INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
31st session
Agenda item 3

FUND/EXC.31/2
30 April 1992

Original: ENGLISH

HAVEN INCIDENT

METHOD OF CONVERTING THE UNIT OF ACCOUNT LAID DOWN IN THE CIVIL LIABILITY CONVENTION AND THE FUND CONVENTION INTO NATIONAL CURRENCY AND RELATED ISSUES

Note by the Director

1 Introduction

1.1 In April 1991 a major oil pollution incident occurred when the Cypriot tanker HAVEN exploded and sank off Genoa (Italy). This incident caused serious oil pollution in Italy, France and Monaco. More than 1 300 claims for compensation against the shipowner and his insurer and against the IOPC Fund have been submitted to the Court of first instance in Genoa. The claims total approximately Llt1 500 000 million (£700 million) plus FFr97.5 million (£10.0 million).

1.2 After legal action had been taken against the shipowner, the Court of first instance in Genoa opened limitation proceedings in May 1991 and fixed the limitation amount at Llt 23 950 220 000 (£11.1 million), which corresponds to 14 million SDR, ie the maximum amount under the Civil Liability Convention. The limitation fund was established by the P & I insurer, the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd (the "UK Club"), by means of a letter of guarantee. The IOPC Fund has intervened in the limitation proceedings, pursuant to Article 7.4 of the Fund Convention.

1.3 The IOPC Fund has lodged opposition to the Court's decision to open the limitation proceedings, reserving its right to challenge the shipowner's right of limitation. Corresponding oppositions have also been lodged by the Italian Government and some other claimants.

1.4 In the limitation proceedings, an important legal question has arisen, viz the method to be applied for converting the maximum amount payable by the IOPC Fund (900 million (gold) francs) into Italian Lire. The IOPC Fund had always taken it for granted that the conversion should be made on

the basis of the Special Drawing Right (SDR) of the International Monetary Fund (IMF) for reasons set out below. It was maintained by some claimants, however, that the conversion should be made by using the free market price of gold, since the 1976 Protocol to the Fund Convention which replaced the (gold) franc with the SDR was not in force.

1.5 A judge of the Court of first instance in Genoa, who is in charge of the limitation proceedings, rendered his decision on this issue on 14 March 1992. The judge held that the maximum amount payable by the IOPC Fund should be calculated by the application of the free market value of gold which gives an amount of Llt771 397 947 400 (£360 million) (including the amount paid by the shipowner under the Civil Liability Convention), instead of Llt102 864 000 000 (£48 million), as maintained by the IOPC Fund, calculated on the basis of the SDR. The IOPC Fund has lodged opposition to this decision.

1.6 The judge also dealt with two other issues of interest to the IOPC Fund, namely whether the maximum amount payable by the IOPC Fund should be increased by the addition of interest and whether the bank guarantee constituting the shipowner's limitation fund should also cover interest on the limitation amount. The judge answered the first question in the negative. The second question was answered in the affirmative, and the judge held that the interest should accrue to the benefit of the claimants.

1.7 An English translation of the judge's decision is attached at Annex I to this document.

1.8 In view of the importance of the issues decided by the judge, this document sets out in some detail the relevant provisions of the applicable international conventions, the positions taken by the parties, the pleadings presented by the IOPC Fund, the legal opinions submitted by the Fund in support of its position, the reasons given by the judge and the main points set out in the IOPC Fund's opposition.

2 The International Conventions

2.1 Compensation in the HAVEN case is governed by the 1969 Civil Liability Convention and the 1971 Fund Convention. Pursuant to the Civil Liability Convention, the shipowner has strict liability for oil pollution damage, but is under certain conditions entitled to limit his liability to an amount linked to the tonnage of the ship. Under Article 4.4 of the Fund Convention, the maximum amount of compensation payable pursuant to the Civil Liability Convention and the Fund Convention in respect of any one incident is 450 million (gold) francs, including the sum actually paid by the shipowner or his insurer. 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. Under certain conditions the shipowner is indemnified by the IOPC Fund for a part of the total amount of his liability under the Civil Liability Convention, in accordance with Article 5.1 of the Fund Convention.

2.2 The amounts in the Civil Liability Convention and the Fund Convention in their original versions are expressed in (gold) francs (Poincaré francs). Under the Civil Liability Convention, the amount expressed in (gold) francs should be converted into the national currency of the State in which the shipowner's limitation fund is constituted on the basis of the official value of that currency by reference to the franc on the date of the establishment of the limitation fund.

2.3 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:*
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> 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.

2.4 In 1976, Protocols were adopted to amend both Conventions. Under the Protocols, the (gold) franc was replaced as the monetary unit by the SDR. One SDR was then considered equal to 15 (gold) francs. Pursuant to the 1976 Protocol to the Fund Convention the amounts of 450 million (gold) francs and 900 million (gold) francs laid down in Articles 4.4 and 4.6 of the Fund Convention were thus replaced by 30 million SDR and 60 million SDR, respectively. The (gold) franc was replaced by the SDR also in Article 5.1, which governs the indemnification of the shipowner. The SDR is to be converted into the national currency of the State in which the shipowner's limitation fund is constituted on the basis of the value of that currency by reference to the SDR on the date of the constitution of the limitation fund. 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.

3 IOPC Fund Resolutions

3.1 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 amounts 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).

3.2 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 1978 (IOPC Fund Resolution N°4).

3.3 The two above-mentioned Resolutions are attached at Annexes II and III to this document.

4 IOPC Fund's Position

4.1 The method of converting the (gold) franc into national currency in the HAVEN case was discussed by the Executive Committee in October 1991, at its 28th session, on the basis of a document prepared by the Director (FUND/EXC.28/6/Add.1). The discussions were summarised as follows in paragraphs 3.5.6 -3.5.9 of document FUND/EXC.28/9:

> 3.5.6 The Committee noted that the Assembly, in 1978, had adopted an interpretation of the provisions in the Fund Convention dealing with (gold) francs under which the amount determined in francs shall be converted into SDRs on the basis that 15 (gold) francs are equal to 1 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).
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> 3.5.7 During the discussion of this issue, it was emphasised that the inclusion of the word "official" in the text of 1969 Civil Liability Convention was made deliberately by the Diplomatic Conference in order to ensure stability in the system and was clearly meant to rule out the application of the free market price of gold. It was stressed that the application of different units of account in respect of the Civil Liability Convention and the Fund Convention would lead to unacceptable results, in particular as regards the relationship between the portion of liability to be borne by the shipowner and the IOPC

Fund, respectively, on the basis of Article 5.1 of the Fund Convention. It was also mentioned that the IOPC Fund's Internal Regulations already had substituted the (gold) franc for the Special Drawing Right, 1 SDR equalling 15 (gold) francs.

3.5.8 The Executive Committee agreed with the Director's analysis of this problem. The Committee instructed the Director to base the IOPC Fund's position in the court proceedings on the above-mentioned Resolution.

3.5.9 The Italian delegation stated that the Italian Government reserved its position on this point until it had been able to examine the legal problems in detail. This delegation added that it would be for the Court to interpret Italian law on this point.

4.2 It should be noted that the question of the method to be used for converting the (gold) franc into national currency arose also in respect of the TANIO 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 date of the constitution of the limitation fund under the Civil Liability Convention (document FUND/EXC.6/3/Add.1, paragraph 4). No objection to this method of conversion was raised by other claimants. The Executive Committee was informed of this development at its 6th session, and no delegation indicated any objection to this solution.

5 Pleadings Submitted by the IOPC Fund

5.1 The Director, together with the IOPC Fund's Italian lawyer, prepared pleadings which were submitted to the Court in November 1991 and January 1992. These pleadings were supported by four legal opinions submitted by eminent lawyers. The IOPC Fund's lawyer pleaded the case at an oral hearing held on 24 February 1992.

5.2 At the Director's request, Dr T A Mensah, former Assistant Secretary-General and Director of Legal Affairs and External Relations Division of the International Maritime Organization, made a study of the problems involved. In his study, Dr Mensah made a detailed analysis of the negotiations which led to the adoption of the relevant provisions in the Civil Liability Convention and the Fund Convention, as well as of the developments in the international monetary market which led to the adoption of the 1976 Protocols to the Conventions. Dr Mensah's opinion is contained in the Annex to document FUND/EXC.30/2/1.

5.3 In his study, Dr Mensah mentioned that the addition of the word "official" in Article V.9 of the Civil Liability Convention was a deliberate decision by the 1969 Diplomatic Conference, taken at one of the last plenary meetings of the Conference. He pointed out that the Fund Convention adopted the same unit of account as the Civil Liability Convention in order to ensure the necessary uniformity between the two Conventions on this point. Dr Mensah set out in detail the developments in the international monetary market in the 1970s, in particular the demise of the "gold exchange standard" as established in the Bretton Woods Agreement, which led to an international reserve asset being created by the IMF to replace the dollar, viz the SDR (which in the beginning was linked to gold). He emphasised that with the disappearance of the convertible (gold) dollar on the demise of the par value system, the official value of gold became a legal fiction; gold had thus lost its role in the international monetary system and the IMF established a new SDR in 1976 which was no longer linked to gold. Dr Mensah described the replacement of gold as a unit of account in international treaties and mentioned that almost all international treaties dealing with limits of liability had done away with the gold unit and used the SDR as their monetary unit. He explained the basis of the calculation which resulted in one SDR being considered as equivalent to 15 (gold) francs.

