

INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
35th session
Agenda item 3

FUND/EXC.35/3
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INCIDENTS INVOLVING THE IOPC FUND

HAVEN

Note by the Director

1 Introduction

1.1 In April 1991 a major oil pollution incident occurred when the Cypriot tanker HAVEN (109 977 GRT) exploded and sank off Genoa (Italy). This incident caused serious oil pollution in Italy, France and Monaco. More than 1 300 claims for compensation have been submitted to the Court of first instance in Genoa. The claims total approximately Lit 1 550 000 million (£710 million) plus FF97.5 million (£12 million).

1.2 The judge in charge of the limitation proceedings in the court of first instance in Genoa started hearings in September 1991 to examine the individual claims. These hearings were suspended in December 1991, in order to allow the judge to concentrate on issues relating to the amount of compensation available under the Civil Liability Convention and the Fund Convention, but were resumed in October 1992. Most of the claims have been given a preliminary consideration. As a number of claims are not supported by any documentation, the judge has invited many claimants to present supporting documentation. The claims submitted by the Italian Government and other public bodies have not yet been considered. It is expected that the judge will not be able to establish the list of admissible claims ("stato passivo") until late in 1993.

1.3 At its 32nd session the Executive Committee authorised the Director to state in the court proceedings, when appropriate, the IOPC Fund's position as to the admissibility of individual claims and the amounts which, in the view of the Fund, were acceptable. The Director was instructed to submit any questions of principle to the Executive Committee for consideration, if time allowed him to do so (document FUND/EXC.32/8, paragraph 3.3.8).

2 Consideration of Claims by the Executive Committee at Previous Sessions

2.1 During the examination of the claims carried out by the Director, certain questions of principle have arisen, which in the Director's view should be submitted to the Executive Committee for consideration, in particular concerning the extent to which so-called "pure economic loss" should be compensated.

2.2 At its 34th session, the Executive Committee examined a document presented by the Director dealing with certain questions of principle as to the admissibility of claims (document FUND/EXC.34/2). The Committee took some decisions in this regard whereas it postponed to its 35th session decisions concerning certain claims – viz losses suffered by public bodies, hotels, restaurants, beach facilities and tourist agents – since the decisions on these claims would have far reaching consequences (document FUND/EXC.34/9, paragraphs 3.1.6 and 3.1.7). The Committee agreed with the Director that it was essential to study in more detail the factual situation in respect of each claimant so as to establish the extent to which his loss could be considered as damage caused by contamination. This study is contained in the present document.

2.3 With regard to claims for loss of income suffered by fishermen, the Executive Committee noted, at its 34th session, that the loss suffered by these fishermen resulted from contamination of the area of the sea where they normally carried out their fishing. As the IOPC Fund had in a number of previous cases in Japan accepted claims from fishermen relating to loss of income resulting from their being prevented from fishing, the Committee decided that claims from fishermen in the HAVEN case for such losses should in principle be accepted, although each claimant would have to show that he was actually prevented from fishing as a result of the HAVEN incident and prove the quantum of the loss resulting from his inability to fish. The Executive Committee instructed the Director to state in the court proceedings in Italy the IOPC Fund's position on the claims presented by fishermen as set out by the Committee (document FUND/EXC.34/9, paragraphs 3.1.8 and 3.1.9). In accordance with this instruction, in the court proceedings the IOPC Fund has not raised any objections as to the admissibility in principle of these claims. The IOPC Fund has not been able to admit the claims, however, since the claimants have not submitted sufficient documentation to substantiate the loss allegedly suffered.

3 Claims Submitted to the Executive Committee for Consideration

3.1 Introductory Remarks

The claims in the HAVEN case are being dealt with by the Italian courts. Any decision of the IOPC Fund as to the acceptability of a claim is not binding on the courts. The acceptance by the IOPC Fund of a particular claim may be challenged by any other claimant, in view of the fact that the total amount of the accepted claims is likely to exceed the maximum amount of compensation available under the Civil Liability Convention and the Fund Convention which, in the IOPC Fund's view, is 60 million Special Drawing Rights (£55 million).

3.2 Losses Suffered in Respect of Hotels, Restaurants, Beach Facilities and Shops

3.2.1 Claims have been presented by owners or operators of some 700 hotels, 55 restaurants and 93 beach facilities located in the towns and villages along the Italian coast between Genoa and the French border. These claims, which total approximately Lit 85 000 million (£38 million), relate to alleged loss of income caused by reduced tourist activity resulting from the HAVEN incident.

3.2.2 From the point of view of pollution, the coastline can be divided into two parts, the stretch from Genoa to Savona and the stretch from Savona to the French border. The former part suffered heavy pollution in places, and the clean-up operations lasted generally until July 1991, ie they covered part of the main tourist season. The latter part suffered only limited pollution and the clean-up operations were completed by the middle of May 1991. It should be noted that within the stretch of coast

between Genoa and Savona there were considerable variations: Arenzano and Varazze were heavily polluted and the clean-up operations continued during the holiday season, whereas in Celle and Abisola, the pollution was lighter and the beaches were cleaned by the beginning of the summer season.

