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HAVEN INCIDENT

Note by the Director

Attached is the text of the intervention made by the Italian delegation during the discussion concerning the admissibility of claims relating to damage to the marine environment.

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This is not the appropriate forum to discuss the legal question of the admissibility of claims for damage to the environment under the Civil Liability Convention and the Fund Convention: we only want to again underline our point of view and the differences between it and the Fund position.

We accept that, as Italy ratified and implemented both the Civil Liability Convention and the Fund Convention, in the Italian legal system these conventions represent the special law in the field. But this is not the real question.

Actually, neither convention contains any provision excluding or limiting the right of compensation for environmental damage.

Under the Civil Liability Convention "pollution damage" is defined as "any 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" (art. I, par. 6).

According to this definition, pollution damage includes any damage caused by the escape or discharge of oil. Such interpretation is confirmed by the strict construction of art. II of the

Civil Liability Convention which reads: The "Convention shall apply exclusively to pollution damage caused on the territory including the territorial sea of a Contracting State and to preventive measures taken to prevent or minimize such damage".

We all know that the Fund has always accepted the admissibility of claims for damage to the environment, but only in relation to its "quantifiable elements", that's to say damage that can be assessed on the basis of "market prices", whereas it has always rejected it as to "non-quantifiable elements", that's to say damage that cannot be assessed by means of strictly commercial methods.

Accordingly, the Fund has accepted the possibility to pay compensation for expenses incurred to clean up sites affected by environmental pollution, for economic loss suffered by those who depend directly on earnings from coastal or sea-related activities (for example fishermen, hoteliers, etc.), whereas compensation has been rejected for damage that can only be calculated in accordance with theoretical models.

It was stated that the fund Convention and the

Civil Liability Convention do not exclude the admissibility of claims for damage to the environment and we do agree with it. On the contrary, we cannot agree with the next step, that's to say with the interpretation limiting such admissibility to quantifiable elements.

It is to be noted that Italy has not ratified the 1984 London Protocol which, moreover, has not yet come into force because it has not been ratified by the necessary minimum number of countries; (among the countries that have not ratified the protocol we can mention Japan, apart from Italy, which is quite notable as the two countries are the Fund's main contributors). Nor, can the 1980 Resolution nr. 3 modify either the conventions or national law.

Now, if it's true - as it is - that neither the Fund Convention nor the Civil Liability Convention provide for any limitations to identify the damage to the environment that can be admitted for compensation, it is therefore necessary to resort to national law.

According to Italian national law, the marine environment is a unitary intangible property, although it is composed of corporeal goods (that's to say flora, fauna, the purity and health of

waters, seabed and coasts, both natural and artificial ones).

National law protects the environment as it contributes to determine the quality of life and as a source of living for coastal populations as well as for the whole national community.

Therefore, the environment is a corporeal and legal property whose impairment is a real fact having an economic value: it has to be reinstated or, if not possible, indemnified.

As the State represents the supreme guardian of national and local community interests concerning the preservation of the environment, it is obliged to take actions to prevent - if possible - or, at least, to minimize and repair pollution damage.

Accordingly, the State has a legal right of compensation for expenses incurred for such operations and, if the pollution causes dramatic irreversible consequences for the environment, the State has a right to be indemnified for the damage suffered.

Italian national legislation regarding compensation for environmental damage dates back

to past times - at least as far as marine environment protection is concerned but its present situation is regulated by Act nr. 979 of 1982 and Act 349 of 1986.

Actually, Act nr. 963 of July, 14th 1965, regulating matitime fishing, forbade a number of activities that could jeopardize the marine environment, also providing for criminal sanctions for failure to comply with it; but in Art. 29 it also expressly envisaged that the Ministry of the Merchant Marine could claim for compensation for the damage.

By linking this provision to Art. 15, forbidding, inter alia, the impairment of biological resources of the sea (by means of toxic substances), it becomes clear that since the Act of 1965 the Italian law envisaged the possibility to pay compensation for damage to the marine environment (caused by oil,' for what we are concerned) both for quantifiable and non-quantifiable elements. In relation to the latter, art. 1226 of the Civil Code was obviously to apply: it provides for the possibility to determine the amount of the damage in an equitable manner, if it's not possible to achieve a precise quantification.

Thus, when the Civil Liability Convention and

Fund Convention were signed (in 1969 and 1971) and when they were ratified by Italy, thus coming into force in this country, national regulations had already been existing for years, envisaging the admissibility of claims for environmental damage as well as the possibility to calculate the amount of the damage by means of non-market models.

The Civil Liability Convention and the Fund Convention do not exclude the possibility to pay compensation for the environmental damage, nor do they limit the type of damage that can be indemnified (whether quantifiable or not). Therefore, it is obvious that, under Italian national law the damage to the marine environment was to be considered indemnifiable, although it isn't either possible or easy to assess it by means of market methods.

Later, Act nr. 979 of 1982 created an even stricter system, although it did not change the rules governing the quantification of the damage; this act made civil liability for pollution an absolute liability and expressly envisaged the compensation for expenses incurred for the restoration of the marine environment, as well as the liability for damage to sea resources.

Act nr. 349 of 1986 then provided for the admissibility of claims for the environmental damage in general, whereas the previous system, as already mentioned, only referred to the marine environment. This act introduced a new provision, according to which compensation is only due in the cases of fault; in the case of an equitable quantification, it is possible to take into account the seriousness of the fault and the profit earned by the wrong-doer following to his actions against the environment.