5.4 Dr Mensah stated that it was no longer possible to use the official value of gold to determine the limits laid down in the Civil Liability Convention and the Fund Convention; on the other hand, to use the market price of gold would be patently wrong in law, because it would be contrary to the provisions of the Conventions and had been deliberately rejected by two Diplomatic Conferences. In Dr Mensah's view, a system of compensation based on the market price of gold would be unable to guarantee uniformity of the unit of account in the States Parties to the Conventions. He also explained in his study how the adoption of different values for the units of account in the 1969 Civil Liability Convention and the 1971 Fund Convention would produce results which were clearly at variance with the second main objective of the Fund Convention, viz to indemnify the shipowner of a specified portion of his total liability under the Civil Liability Convention.

5.5 The conclusions of Dr Mensah were as follows:

"In the light of all these considerations it is my firm and considered opinion that the correct and also the most appropriate unit of account to be adopted in determining the limits of liability under the 1971 Fund Convention should be the SDR, with the method of conversion into the national currencies as provided in the 1976 Protocol to the 1969 CLC, and in the decision of the IOPC Fund Assembly, both of which are binding on the State of Italy. This is the only method of application which:

(a) does not lead to the State of Italy being in breach of its international obligations as a Member of the IOPC Fund organisation and a Party to the 1971 Fund Convention and its 1976 Protocol;

(b) does not lead to a result which is clearly contrary to the intentions of the 1969 and 1971 Liability and compensation scheme as amended by the Protocols of 1976;

(c) does not lead to unworkable and absurd results in the practical application of the inter-related liability and compensation scheme under the 1969 CLC and the 1971 Fund, especially when the Fund is obliged to "top-up" the compensation paid by the shipowner under the 1969 CLC or to indemnify a shipowner in respect of the compensation paid by the shipowner under the 1969 CLC. In such cases the use of different units of account in the 1969 CLC and the 1971 Fund Convention (and different bases for converting the units into national currencies) could produce complications which cannot be in the interests of victims, shipowners or the States Parties to the 1969 CLC and the 1971 Fund Convention;

(d) enables the 1969 CLC and the 1971 Fund Convention to be applied in practice in the co-ordinated way which was clearly intended by the drafters of the two Conventions and also in a manner which ensures that the conversion of the limitation amounts in the two Conventions results in amounts in the national currencies of Contracting States, which are, as far as possible, of the same real value by reference to the limits specified in the Conventions.

Any other unit of account and any other method of converting the units into national currency would be unjustifiable in law and would also lead to absurd results in practice."

5.6 At the Director's request, opinions were also prepared by Professor Benedetto Conforti of the University of Rome, Professor Riccardo Monaco, President of the International Institute for the Unification of Private Law (UNIDROIT) in Rome and Professor Yves Gaudemet of the University of Law, Economics and Social Sciences in Paris.

5.7 Professor Conforti dealt with the effects in Italian domestic law of Resolution N°1 adopted by the IOPC Fund Assembly. In his view, the Resolution was directly applicable in the Italian legal system.

Professor Conforti stated that decisions by intergovernmental organisations were automatically enforceable for the same reasons that the provisions of the treaties establishing such organisations were directly applicable. This was particularly the case, in his view, if the organisation in question was in direct contact with individuals, as was the case for the IOPC Fund. Professor Conforti stressed that the Civil Liability Convention and the Fund Convention constituted sources of rights and duties for Contracting States and for individuals. He pointed out that Article 18.14 of the Fund Convention empowered the Assembly to perform such other functions as are necessary for the proper functioning of the IOPC Fund. The adoption of Resolution N°1 was, in his view, a decision necessary for the proper functioning of the Organisation because it was needed to avoid paralysing the IOPC Fund.

5.8 Professor Monaco examined the question of whether Resolution N°1 constituted an agreement between Contracting States to the Fund Convention on the provisional applicability of the Convention in accordance with Article 25.1 of the Vienna Convention on the Law of Treaties. In his view, this Resolution must be seen as such an agreement. Professor Monaco pointed out that Article 18.14 of the Fund Convention gave the Assembly the power to perform such other functions as are necessary for the proper functioning of the IOPC Fund, and he considered that the adoption of this Resolution was necessary for the functioning of the organisation. Professor Monaco took the view that this Resolution expressed the common will of the Contracting Parties to the Fund Convention as to the provisional enforcement of the 1976 Protocol to the Fund Convention.

5.9 Professor Gaudemet was requested by the Director to express an opinion on the effects in French law of Resolution N°1, in view of the similarity between the French and Italian legal systems. In his opinion, he stated that international treaties, once they were ratified and published in France, applied directly in French law, provided that the provisions were self-executing. In his view, the same applied to legal norms emanating from organisations empowered by the treaty in question to issue such norms. Professor Gaudemet maintained that if the provisions of a treaty or norms derived from the treaty were addressed to individuals, these provisions or norms were directly applicable to these individuals who could invoke them before the courts and who could have the provisions invoked against them. The provisions in the 1969 Civil Liability Convention and the 1971 Fund Convention concerning the maximum amount of compensation payable by the IOPC Fund and the method for the calculation of this amount in national currency were in his view directly applicable to individuals in French law and could be invoked against individuals; the same applied to Resolution N°1 if one were to consider this Resolution as a derived norm. Professor Gaudemet also maintained that Article 1.4 of the Fund Convention, which referred to Article V.9 of the Civil Liability Convention, should be interpreted as determining the SDR as the unit of account also in respect of the Fund Convention.

5.10 The reasons set out by the IOPC Fund in its pleadings to the Court in Genoa can be summarised as follows:

> 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 (Article 4) and, secondly, to indemnify the shipowner for a specified portion of his liability to victims under that Convention (Article 5). 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.
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> 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. The market value of gold can certainly not constitute an "official" value.
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> The inclusion of the word "official" in the text of 1969 Civil Liability Convention was made deliberately by the Diplomatic Conference which adopted the Convention in order

to ensure stability in the system and was clearly meant to rule out the application of the free market price of gold. Article 31.4 of the Vienna Convention on the Law of Treaties imposes the subjective interpretation of treaties.

In a case relating to the International Convention for the Unification of certain rules relating to Bills of Lading, 1924 (the Hague Rules), the Italian Supreme Court of Cassation held that the unit of account laid down in the Convention should be converted into Lire on the basis of the market value of gold. However, the relevant provision of the Hague Rules does not contain the word "official".

In Article 1.4 of the Fund Convention it is stated that "franc" means the unit referred to in Article V.9 of the Civil Liability Convention; thus the unit of account must be the same in both Conventions. In view of the fact that the 1976 Protocol to the Civil Liability Convention has entered into force, there can be no doubt that the unit of account in respect of the shipowner's liability in the HAVEN case is to be determined in SDR. Under Italian jurisprudence, the reference in Article 1.4 of the Fund Convention to Article V.9 of the Civil Liability Convention covers also changes to the latter Article by the 1976 Protocol to the Civil Liability Convention. It was only for technical reasons that a separate Protocol to the Fund Convention was adopted.

The "market price" of gold 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 continually 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 IOPC 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.

It cannot be argued that gold was chosen as the unit of account so as to ensure an automatic adaptation of the limitation amounts to compensate for the devaluation of national currencies due to inflation. This is shown by the fact that Article 4.6 of the Fund Convention authorises the IOPC Fund Assembly to increase the maximum amount payable by the IOPC Fund, taking into account inter alia changes in monetary values.

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 Resolution N°1 adopted by the IOPC Fund Assembly in 1978.

The 1984 Protocol to the Fund Convention was adopted mainly for the purpose of increasing the amount of compensation available to victims. If the maximum amount payable by the IOPC Fund under the 1971 Fund Convention were to be converted into national currency on the basis of the free market value of gold, the 1984 Protocol would in fact result in a decrease in the level of compensation.

The State of Italy, as a Member of the IOPC Fund, is bound by the decision 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 1976 Protocol to the Fund Convention which provides for the SDR method. Although the latter

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 IOPC Fund's obligations (Article 18.1 of the Vienna Convention on the Law of Treaties).

The Resolution adopted by the IOPC Fund Assembly in 1978 has direct effect in Italian domestic law. This is particularly so since the IOPC Fund was set up for the purpose of having direct legal relationships with individuals in Member States. This Resolution did not change or construe the Fund Convention but filled a "legislative empty space" which, if not filled, would have made it impossible to apply the Convention. The Resolution was adopted by the Assembly on the basis of Article 18.14 of the Fund Convention. The Resolution also has to be considered as an agreement between the Parties on a provisional application of the 1976 Protocol to the Fund Convention, in accordance with Article 25.1(b) of the Vienna Convention on the Law of Treaties.

6 Position of the Other Parties

6.1 In its pleadings, the French Government has supported the IOPC Fund's position. The Italian Government has not taken any position as to the method of conversion. Similarly, the shipowner and the UK Club did not express any opinion on this question.

6.2 Some Italian claimants who maintained that the conversion should be made on the basis of the market value of gold advanced the following main arguments:

The IOPC Fund wants to make the 1976 Protocol to the Fund Convention applicable before it has entered into force. Resolution N°1 is null and void before the entry into force of that Protocol. That Resolution is not directly applicable in Italian law.

