Convention that the IOPC Fund should pay damages of a punitive character, calculated on the basis of the seriousness of the fault of the wrong-doer or the profit earned by the wrong-doer. If such damages were to fall within the scope of the Conventions, the results would be unacceptable. Should the shipowner's limitation amount be exceeded, the IOPC Fund would have to pay damages calculated by the Court on the basis of the seriousness of the **shipowner's** fault and the extent of **his** profit. In the event that the aggregate amount of the other established claims reaches the limitation amount, the inclusion of punitive damages would be without any economic consequences for the shipowner. The purpose of punitive damages awarded on the basis of such criteria is to act as a deterrent. It is obvious that there would be no such effect in respect of the IOPC Fund.

8.10 If punitive damages of the kind discussed above were considered to fall within the scope of the Conventions, the State and other public entities might receive a large portion of the amounts available under the Conventions. In major incidents this would be to the detriment of victims who actually suffer quantifiable economic loss, such as fishermen and hotel owners, since if the aggregate amount of the established claims exceeds the total amount of compensation available under the Conventions, each claim will be reduced by the same percentage (Article V.4 of the Civil Liability Convention and Article 4.5 of the Fund Convention).

8.11 It should be noted that many States have introduced a system of criminal or civil penalties for oil pollution from ships. In the Director's view, the Civil Liability Convention and the Fund Convention do not prevent Contracting States from introducing such penalties, since they are not "compensation".

8.12 To the extent that claims relate to **compensation** for pollution damage, they would fall within the scope of the Conventions. However, such claims should be considered on the basis of the interpretation of the Civil Liability Convention adopted by the IOPC Fund Assembly in Resolution N°3, as amplified by the Working Group and endorsed by the Assembly. This means that claims for **compensation** in respect of unquantifiable elements of damage to the environment should be rejected, because the damage sustained is not quantifiable on the basis of a market price. Furthermore, compensation may not be assessed on the basis of an abstract quantification of damage calculated in accordance with theoretical models. It should be noted that under Article III.4 (first sentence) of the Civil Liability Convention, claims relating to compensation may not be made against the shipowner outside the Convention.

8.13 The Director's analysis is limited to the legal situation in Italy. He does not consider it appropriate for him to express, in the context of the HAVEN incident, any opinion on the admissibility of claims relating to environmental damage in other Member States.

9 Director's Conclusions

9.1 As set out above, the Director is of the opinion that claims for damages in respect of unquantifiable elements of damage to the marine environment pursuant to the 1986 Act do not fall within the scope of the Civil Liability Convention and the Fund Convention, since such damages do not relate to compensation. The acceptance of such elements as admissible within the system of compensation created by the Conventions would, in his view, lead to unreasonable results. As for claims relating to compensation, such claims can only be admitted if the claimant has suffered quantifiable economic loss.

9.2 Subject to any instructions which the Executive Committee may wish to give him, the Director intends to submit pleadings on behalf of the IOPC Fund to the Court in Genoa along the lines set out in paragraphs 8.1 - 8.13 above. However, since the claimants have not yet given any details as to the basis of their claims, the content of the IOPC Fund's pleadings can only be decided when the claimants have presented their arguments.

10 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 it deems appropriate as to the position to be taken by the IOPC Fund in the legal proceedings in the Court of Genoa in respect of the admissibility of claims relating to damage to the marine environment.

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ANNEX

IOPC Fund 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.