Resorting to this provision, the Director states in his presentation that, as such compensation is to be considered as a penalty against the wrong-doer, it cannot be payed under the Civil Liability Convention or the Fund Convention, whose only purpose is to pay compensation to those who have suffered damage caused by oil pollution.

We cannot agree with this opinion for two reasons:

1) First and foremost, the compensation for marine pollution is regulated by Act nr. 979/1982 and not by Act nr. 349/1986. According to the former, the compensation is quantified without referring to the seriousness of fault or profit; this is true also because fault and profit would

not apply to most cases, as liability can be absolute, thus being independent from fault; moreover, the reference to the profit earned by violating the law, and therefore causing the pollution, would not be relevant.

2) Secondly, even supposing that Act nr. 349/1986 would apply, we could perhaps perceive a punitive aspect in it, but we would definitely have to state that the compensation aspect would prevail, as it was the lawmaker's intention only to identify a few elements that could be used to assess the damage; yet, there are other predominant aspects relating to the seriousness of the impairment suffered by the hydrogeological balance in the area concerned, as well as to the seriousness of the economic consequences suffered by the populations living on the coasts.

As to the HAVEN case, the Fund knows that the Italian Government charged the ATI consortium with the study, detection and monitoring of significant elements concerning the impairment of marine resources in the Gulf of Genoa: only at the end of this study (probably by the end of 1992) shall we receive the data necessary to quantify the environmental damage: only at

that time shall we be able to submit a thorough and detailed compensation claim. In its first claim presented to the Court of Genoa, Italy indicated only an approximate amount of the damage because the claim had to be submitted within very short time limits and we did not have any reliable data to assess it.

This means that, when the Italian Government claim is discussed before the Court of Genoa, it will not take into account abstract or theoretical models, but it will be based as much as possible on the economic losses actually suffered.

As explained above, the compensation for the environmental damage, as to its non-quantifiable elements, is not a penalty but a real compensation for the impairment of a legal and economic property; this is true, according to Act nr. 979/1982, but also to Act nr. 349/1986 if it were applicable.

Therefore, there's no reason to deny such compensation on the basis of the Civil Liability Convention and the Fund Convention.

It shouldn't be necessary to repeat that Italy has not ratified the 1984 London Protocol which,

in any case, has not yet come into force. The opposite interpretation and the accordingly opposite attitude of the Fund in previous cases, has no legal bases: therefore, it cannot influence the correct interpretation and implementation of the conventions that the Court of Genoa will give, also because it would be contrary to Italian national legislation.

Art. 31 of the Vienna Convention on the Law of Treaties cannot be invoked against the theory we are supporting: the interpretation given by the Italian Government does not seem contrary "to the object and purpose of the convention".

On the contrary, in this context, it should be noted that Italy has always met the economic obligations it had accepted by ratifying both the Civil Liability Convention and the Fund Convention as well as the modifications to them that have actually come into force. I would like to underline that Italy is the second-highest contributor to the Fund according to the principles regulating the Fund Convention. Italy has always met its obligations as it is convinced that oil sea-transportation takes place in the interest of the international community, and for this reason, it would be fair and equitable that the related risks are covered, above a certain limit,

by the international community itself.

The Italian Government is deeply convinced that the fundamental principles of the Fund Convention are extremely valid and useful, but it is also deeply convinced that such convention is to be interpreted and implemented as a whole and with a certain far-sighted approach, in order to really meet its fundamental aims.

As you know, at its 28th session, the Executive Committee instructed the Director, in order to calculate the maximum amount payable by the Fund, to support the method that is linked to the Special Drawing Rights of the International Monetary Fund and not that linked to gold franks. The Italian Government has not yet explained its position on this issue, reserving its right to take its decisions later.

The HAVEN disaster involves the interests of different States, public entities and thousands of particulars; it seems that the economic value of such interests exceeds 1 thousand billion lire - that means something less than 1 billion dollars or 500 million pounds. In such a case it is very difficult to agree with the opinion that the maximum amount payable can be 100 billion lire, which is less than one tenth of the total

amount of the damage, and that on the basis of a protocol - the 1976 London Protocol - which has never come into force.

Indeed, this Protocol has never come into force because it was not ratified by the necessary minimum number of countries: and probably this has not happened by chance. Almost certainly, the reason is that, although the value in special Drawing Rights to be converted into national currency is quite stable in time, it can be affected by devaluation. Consequently, it could defeat the insurance function of the Fund just in the most serious - and therefore most important - cases like the HAVEN one.

The interest of the Italian Government - which is the second-highest contributor to the Fund - goes far beyond a system that limits the possibility to pay compensation only for a few oil barrels spilt into the sea. We are convinced that the potential of the Civil Liability Convention and Fund Convention should be interpreted and fulfilled on the basis of a wider approach.

In this context, and apart from the HAVEN incident, the Italian Government is deeply interested in an interpretation of the Civil Liability Convention

and Fund Convention which includes the admissibility of claims for environmental damage in all its elements. As already said, the Italian legislation has recognized such a possibility since 1965, at least as far as the marine environment is concerned.

The protection of the environment, both as a preventive protection from pollution and, when the event has actually occurred as the implementation of all the necessary measures to minimize, quantify and locate the damage, to identify its nature, to study the most appropriate solutions to recover the environment and, in the worst cases, to compensate those who have suffered any damage, is not only a legal issue linked to the interpretation of international conventions, but also, and above all, an unavoidable question of civilization.