By allegedly interpreting the Fund Convention, the IOPC Fund is actually modifying it by introducing the SDR instead of the (gold) franc. The fact that a special Protocol was adopted to the Fund Convention shows that this is an amendment to the Convention. Article 18.14 does not give the Fund Assembly power to modify the Convention.

The IOPC Fund deduces a hypothetical will of the legislator from the inclusion of the word "official" in the text of the Civil Liability Convention. The terms of Conventions must be interpreted in an objective manner. Since there is no official value of gold, the free market value should be applied.

The purpose of the Fund Convention is to provide full compensation to victims. This purpose is best accomplished by using the free market value of gold for converting the maximum amount payable by the IOPC Fund into national currency. The only value of gold which is recognised by all monetary authorities in the world is that determined by the market.

The application of the market value of gold would guarantee uniformity over time as to the adequacy of the limits of compensation. The drafters of the Fund Convention wanted to introduce a monetary limit which was variable in relation to the change in the price of gold as a consequence of the devaluation of national currencies. The value of the (gold) franc is chronologically linked to the date of the establishment of the limitation fund and not to the date of the Fund Convention.

The inadequacy of the limit of 60 million SDR is demonstrated by the need to adopt the 1984 Protocol to the Fund Convention with higher limits.

In a case relating to the Hague Rules, the Supreme Court of Cassation held that the conversion of the unit of account should be made on the basis of the market value of gold.

Since there was an official value of gold when the Civil Liability Convention was adopted, this value would have been applied whether or not the word "official" had been inserted in the text of the Convention.

As for the relationship between Articles 4 and 5 of the Fund Convention, the indemnification of the shipowner must remain a fixed proportion of his liability although different units of account should be applied in respect of the two Conventions.

One claimant seems to maintain that when calculating the maximum amount payable by the IOPC Fund under Article 4.4(a), deduction should be made for the limit of the shipowner's liability calculated on the basis of the free market value of gold.

7 Judge's Decision

Conversion of (gold) francs

7.1 As mentioned in paragraph 1.5, the judge held that the maximum amount payable by the IOPC Fund should be calculated by the application of the free market value of gold which gives an amount of Llt771 397 947 400 (£360 million) (including the amount paid by the shipowner under the Civil Liability Convention), instead of Llt102 864 000 000 (£48 million), as maintained by the IOPC Fund, calculated on the basis of the SDR.

7.2 The arguments given by the judge can be summarised as follows:

As early as 1969, the problem of the difference between the official value of gold and the free market price had been noted. In 1969 and 1971, however, the difference between the official value and the market value of gold was very small (in 1971, none). The difference was so small that it did not make the reference to a unit having an intrinsic value of gold meaningless.

The need for stability has two aspects, viz geographically and over time. As for stability between various States, the free market value of gold at any given time does not vary much between the various main gold markets. Application of the free market price would therefore lead to a substantial uniformity worldwide. On the other hand, there have been considerable fluctuations in the free market value of gold in recent years. The fluctuations of the SDR were much smaller. Applying the free market value of gold would significantly affect the stability over the years.

Under Article V.9 of the Civil Liability Convention, referred to in Article 1.4 of the Fund Convention, the conversion of the (gold) franc into national currency should be made on the date of the establishment of the limitation fund. It is therefore not satisfactory to use the SDR, since the conversion from gold to SDR was made about 20 years ago.

The reference in Article 1.4 of the Fund Convention to Article V.9 of the Civil Liability Convention relates to the 1969 Civil Liability Convention and cannot therefore be considered as referring to the changes in the Civil Liability Convention under the 1976 Protocol thereto because, otherwise, there would have been no need for a separate Protocol to the Fund Convention.

The IOPC Fund Resolution N°1 has no direct effect in Italian domestic law. The IOPC Fund Assembly has no power to amend the Fund Convention by replacing the (gold) franc by the SDR as the unit of account. A separate Protocol to the Fund Convention

was considered necessary to effect such a replacement. Article 18.14 of the Fund Convention does not give the Assembly any such power, since this provision deals with the IOPC Fund's functions from an operative point of view.

Resolution N°1 cannot be considered as an agreement between the Parties on a provisional application of the 1976 Protocol to the Fund Convention, since some IOPC Fund Member States have not ratified this Protocol and a provisional application cannot last for such a long time. The mere fact that Italy has ratified that Protocol does not lead to Italy being obliged to observe the provisions of the Protocol before it has come into force.

The provisions of Article 5 of the Fund Convention relating to indemnification of the shipowner must be interpreted as obliging the IOPC Fund to make a percentage contribution. It is therefore possible to apply the same percentage also with respect to the unit of account laid down in the 1976 Protocol to the Civil Liability Convention, viz the SDR.

If the maximum amount payable by the IOPC Fund were to be determined on the basis of the free market value of gold, this would result in the word "official" in the text of the Fund Convention being disregarded. On the other hand, if the maximum amount were to be calculated on the basis of the value of the SDR, this would lead to the substitution of the SDR for the (gold) franc. Either interpretation would in fact modify the 1971 Fund Convention.

The fact that the maximum amount payable by the IOPC Fund was calculated in the TANIO case on the basis of the SDR is not a decisive argument, since it implies an interpretation rejected by other judges, although with reference to other Conventions.

Under Article V.9 of the 1969 Civil Liability Convention, the conversion of (gold) francs into national currency should be made using the rate of exchange on the date of the constitution of the limitation fund. For this reason, it is not satisfactory to use the SDR, on the basis of a fixed conversion rate dating back 20 years, ie one SDR equalling 15 (gold) francs.

The decision in this case will be an interpretation of the Fund Convention implying a modification of its text. When different interpretations are possible, the preferred interpretation should be the one that gives the best protection to the victims. The main purpose of the Fund Convention is to provide adequate compensation to victims, and the use of the market value of gold as the basis of calculation meets this purpose better than the SDR method. It is recognised that the SDR method is more consistent with the needs of stability and uniformity within the international system. Nevertheless, as the Convention does not mention the SDR, using the SDR method would mean a rewriting of the text of the Convention. A judge is even less entitled to undertake such rewriting than he is to disregard the word "official".

The strengthening of the position of victims in the 1984 Protocol to the Fund Convention should be viewed in relationship to the 1976 Protocol to that Convention, although not yet in force.

As regards the amount to be paid by the IOPC Fund after deduction for the shipowner's liability, emphasis has to be placed on the expression "compensation actually paid" by the shipowner in Article 4.4(a) of the Fund Convention, which in this case is calculated in SDR. The maximum amount payable by the IOPC Fund thus amounts to the difference between the IOPC Fund's limit of 900 million (gold) francs, converted into Italian Lire on the basis of the free market value of gold, and the limit of the shipowner's liability, converted on the basis of the SDR.

Other Questions

7.3 The judge also considered whether the maximum amount payable by the IOPC Fund should be increased by the addition of interest or revaluation for the period from the date of the incident to the date of payment. The IOPC Fund had opposed that interest be added, since the Fund Convention used the wording "the aggregate amount of compensation payable" by the IOPC Fund.

7.4 The judge held that the maximum amount payable by the IOPC Fund should not be increased by interest or revaluation. In reaching this decision, the judge took into account the character of the IOPC Fund's involvement and the difference in its involvement from that of a liability insurer.

7.5 The IOPC Fund and a number of claimants had lodged oppositions against the acceptance by the Court of a bank guarantee to constitute the limitation fund. The reason for the oppositions was that no interest accrues on a bank guarantee, whereas if the limitation amount had been paid in cash, it would have been invested by the Court and would have earned interest to the benefit of third parties and the IOPC Fund. For this reason, the IOPC Fund had asked the Court either to declare that the guarantee was insufficient and that no limitation fund had been validly established, or to order that the guarantee should be increased to Llt 42 003 500 000, so as to cover interest for a period of five years before the end of which no final judgement could be expected.

7.6 The judge decided that the guarantee should also cover interest for the period up to the distribution of the limitation fund and that interest should accrue to the benefit of victims. The reasons for this decision can be summarised as follows:

> The shipowner and his insurer are responsible for a liability, whereas the IOPC Fund only provides supplementary cover. This difference justifies different treatment in respect of interest. The fact that the shipowner opted for a guarantee (instead of a cash deposit) shows that the guarantee is more advantageous for the person constituting the limitation fund. If a cash deposit had been made, it would have borne interest, which is not the case with a guarantee. It is not likely in a case as complex as the HAVEN that the distribution of the limitation fund will take place quickly. The 1969 Civil Liability Convention is silent on this point. An interpretation which results in the guarantee having to be increased by interest avoids or at least reduces the consequences of inflation and seems therefore more in keeping with the spirit of the Convention. The choice between a cash deposit and a guarantee cannot result in substantially different protection for the victims. The question is referred to in the 1984 Protocol to the Fund Convention, which does not appear to be an innovation. Under the Protocol, interest will accrue in favour of victims. The guarantee should therefore include interest from 16 May 1991 to the date of the distribution of the limitation fund, at a rate corresponding to that of the Banca Commerciale Italiana for the period in question. On the other hand, the guarantee need not extend to revaluation, because the shipowner and his insurer have fulfilled their obligation when the limitation fund was established.

8 Oppositions Lodged Against the Judge's Decision

8.1 In the beginning of April 1992, the IOPC Fund lodged opposition to the decision of 14 March 1992. In the opposition document, the IOPC Fund set out the main points on which it disagrees with the judge's reasoning. These points can be summarised as follows:

> The judge has violated the provisions of the 1969 Civil Liability Convention and the 1971 Fund Convention which form part of Italian law, since Article V.9 of the Civil Liability Convention refers to the official value of the (gold) franc and the adjective "official" was inserted specifically for the purpose of preventing the use of the free market value of gold. In addition, the judge has violated Article 31.4 of the Vienna

Convention on the Law of Treaties which imposes the subjective interpretation of treaties.

The judge has acknowledged that deleting the adjective "official" results in a forced interpretation of the text of the Conventions, but has held that between this forced interpretation and the IOPC Fund's interpretation, he prefers the former because it protects better the interests of the victims. However, the IOPC Fund's interpretation is not a forced interpretation, because Article 1.4 of the Fund Convention is a norm which, according to the jurisprudence of the Italian Supreme Court of Cassation, refers to the law originally referred to and to all its amendments, in this case including the 1976 Protocol to the Civil Liability Convention which is in force and which replaced the (gold) franc with the SDR.

If one were not to share the IOPC Fund's opinion, the demise of the gold parity would have caused a legislative empty space which could be filled only by application by analogy of the Civil Liability Convention also in respect of the limit laid down in Article 4.4 of the Fund Convention. This analogy is imposed by the reference in Article 1.4 of the Fund Convention to Article V.9 of the Civil Liability Convention. The judge has already applied interpretation by analogy when using the norms of the Civil Liability Convention and the Italian Code of Navigation regarding the determination of the stato attivo<1> also in respect of the determination of the limit of the IOPC Fund's obligations. In fact, the procedure in the Code of Navigation, applied in relation to the Civil Liability Convention, refers only to the limit of the shipowner's liability and therefore does not have direct application to the determination of the cover of the IOPC Fund. For this reason it is not possible to understand why the judge has not also applied the Civil Liability Convention by analogy to fill the legislative empty space left by the demise of the gold parity<2>.

This legislative empty space would also have been filled by Resolution N°1 adopted by the IOPC Fund Assembly. This Resolution has direct effect in domestic law, as have the decisions made in 1979 and 1986 by the Assembly to increase the maximum amount payable by the IOPC Fund, in accordance with Article 4.6 of the Fund Convention, since the IOPC Fund is an entity created for having direct relationships with individuals in Member States. Resolution N°1 was adopted in accordance with Article 18.14 of the Fund Convention since, after the demise of the gold parity, the IOPC Fund could operate only by substituting the SDR for the (gold) franc.

Resolution N°1 also constitutes an agreement between the Parties on the provisional application of the 1976 Protocol to the Fund Convention, in accordance with Article 25.1(b) of the Vienna Convention on the Law of Treaties.

The judge has stated that Article 5 imposes on the IOPC Fund an obligation to reimburse the shipowner of a certain percentage of his liability and not for a fixed amount. Since the reimbursement would be a percentage of a sum determined in SDR (viz the limit of the shipowner's liability), the reimbursement by the IOPC Fund should also be determined in SDR. According to the judge, the 1971 Fund Convention would thus have two units of account, viz the (gold) franc converted into Italian Lire on

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<1> "Stato attivo": the amounts available for distribution to claimants.

<2> Article 12 of the Introductory Provisions of the Italian Civil Code reads:

> "In applying statutes no other meaning can be attributed to them than that made clear by the actual significance of the words, according to the connection between them, and by the legislative intent.
>
> If a controversy cannot be decided by a precise provision, consideration is given to provisions that regulate similar cases or analogous matters; if the case still remains in doubt, it is decided according to the general principles of the legal order of the State."

the basis of the free market value in respect of compensation to victims according to Article 4, and the SDR for the indemnification of the shipowner according to Article 5. This interpretation is in violation of Article 1.4 of the Fund Convention which clearly sets only one unit of account for the whole Convention. This interpretation is also in conflict with Article 32(b) of the Vienna Convention, since the interpretation according to which the Fund Convention would have two units of account would lead to absurd and illogical results.

The application of the free market value of gold is in contravention of the principles of stability and uniformity which lie behind the reference in Article V.9 of the Civil Liability Convention to the "official" value of the unit of account.

The use of the SDR is not contrary to the principle laid down in Article V.9 of the Civil Liability Convention according to which the unit of account should be converted into national currency on the basis of the rate of exchange on the date of the establishment of the limitation fund, because the conversion of the SDR into Lire should be done at the rate of exchange on that date.

The universally accepted interpretation of the Fund Convention is that the limit of the IOPC Fund's cover should be determined by using the SDR. This method was applied in the TANIO case. The SDR method was also the basis of the decisions taken by the Assembly in 1979 and 1986 when the Assembly increased this limit in stages from 450 million to 900 million (gold) francs. Various documents issued by the IOPC Fund show clearly that the Contracting States and the IOPC Fund Member States have based their decisions on that assumption<3>. The parties to the CRISTAL Contract have also been of the same opinion since that Contract states that the maximum amount of the IOPC Fund's cover should be deducted from the CRISTAL limit of $135 million when calculating the amount payable under CRISTAL.

It is not correct that the adoption in 1976 of a separate Protocol amending the Fund Convention excludes the automatic replacement of the unit of account in the 1971 Fund Convention as a consequence of the change of unit in the 1969 Civil Liability Convention. As mentioned above, the judge acknowledged that there is an automatic change in the unit of account in respect of Article 5 of the Fund Convention. There is no reason why a different approach should be applied in respect of the same unit in Article 4.

The interpretation which consists in ignoring the word "official" in Article V.9 of the Civil Liability Convention and Article 1.4 of the Fund Convention is an interpretation against law which is absolutely forbidden. If the substitution of the (gold) franc by the SDR were not to be allowed, the consequence would be that the Fund Convention would be inapplicable. The judge has in fact made a judgement of equity which is not allowed under Article 113 of the Code of Civil Procedure<4>.

If the judge's decision, according to which the maximum amount payable by the IOPC Fund should be converted on the basis of the free market value of gold, were to be confirmed, the IOPC Fund requests the annulment of the decisions by the Fund Assembly of 1979 and 1986 increasing the maximum amount. It is clear that these decisions were taken on the basis that 450 million (gold) francs were equal to

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<3> Documents OPCF/A.1/SR.7, OPCF/A.1/14/1, FUND/A.2/16/1, FUND/A.2/17, FUND/A.4/15, FUND/A.4/16, FUND/A.9/12, FUND/A.9/12/1, FUND/A.9/12/2 and FUND/A.9/18.

<4> Article 113 of the Italian Code of Civil Procedure reads:

> "In deciding the case, the judge must follow the norms of law, except when the law gives him the power to decide according to equity."

30 million SDR. Since this mistake of law was the only reason why the Assembly increased the limit of the IOPC Fund's cover, the decisions are voidable according to Articles 1428 and 1429 of the Civil Code[<5>]. The mistake is recognisable, because Resolution N°1 adopted by the IOPC Fund Assembly showed the Assembly's conviction that the (gold) franc should be converted at the value of 15 francs equalling one SDR. The Records of Decisions of the Assembly and related documents submitted by the IOPC Fund show that these decisions were based on this assumption[<6>].

The judge fixed the maximum amount payable by the IOPC Fund unconditionally. However, under Article 4.1(b) and (c) of the Fund Convention, the IOPC Fund's obligations are subject to the condition that the total amount of the claims exceed the limit of the shipowner's liability; if the shipowner is financially incapable of meeting his obligations, the claimants must take all reasonable steps to pursue the legal remedies available to them to obtain satisfaction of their claims from the shipowner. The IOPC Fund has lodged opposition to the judgement opening the limitation proceedings to preserve its right, in case fault or privity on the part of the shipowner should deprive him of the right to limitation. If the IOPC Fund's opposition on this point were to succeed, the claimants would have to comply with the provisions of Article 4.1(b) and (c), and these conditions should be expressly stated by the judge as a prerequisite for the IOPC Fund's obligation.

It is not correct that the interest on the limitation amount of the shipowner's liability should go to the benefit of the victims and not to the benefit of the IOPC Fund. The judge has held that the 1984 Protocol to the Fund Convention, which expressly states that the interest should be to the benefit of victims, has no innovative nature, but simply confirms the system set up by the 1969 Civil Liability Convention. This assumption is wrong. The States participating in the 1984 Diplomatic Conference intended to amend the regime in force, since it appeared unfair that interest should be to the benefit of the IOPC Fund and not of the victims[<7>]. Furthermore, in the TANIO case, the interest on the limitation fund was credited to the IOPC Fund, showing the correct interpretation of the Convention in its original version.

8.2 The IOPC Fund will submit pleadings elaborating these arguments in late May 1992.

<5> Articles 1428, 1429 and 1431 of the Italian Civil Code read:

Article 1428:
"Mistake is a cause for annulment of a contract when it is essential and recognisable by another contracting party."

Article 1429:
"Mistake is essential:
1-3 .....
4 when the mistake was one of law and was the only or the principal reason for entering into the contract."

Article 1431:
"A mistake is considered recognisable when, with respect to the content, the circumstances of the contract, or the quality of the contracting parties, it would have been detected by a person of normal diligence."

These provisions apply directly only to contracts. However, they apply also to unilateral acts in accordance with Article 1324 of the Civil Code which reads:

Article 1324:
"Unless otherwise provided in the law, the rules that regulate contracts apply, to the extent compatible, to unilateral inter vivos acts having patrimonial content."

<6> Such a declaration would only have effect in the proceedings in the HAVEN case and between the parties to these proceedings.

<7> IMO documents LEG/CONF.6/20, LEG/CONF.6/21, LEG/CONF.6/C.2/SR.17 and LEG/CONF.6/C.2/SR.30.

8.3 Normally, the opposition document should be notified by court bailiff to all the parties. In the present case, it would have been practically impossible to notify some 1 300 parties by such a procedure. In addition, it would have been very costly, since the opposition deed would have to be on "stamped paper", and the total cost would probably have exceeded £100 000. At the IOPC Fund's request, the President of the Court of Genoa ordered that the notification should be made by "public proclamation" (pubblici proclami), ie by notice in the Official Gazette, in a national and some local newspapers, and in some local Gazettes; personal notification would be necessary only in respect of the Italian Government and Government authorities and in respect of the non-Italian claimants. This procedure was carried out during the latter half of April 1992, and the total cost to the IOPC Fund was approximately £22 000.

8.4 No counter pleadings have so far been submitted by any claimant.

8.5 The shipowner and the UK Club have lodged oppositions to the decision of the judge that the guarantee constituting the limitation fund should also cover interest for a certain period. Their main argument is that under Article V.1 of the Civil Liability Convention, the aggregate amount of the shipowner's liability shall in no event exceed 14 million SDR. They maintain that for this reason this limit cannot be exceeded by the addition of interest. In addition, they argue that the Italian Act N°504 of 27 May 1978 implementing the Civil Liability Convention allows only the establishment of the limitation fund by means of a guarantee, so that a cash deposit is not foreseen in Italian law. The interpretation by the judge is in their view contrary to Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties. If the judge's decision that the guarantee should also cover interest is correct, however, then they agree with the IOPC Fund that the interest should be to the benefit of the IOPC Fund and not to the benefit of the victims, since the 1984 Protocol to the Civil Liability Convention represents an innovation on this point.

8.6 The IOPC Fund will submit counter pleadings on this issue.

8.7 The oppositions will be considered in June 1992 by the Court of first instance composed of three judges (including the judge who rendered the decision of 14 March 1992). It is expected that an oral hearing will be held on 12 June 1992.

9 Further Appeal Possibilities

If the IOPC Fund's opposition were to be unsuccessful, an appeal against the judgement of the Court of first instance may be made to the Court of Appeal. From there, an appeal may be lodged with the Supreme Court of Cassation.

10 Action to be Taken by the Executive Committee

The Executive Committee is invited to take note of the information contained in this document and to give the Director such instructions as it considers appropriate in respect of the Court proceedings in Italy concerning the method of converting the (gold) franc into Italian Lire and other issues dealt with in this document.

* * *

ANNEX I

Decision of 14 March 1992 by the Judge of the Court of First Instance in Genoa in Charge of the Limitation Proceedings in the HAVEN Case

(Translation from Italian)

Stato Attivo in the HAVEN Case

The Judge, setting aside the reservation referred to in the Minute of the 9 March 1992, held as follows:

(A) **As Regards the Limitation Concerning Venha Maritime Limited and the United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited:**

1 Any lack of locus standi under Article 100 of the Code of Civil Procedure (CPC) on the part of persons other than the IOPC Fund (leaving aside the hypothetical insolvency of the latter, which is extremely unlikely in view of its structure) is irrelevant, since in this procedure the Judge must take account of all the problems relating to the compensation fund, even in the absence of the views of interested parties;

2 In its Judgment of 29 May 1991 the Court considered the adequacy of the limitation fund, guaranteed for an amount in excess of that resulting from the latest Lire/SDR conversion rate then available;

3 The Court made no ruling with regard to interest, which many creditors consider should form part of the compensation fund;

4 These creditors requested either the deposit in cash of the limitation amount or an increase in the amount of the guarantee to take account of interest accruing in the course of the proceedings;

5 These requests were also put forward in the opposition actions against the aforesaid Judgment and seem to imply, in substance, an amendment of or addition to the same in parte qua;

6 Article V.3 of the 1969 Liability Convention provides that, for the purpose of availing himself of the benefit of limitation provided for in Article V.1 of the Convention, the owner shall constitute a fund for the sum representing the limit of his liability, but it does not require that the fund should be constituted before the opening of the limitation proceedings (so that, in the TANIO case, the formal limitation proceedings were first opened and then the fund was constituted);

7 Article 623 of the (Italian) Code of Navigation (CN) provides that, before declaring the proceedings open, the Court shall ascertain the existence of the requisites of law. This regulation does not provide, however, that the limitation amount shall be calculated by the Court; the deposit and also the calculation of the amount are dealt with in Article 629 CN and,

moreover, the declaration of the value of the vessel, required for the said calculation, may be presented, pursuant to Articles 621 and 623 CN, after the order for the opening of proceedings;

8 The fact that the calculation of the limitation amount, in the Code of Navigation system, may take place after the said Judgment, has the effect that, while Article V.3 of the 1969 Liability Convention provides that the Guarantee shall be "acceptable ..... and considered to be adequate by the Court", the Judge who, in the case of a cash deposit, must in any event ascertain the amount of the limitation sum, is not precluded from making a decision on the subject;

9 In the Judgment of 29 May 1991 the Court, having noted that the limitation amount is Llt 23 950 220 000, "therefore" considered the adequacy of the fund constituted by guarantee for Llt 24 002 000 000 and the use of the term "therefore" shows that the adequacy was referable to the relationship between these figures and not to other elements (eg interest) not explicitly mentioned;

10 In any event, the findings which on the point should be considered implicit in the Judgment (because of the fact that the Order declared the proceedings open) do not form part – for the reasons given – of the typical content of an Order under Article 623 CN.

Therefore the mere fact that the findings are included in this Judgment, even if only implicitly, does not prevent the Judge (who, in accordance with Articles 629 and 628 CN may both determine the limitation amount and establish the fund) from examining the problem, even if it is also raised in the opposition actions;

11 Against the contention that interest should also form part of the fund it is noted that:

A Article V.1 of the 1969 Liability Convention (as amended by the Liability Convention Protocol of 1976) provides that the aggregate amount shall "not in any event exceed 14 million units of account";

B Article V.3 of the 1969 Liability Convention equates a cash deposit to the provision of a bank guarantee or other acceptable guarantee;

C DPR (Decree of the President of the Republic) 504/78 (Article 7) concerns the giving of a suitable bank or insurance guarantee and provides that the competent Ministry shall ascertain the adequacy of the bank or insurance guarantee;

D In the case of damage caused by a vessel belonging to an owner who is clearly not to blame, such owner would be subjected to a further burden which would not be easily quantifiable, because it would depend on diverse variables, such as the number of claimants, the validity of requests to be admitted to the list of claimants on the Compensation Fund etc;

E Judicial deposits do not bear interest;

F It would be unfair for the owner and his underwriter to be subject to the burden of interest, while the IOPC Fund is not so subject;

G It would create serious problems for the underwriter of an owner to have to increase the bank guarantee in respect of interest;

H Such interest in any event would not be payable under Italian law.

12 With reference to the matters raised in paragraph 11 above it should be noted that:

A1 Article V.1 imposes a maximum limit in the case where the multiplication of the tonnage by 133 units of account results in a figure (as has happened in the case under examination) in excess of 14 million units of account, but is silent on the subject of interest;

B1 The comparison implies a substantial effective equivalence between deposits in cash and guarantees (bank or other, but in any event "acceptable"), bearing in mind the fact that the guarantee must be judged "adequate". This adjective may refer both to the credit-worthiness of the guarantor and to the suitability of the guarantee itself to satisfy - like a cash deposit - the victims;

C1 The DPR 504/78 (Article 7) in fact provides that the Minister shall ascertain "the existence of the financial and economic capacity" of those undertakings which intend to give guarantees as provided by Article 5 of the 1969 Liability Convention and therefore is silent as regards the question of whether the guarantee is adequate or otherwise which is for the Court to decide;

D1 The point raised under D is correct, but it could be considered that (in addition to the cost of the basic guarantee, as it may be called) the owner may also claim against the persons responsible for his vessel having caused oil pollution for the greater costs deriving from the cover - by guarantee - of interest;

E1 The point made under E is correct, but this is not the only possible form of deposit. A deposit with a bank (especially where it is a question of substantial sums) is commonly made, and this finds support in Article 34 LF (Legge Fallimentare = Bankruptcy Law) and is certainly not excluded by Article 629 CN.

If a judicial deposit were the only possible form of deposit, one cannot see why the Judge should have to determine how it should be made, since judicial deposits are fully regulated by legislation;

F1 The owner and the underwriter are responsible for a liability, albeit with particular characteristics, of the former, while the IOPC Fund provides, to victims, only supplementary cover for damages. Such difference of position justifies the different treatment referred to;

G1 The possibility that the underwriter's guarantee should extend to interest may be taken into consideration by the underwriter for the purpose of determining the premium due to him by the owner and the fact that, for the latter, this could imply a greater insurance cost (normally, in any event, destined to be unloaded "downstream") is not an obstacle to the extension of the guarantee to interest (cf, in this connection, although with reference to another Convention, the Judgment of 1 May 1981 of the Supreme Court of the Netherlands in the action State of the Netherlands - Liberia Giants Shipping Corp);

H1 The very fact of opting for the guarantee (instead of for the cash deposit) shows that the guarantee, although undoubtedly onerous, is however more advantageous for the person resorting to it than the cash deposit. In the case where the latter is effected, the sum deposited (and subject to judicial control) increases in favour of creditors (obviously in the case of a deposit with a bank) while - where a guarantee only is given - the difference between interest and the cost of a guarantee (which is the logical justification for recourse to a guarantee) is for the benefit of the owner and/or underwriter. The interest, which is under discussion here, would seem to fall within the category of interest which would correspond to that which would have accrued in favour of creditors, if there had been a deposit with a bank;

13 In a complex procedure, such as the present, it is not reasonably foreseeable that a distribution of the limitation fund can take place quickly to those entitled and this gives concrete importance to the question of interest;

14 Given that the 1969 Liability Convention is silent on the point and given the points made under 12 above, an interpretation which, taking account of interest, avoids or at least reduces the consequences of inflation, which are such as to be able to erode considerably, over the years, the limitation fund, seems more in keeping with the spirit of the Convention itself;

15 The choice between a deposit (whether interest bearing or not) and a guarantee (including interest or otherwise) cannot give rise to substantially different protection for victims and this explains why the guarantee (for which alone the problem arises) must be "considered adequate";

16 The possibility that the fund referred to in Article V.3 of the 1969 Liability Convention (in the text amended by the 1984 Liability Convention Protocol) may produce interest is expressly considered by Article 6 of the 1984 Fund Protocol with a provision that, from this point of view, does not appear innovative, since the earning of the said interest is a normal consequence of the fact that money breeds money. The fact that no account is taken of possible interest for the purposes of determining the total due by the IOPC Fund confirms that any such interest will accrue in favour of victims (since otherwise there would be no reason to mention it) and is evidence of their interest in the matter, since it is a question of greater sums which do not affect the aforesaid total. Given that the texts of the 1969 Liability Convention and 1976 Liability Convention Protocol are silent on the point, the provision under review, although it has not yet come into force, seems – as stated above – not innovative but rather confirming a result one can already arrive at by interpretation;

17 If, having resolved the points made under 11, it is considered possible and in keeping with the spirit of the 1969 Liability Convention to give a guarantee which includes interest, which thus (see marginal note at end) adequately protects claimants, such method of constitution of the fund seems as satisfactory as a cash deposit;

18 The guarantee should therefore include interest accrued and accruing (from 16 May 1991 to the date of distribution of the limitation fund to the claimants) at a rate corresponding to that of Banca Commerciale Italiana for the period in question;

19 The guarantee need not on the other hand extend to revaluation, since, once it has been given in accordance with paragraphs 17 and 18 above, the owner and underwriter cannot be held liable for not having promptly recompensed the loss (cf Cass 24/4/84 N°2643 and Court of Genoa 13/3/81), since they have at that point fulfilled their obligations and since the timing of the distribution of the limitation fund depends on factors (such as those indicated under 11.D) for which they are not responsible;

20 The compensation fund, *insofar as it concerns the fund* constituted by Venha Maritime Ltd and the United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited, is therefore represented by the limitation amount of Llt 23 950 220 000, increased by interest thereon from 16 May 1991 to the date of distribution of the limitation amount to the claimants – at the rate payable during the period in question by Banca Commerciale Italiana.

In respect of the limitation amount thus increased there shall be given, the other conditions remaining unchanged, the bank guarantee previously presented for an amount of

Llt 24 002 000 000 together with a supplementary guarantee to be lodged with the Court within five days from the date on which this Order shall become final.

(B) **As Regards the Limitation Concerning the IOPC Fund:**

1 The fact that the 1976 Protocol to the Fund Convention has not yet come into force, so that the link which existed and was intended with the Liability Convention has been severed (the 1971 Fund Convention is "supplementary to the International Convention of 1969" according to the heading of the former), poses serious problems of interpretation, since, in order to allow the 1971 Fund Convention to continue to be applied, it is necessary to read the text in a way very different from its literal sense;

2 The argument which supports the adoption of the SDR as the unit of account of reference leads straight to the replacement by it of the gold franc, whereas the argument that the latter is the unit of reference leads to the erasure of the adjective "official" which qualifies the value (of gold) to which reference must be made;

3 In favour of the adoption of the SDR, in place of the Poincaré gold franc, as the unit of account to determine the indemnity due by the IOPC Fund it has been observed that:

A Article 1.5 *[Translator's note: this should read 1.4]* of the 1971 Fund Convention refers to Article V.9 of the 1969 Civil Liability Convention, so that the change in the latter of the unit of account must also affect the former;

B In Article V.9 of the 1969 Liability Convention the adjective "official" was inserted, since there was generally a difference between the official rate of exchange for gold and that on the free market;

C Resolution N°1 of November 1978 of the IOPC Fund has direct effect on the law of the Member States;

D The said Resolution, in any event, has the validity of an agreement between the said Member States for the purposes of the provisional application of the 1976 Fund Protocol;

E The reimbursement to the owner of excess amounts as provided in Article 5 of the 1971 Fund Convention implies a necessary congruity of the monetary units indicated in the said Article with those in Article V of the 1969 Civil Liability Convention;

F The French experience in the TANIO case shows that no regard was had to gold francs;

G The CRISTAL agreement presupposes, for its own operativity, that the indemnity paid by the IOPC Fund be calculated in SDR;

H The 1984 Fund Protocol has the purpose of offering "an increased indemnity" and, if reference then had to be made to gold francs, there would certainly not be an increased indemnity;

I Since the limit of liability of the owner is calculated in SDR and the IOPC Fund intervenes to indemnify the difference which remains "uncovered", if for the IOPC Fund it is necessary to have regard to gold francs, the same applies to the owner and, in such case, there remains, in the particular case, an intermediate band (between the limits in SDR and in gold francs) not indemnified by anyone;

K The adoption of gold (at its market value) as the unit of reference involves additional very substantial burdens for the IOPC Fund.

4 The IOPC Fund, furthermore, has denied that its own limit of cover can be increased due to devaluation and interest;

5 With reference to the points made under 3, it should be noted:

A1 Article 1.5 *[Translator's note: again this should read 1.4]* of the Fund Convention refers to Article V.9 of the "Liability Convention" and this, in Article 1.1 of the Fund Convention, is identified as the 1969 Convention on Civil Liability. The inapplicability, in this case, of principles relating to inchoate provisions and cross references made by them also appears from the fact that, *simultaneously with the* 1976 Liability Convention Protocol, in the 1976 Fund Protocol (Article II) express reference was made to the unit of account or monetary unit referred to in the 1976 Liability Convention Protocol and, above all, Article III eliminates every reference to gold francs;

B1 The insertion of the adjective "official" was intentional, for the reasons given under 3.B, and therefore it is not easy to ignore it in construing the provision.

It has been said that, as long as there existed an official quotation for gold, it was logical that reference should be made to it, so that the description "official" in fact would add nothing as compared with other cases where reference is made to gold currency and this additional definition is missing.

It may be noted however that, in 1969, the problem of the differences in quotations for gold (on the free market and according to the official quotation) was beginning to be felt in very different terms from formerly. In 1969, in fact, gold reached a quotation of as much as US $45 per ounce troy weight. As at 1 December 1969 (a quotation for Saturday 29 November 1969, the day on which the Liability Convention was signed, not being available) the official quotation for gold in Milan was Llt 723 (the average between the buying and selling price according to official statistics) per gramme. The free market quotation, again per gramme, was: in Zurich Llt 716.109; in Frankfurt Llt 719.594; in Paris Llt 753.187; in London Llt 718.123; in Hong Kong Llt 829.518; in Milan (in US Dollars then converted into Lire) Llt 732.82. The average therefore was Llt 744, representing an increase of 3% in comparison with the official quotation.

On 17 December 1971 (when the Fund Convention was signed) the official quotation for gold in Milan was Llt 847.50 (average as calculated above) per gramme. The quotation on the free market, again per gramme, was: in Zurich Llt 845.945; in Frankfurt Llt 834.681; in Paris Llt 820.448; in London Llt 830.112; in Hong Kong Llt 856.204; in Milan Llt 859.876 (by conversion at the export rate of exchange from the quotation in US Dollars per ounce). The average was therefore Llt 841.211, with no difference as compared with the minimum official quotation.

On 19 November 1976 (when the 1976 Liability Convention and Fund Protocols were signed) no official quotation existed. The average on the free market was Llt 3710.758 (London: 3644.63; Zurich: 3644.63; Paris: 3660.058; Milan: 4030; Frankfurt 3668.42; Hong Kong: 3616.81).

The above exercise shows – even if only with reference to certain significant dates for the purposes of the matter under examination – that, when the Swiss delegate, Mr Muller, proposed the specification "official", there had already been fluctuations in the quotation for gold on the free market, although they had been substantially reabsorbed at the date of drawing up of the Liability Convention.

It could be asked whether the gold clause had the sole aim of ensuring stability for the parameter adopted or also that of effectively guaranteeing "an equitable indemnity" for the victims.

In the context of an already manifest instability of quotations, the reference to the official quotation for gold (rather than the market value) certainly implied a (possible) diversity of values, but this was not then such as to deprive of meaning the reference itself to an entity having in any event an intrinsic value.

Seeing that, at the aforesaid date of 1969, the average difference between such quotation and value was very restricted, one could also discuss – for the purposes of construing the term "official" – whether it is certain that the intention then was only to give priority to the uniformity assured by this term or whether it was also intended to form a link to an entity having an intrinsic value, so that – the possibility of an official quotation and, therefore, the possibility of achieving the first result having failed, – not only for that (until the 1976 Liability Convention Protocol for the States which were parties to it as far as concerns the Liability Convention and until now for the Fund Convention) it would have been and it would be necessary to ignore the reference to gold.

It should also be noted, moreover, that already in 1976 the market price of gold had been subject to increases, recorded above, which greatly exceeded the depreciation of the principal currencies (eg: on 17 December 1971 the average between French Francs, US Dollars and DM was Llt 298.325 which increased to Llt 465.31 on 19 November 1976), so that the reference to gold at the market price would have had the effect not only of maintaining constant the amount of the limits provided for by the Liability Convention but actually of strengthening the protection offered to victims.

In the light of these points, one cannot leave out of consideration the existence of the term "official". Indeed, the link to the official value must have permitted a certain stability in terms of time and geography.

From this last point of view it could be held that, even today, a substantial uniformity of value can be obtained if one considers the quotation for gold with reference not to a single financial market but to an average between the national market and the most important international markets (London, Paris, Frankfurt, Zurich, Hong Kong; New York is not quoted, and therefore the Judge has no comparable data available). The operation of interpretation – once it is felt that the "official" quotation can be ignored – would be possible and, bearing in mind the normal state of the markets, would ensure a substantial uniformity of values, even in the case – put forward by the IOPC Fund – in which the same accident could give rise to limitation procedures in different countries.

Anticipating what will be said further on, it should be noted moreover that the problem of uniformity, in geographical terms, in the limits of liability is posed, in any case, for countries referred to in Article V.9(b) of the Liability Convention (as amended by Article II of the 1976 Liability Convention Protocol), so much so that in Article V.9(c) of the Liability Convention (in the text in force after the 1976 Protocol) reference is made to a conversion which "shall be made in such manner as to express ..... as far as possible the same real value for the amounts in paragraph 1 (new Article V.1) as is expressed there in units of account".

The argument concerning stability in terms of time is somewhat different, given that the official quotation for gold remained substantially stable for a long period. The SDR after all, although affected by the devaluation of the currencies which make up the "basket", underwent much more limited variations than those of gold on the free market. From this point of view – and here it suffices to consider the truly striking variations which have occurred in the last few years (cf below under 10.B) in the quotation for gold –

the "detachment" of the limits of liability from a term of reference having an official quotation undeniably affects to a considerable extent a relative uniformity, in time, of the limits themselves.

C1 The theory of the immediate direct effect of the IOPC Fund's Resolution N°1 of November 1978, although very authoritatively maintained, does not persuade this Judge.

Article 18.14 of the Fund Convention attributes to the Assembly the power of performing such "functions as are allocated to it under the Convention or are otherwise necessary for the proper operation of the Fund". It can be excluded that the Assembly is competent to change the unit of reference from the gold franc to the SDR (particularly by way of interpretation) so much so that it was held necessary to approve the 1976 Fund Protocol, the innovative part of which (Articles II and III) concerns precisely the point in question. If this change is not within the competence of the Assembly, it cannot be decided by the Assembly merely because it is necessary for the proper operation of the Fund, since it must be considered that in using this expression regard was had to the functions necessary from an operative point of view, but without usurping the powers of revision or amendment reserved by Article 45 of the Fund Convention to the Contracting States.

The direct effect of decisions referred to in Article 4.6 of the Fund Convention is based on a specific power granted to the Assembly by this article. The same may be said, for example, of the provisions of Article 11 of the Fund Convention.

A comparison with principles elaborated in the context of community law does not appear feasible, given that the latter is unique and has particular characteristics, such as to enable one to speak of a true and proper legal system (of the community) which has no application to specialised international organisations. It should be noted moreover that Resolution N°1 adopted "a method of interpretation of the regulations on the franc contained in the Convention" and it was resolved at the same time that references to francs in the Internal Regulations should be replaced by references to the SDR "as soon as the 1976 Fund Protocol has come into force". Internal Regulation 2 provides accordingly, but – as explained – should not be operative. The Resolution concluded with the recommendation to the Contracting States to become as soon as possible parties to the 1976 Fund Protocol and this is significant, because, in the opinion of this Judge, if the Member States had by this Resolution already resolved the problem, in the sense argued by the IOPC Fund, the entry into force of the 1976 Fund Protocol, Article III of which operates a series of conversions precisely on the basis that one gold franc = 15 SDR, would not have been a matter of urgency.

D1 It does not seem that it can be said that the above mentioned Resolution N°1 has the validity of an agreement (relevant according to Article 25.1.b of the Vienna Convention of 23 May 1969 ratified by law n°112 of the 12 February 1974) between Member States of the IOPC Fund for the purposes of a provisional application of the 1976 Fund Protocol. It seems singular that States, who have not thought fit to ratify the latter, should be bound by an alleged agreement directed to deal with a situation of a temporary nature which has now continued for more than fifteen years. The very concept of "temporary nature" does not permit the reaching of such a conclusion. Nor can one think, from a different point of view, that Italy, just because it has ratified this Protocol, is bound by the provisions of Article 18.b) of the above mentioned Vienna Convention, since, in the case under examination, until the 1976 Fund Protocol comes into force, the 1971 Fund Convention must be observed.

E1 First of all, it should be said that reimbursement to the owner is no longer provided for in the 1984 Fund Protocol. Although this has not yet entered into force, it seems reasonable to deduce from it that, in the intention of the parties to the said Protocol, the truly essential part of the 1971 Fund Convention, a dozen years after its signature, was the part relating to the protection of victims. Without prejudice to the fact that, obviously, in the case in question the 1971 Fund Convention should be applied, from what has been said above a principle of interpretation could be deduced according to

which – where the need to protect the owner and third parties requires different interpretations of the uniform regulations – priority must be given to the interpretation which best ensures the protection of third parties.

This having been said however the incongruity of the units of account considered in the 1976 Liability Convention Protocol and in the 1971 Fund Convention does not prevent the making of the aforesaid reimbursement on the basis of the latter.

On the basis of Article 5.1 of the 1971 Fund Convention, the Fund undertakes, within the limits referred to under letter (b), the obligation of reimbursement resulting from the application of the parameters referred to under letter (a). This enables it to be established that, starting from a certain tonnage (83 333.34 tonnes), the contribution is due in varying amounts, depending on the actual tonnage, from 19.84% to 40.47%, while up to 83 333.33 tonnes the contribution itself is due in the fixed amount of 25% of the limit of the owner.

Bearing in mind the fact that the maximum limit of liability, according to the 1976 Liability Convention Protocol, is reached for a vessel of 105 263 tonnes (and not 105 000 tonnes, as in the 1969 Liability Convention) and adjusting, upon the basis of the relationship between these two last tonnage measures, the values, again of tonnage, as specified above on the basis of the 1971 Fund Convention, it is possible to apply the same percentage amounts also with reference to the different unit of account provided for by the 1976 Liability Convention Protocol.

F1 The owner and disponent owner of the TANIO constituted the (first) fund on the basis of the 1969 Liability Convention, given that the 1976 Liability Convention Protocol had not yet come into force. The value of the Poincaré franc taken into consideration for the purpose was determined as FFr0.368437. The limitation amount (FFr11 833 717.79) calculated on this basis is slightly higher than that obtained (on the basis of the rate, on the 25 April 1980, of 1 SDR equals FFr5.46284), equating 1 SDR to 15 gold francs (FFr11 697 273). It is not known however how the limitation amount as regards the IOPC Fund was calculated.

However, even accepting that this was calculated in SDR, this precedent – although authoritative and deserving of great attention, in the light of the requirement of an interpretation, as far as possible, in accordance with international rules – does not in itself constitute a decisive argument, because it implies a kind of interpretation (which replaces one unit of account with another) which other Judges (cf Supreme Court of New South Wales – Commercial Division 22.9.1988) have felt unable to adopt, although with reference to another Convention.

G1 The same substantially may be said as regards the CRISTAL Agreement, given that the fact that this can operate in practice only where the limit in SDR is already considered applicable to the IOPC Fund, implies an interpretation in this sense by those who have adopted this Agreement on a voluntary basis.

H1 The strengthening of the protection of victims, intended by the 1984 Fund Protocol, should be viewed with reference to the 1976 Fund Protocol which, although not yet in force, constitutes the logical antecedent for an innovation in the determination of the unit of account.

I1 On the basis of Article 4.4(a) of the 1971 Fund Convention, it is necessary to have regard to the amount of compensation actually paid under the Liability Convention. Contrary to what is said under E1, it is not possible, in this case, to adopt a proportional criterion, it being a matter of determining a value (limit of the "first" fund) in absolute figures calculated on the basis of tonnage multiplied by gold francs (or SDR). As the IOPC Fund has correctly pointed out, in the case under examination the liability of the owner may be equivalent to Llt 24 billion (in SDR) or to about

Llt 179.5 billion (in gold francs). Now it is true that the above-mentioned Article 4.4(a) refers to the 1969 text of the Liability Convention, but it is also true, for those countries which have ratified the 1976 Liability Convention Protocol, that in such case the compensation can no longer be "actually paid" under the 1969 Liability Convention.

If, then, the emphasis is placed more on the difference between the IOPC Fund maximum and the "compensation actually paid" (in relation to a limit of liability for oil pollution and leaving aside the reference to one or other criterion for determining the same), the intervention of the IOPC Fund will be equal to the difference between its own limit, calculated on the basis of the market price of gold and the owner's limit, calculated in SDR. In the case of countries who are not parties to the 1976 Liability Convention Protocol, on the other hand, the difference would be that between congruous amounts, both calculated in gold at the market price.

It therefore follows that, where the tonnage is the same, in this second case the IOPC Fund would have to intervene for a much higher amount.

This result may cause confusion, but it is a consequence of the fact that, where the 1976 Liability Convention Protocol applies, compensation cannot have been paid under the 1969 Liability Convention.

K1 It could be supposed, bearing in mind the provisions relating to contributions set out in Articles 10 to 12 of the 1971 Fund Convention, that the persons liable to make such contributions would at least in part transfer such greater burden "downstream", thus reducing the incidence of it at their charge. The gold/SDR relationship, however, is such as to make serious problems of the type indicated by the IOPC Fund very probable.

6 It is noted that the 1976 Liability Convention Protocol provides, under Article II, – for Contracting States who are not members of the International Monetary Fund and whose law does not permit the application of the provisions of Paragraph 9(a) of Article V of the 1969 Liability Convention (as amended by the 1976 Liability Convention Protocol) – a limit of 210 million monetary units, corresponding to 65.5 milligrammes of gold of millesimal fineness nine hundred. The conversion of this amount into the national currency is to be made according to the law of the State concerned and must be made in such manner as to express in the national currency as far as possible the same real value as would be expressed in SDR.

For those States adhering to the 1976 Liability Convention Protocol and to whom the provisions now indicated apply it is impossible to see how the maximum limit (equal to 12 379.5 kg of gold of millesimal fineness one thousand) can be converted as far as possible into the same real value as 14 million SDR.

The market quotation does not appear to permit it, given the relationship between it and that of the SDR.

In reality, apart from this difficulty of conversion, it is not in any event conceivable that, in one and the same Protocol, two such different limits were intended and, since the only clear limit is the one expressed in SDR, it must be excluded that the other limit can be considered to be expressed in gold at its market value, which is more than seven times greater. The argument however does not seem to affect the solution of the problem under examination, since – see point 5.A1 – the 1971 Fund Convention is supplementary to the 1969 Liability Convention, so that amendments to the latter do not automatically also concern the former.

One cannot even hold with certainty that the 1976 Liability Convention Protocol supplies, on the point, a rule for interpretation of the 1969 Liability Convention, since first and foremost it changes the unit of reference and then it also provides an "indicative" criterion for conversion of gold.

It follows that, for States adhering only to the 1969 Liability Convention, the conversion problem is posed in the terms considered up to now for the 1971 Fund Convention.

7 Article 1280 Civil Code cannot usefully be referred to in the present case, since the Poincaré Franc ceased to be used as a means of payment as long ago as 1 October 1936 and remained only as a unit of account.

8 The interpretation given by Italian Judges to gold clauses is certainly significant and – even though with reference to Conventions in which it was not stated that the value was the "official" value – implies that the conversion should take place at market value. Since these are uniform regulations, it is also necessary to take account of the different interpretation given in the TANIO case by the French Magistrature.

9 At the end of the examination of the various arguments put forward in the proceedings, the problem remains in substance the very difficult one set out in point 2 and, however it is resolved, it will still involve an amending interpretation of the text of the 1971 Fund Convention.

10 Faced with the formal premise, represented by the use (which – cf point 5 B1 above – had a function and is therefore now relevant for interpretation purposes) of the adjective "official", it may further be noted that :

A Article V.9 of the 1969 Liability Convention, to which Article 1.4 of the 1971 Fund Convention refers, provides that the conversion from gold francs into national currency should be made on the date of the constitution of the fund. From this point of view it does not appear satisfactory to use SDR, on the basis of a fixed conversion rate – as far as the base unit is concerned – dating back twenty years, since in 1969 Article XXI, Section 2 (amended) of the International Monetary Fund Charter came into force.

This provided that one SDR should be equivalent to 0.888671 grammes of fine gold and therefore, taking account of the gold content of the Poincaré franc, one SDR was the equivalent of 15 Poincaré gold francs.

B Among the aims of the 1971 Fund Convention was to provide fair and adequate compensation to victims of oil pollution damage as specified by the Liability Convention.

The adoption of the gold franc at market value certainly fulfils this aim better than the SDR. It can however – as seen under 5 B1 – give rise to disparity in the treatment of victims.

With reference to the place in which a limitation procedure is opened there would not be serious problems, if in these cases reference was made (as, for this reason, it will be made here) to the average quotation between that recorded in the State in which the procedure is opened and that of the principal international financial markets (London, Paris, Frankfurt, Zurich, Hong Kong).

The aforesaid disparity could, on the other hand, be considerable with reference to the time of the opening of the procedure. On the 16th May (which is relevant here because on the 16 May 1991 the fund was constituted by Venha Maritime Limited and the United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited) the closing quotation in US Dollars for an ounce of gold in Paris (and the data for Hong Kong, London and Zurich are substantially similar) was 375.95 in 1984, 322.38 in 1985, 342.15 in 1986, 459.18 in 1987, 448.91 in 1988, 374.86 in 1989. It is clearly evident therefore

that there would have been greater protection for victims in the years 1987 and 1988 as compared with victims in the other years.

It should be asked however whether these disparities justify the failure to adopt a gold parameter (at market prices) which, even at times of the lowest quotation, ensured fair and adequate compensation much better than the SDR and, therefore, in substance, which is more in keeping with the spirit of the Fund Convention, the adoption of a parameter which avoids – substantially – disparities of treatment in time or of one which does not avoid them, but makes possible a fuller relief of the damages suffered.

11 At this point the Judge conclusively holds that:

A On principle, the recourse to SDR in a Convention (and this is demonstrated by the list attached under 4 to the opinion of Dr Mensah) is the solution which most conforms to the requirements of stability and uniformity sought in an international forum.

B In cases like this particular one, however, in which a Convention does not mention SDR, the replacement of gold francs by SDR constitutes – as already noted in the above quoted decision of the Supreme Court of New South Wales – an actual "rewriting" of the text of the 1971 Fund Convention and this, even more than an interpretation which ignores the adjective "official", is not permitted to the Judge.

C Between two alternative interpretations which so much affect the text of the legislation, it is right to choose that which, overall, ensures adequate compensation for victims, without substantially compromising the requirements of uniformity, particularly in geographical terms, of the treatment of such victims.

12 As regards the IOPC Fund therefore it is stated:

A The (HAVEN) fund has been constituted by the owner and the United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited (Article 11, 3rd paragraph DPR n°504 27.5.1978) by the deposit of a letter of guarantee with the Court Office on the 16 May 1991, so that reference must be made to this date.

B At such date the closing market values for gold were Llt 14 600 per gramme in Milan and – expressed in US Dollars per ounce – 356.2 in London: 359.14 in Paris: 357.5 in Zurich: 359.18 in Frankfurt: 359 in Hong Kong (respectively Llt 14 446.24; 14 565.48; 14 498.96; 14 567.10; 14 559.80; all the above on the basis of the quotation of Llt 1 261.45 for one US Dollar).

C The average value of gold, on the six above-mentioned markets, was therefore Llt 14 539.59 per gramme.

D Nine hundred million gold francs (this being the present limit of intervention for the IOPC Fund) correspond to 53 055 000 grammes of gold of millesimal fineness one thousand, equivalent to Llt 771 397 947 400; and this last sum includes, in accordance with Article 4.4(a) of the 1971 Fund Convention, the indemnity to the owner.

13 No revaluation nor interest is due on this amount, bearing in mind the character of the intervention of the IOPC Fund (and of its difference from a liability insurance) and of the fact that, until the assets and liabilities (of the compensation fund) have been finally established, it can certainly not be said that default time starts to run "at the debtor's discretion" (cf Cass 27/4/84 n°2643).

(C) **As Regards the Final Establishment of the Compensation Fund in the HAVEN Procedure:**

1 The contribution to the compensation fund, of the fund, as far as Venha Maritime Limited and the United Kingdom Steamship Assurance Association (Bermuda) Limited are concerned, is as follows:

(a) The limitation amount of Llt 23 950 220 000 increased by interest from the 16 May 1991 to the date of distribution of the limitation amount to the claimants at the rate payable during the period in question by Banca Commerciale Italiana.

(b) For the limitation amount thus increased there shall be given, the other conditions remaining unchanged, the bank guarantee previously presented for an amount of Llt 24 002 000 000 together with a supplement to the guarantee to be lodged with the Court Office within five days from the date on which this Order shall become final.

2 The contribution to the compensation fund, as far as the IOPC Fund is concerned, is represented by Llt 771 397 947 400 inclusive of the indemnity to the owner under Article 4.4(a) of the 1971 Fund Convention.

Marginal note approved on page 4: "(respecting also the principles stated by the Constitutional Court 18 to 22 November 1991 n°420)"

Genoa 14 March 1992

THE ASSIGNED JUDGE
(L Costanzo)

Lodged with the Court Office
14 March 1992

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ANNEX II

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.

* * *

ANNEX III

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.