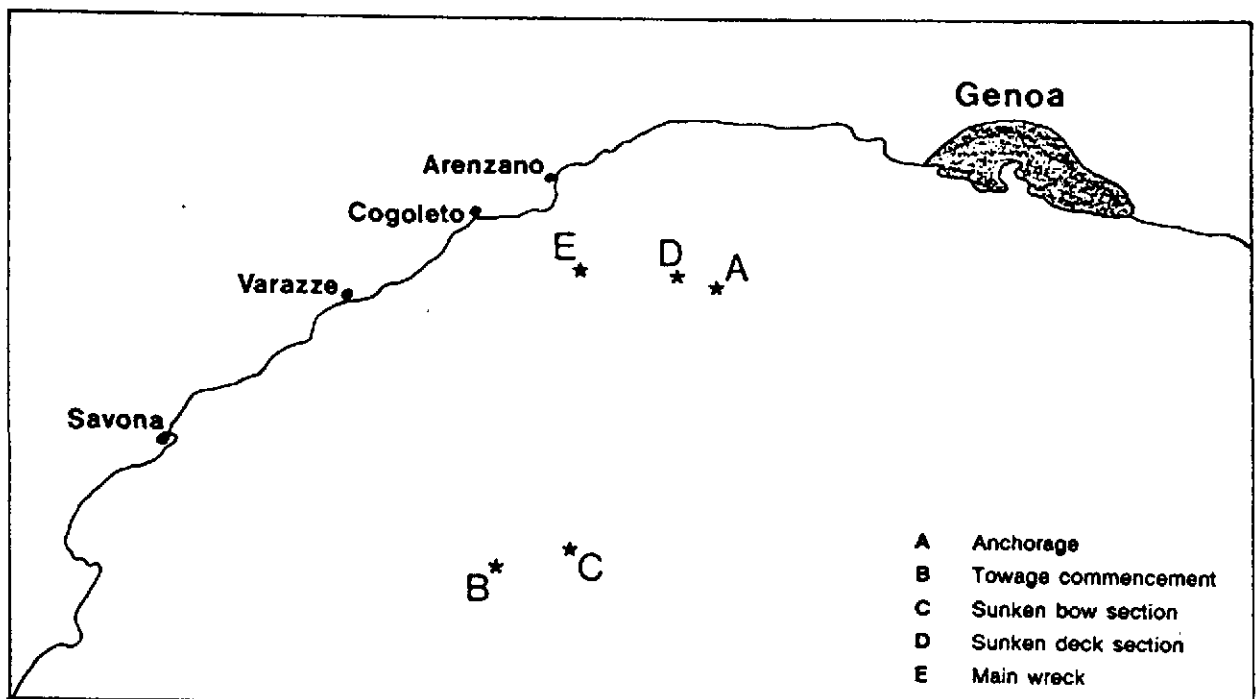
3.2.3 The beach facilities (so-called "bagni") provide their clients with changing cabins, showers, beach chairs etc. The facilities, which often include a bar or small restaurant, are operated under licences granted by the local authorities. All claims in respect of beach facilities which have been submitted relate to facilities located on beaches where pollution occurred, although in many cases the pollution was very light. Some of the operators of these facilities have not only suffered loss of income but also contamination of their property.

3.2.4 With respect to hotels, restaurants and bars, claims have been submitted by owners of such establishments located directly on or very close to a polluted beach. With regard to some villages and towns where beaches were polluted, claims have been submitted in respect of hotels and restaurants along the coast road opposite the polluted beach as well as some located relatively far from the polluted beach.

3.2.5 Claims for loss of income have also been presented by the owners of some hotels located in villages or towns not affected by pollution, for example, in Pietra Ligura (20 kilometres west of Savona) where there was no contamination and where the closest polluted beach is some ten kilometres away.

3.2.6 Some 180 shopkeepers have claimed compensation for loss of income for a total amount of Lit 15 300 million (£6.9 million). The shops covered by these claims are located in towns and villages along the Italian coast from Genoa to the French border.

3.2.7 The shops referred to above represent many different kinds of retailers, eg selling camping equipment, cars, ceramics, clothes, electrical appliances, fish, flowers, food, furniture, ice cream, newspapers, shoes, stationery and swimwear. There is also a claim from a hairdresser. Some of these shops are situated on the sea front by a beach contaminated as a result of the HAVEN incident, others are located on the coast road opposite the beach, and some are situated further away from the beach. Claims have also been presented in respect of some shops which are located in villages whose beaches were not affected by the oil.



3.2.8 The Executive Committee's decisions in respect of the claims set out above – viz losses suffered by the owners of hotels restaurants, beach facilities and shops – will have far reaching consequences. All these claims relate to pure economic loss. As mentioned in document FUND/EXC.35/2, paragraph 2.6.3, in many jurisdictions claims for pure economic loss of the kind presented in the HAVEN case would not be accepted. It appears that the position of Italian law is not clear in this regard. The IOPC Fund has previously accepted, however, certain claims of this kind without accompanying damage to property. In the TANIO case, the IOPC Fund accepted claims for loss of income suffered by operators of hotels and restaurants at seaside resorts, although the documentation in the IOPC Fund's archives does not set out in any detail the considerations on the basis of which the individual claims were accepted (document FUND/EXC.10/5, paragraph 3.3.4 and FUND/EXC.10/WP.1, paragraph 2.3).

3.2.9 In the view of the Director, the basic criteria for the admissibility of a claim of the kind discussed is that the damage can be considered as having been caused by contamination. The Director considers that there are many factors which could be taken into account in order to draw reasonable limits in respect of the establishments which should be entitled to compensation in the situation resulting from the HAVEN incident.

3.2.10 The Director takes the view that the loss of income suffered by the operators of beach facilities ("bagni") as a result of the reduction in tourism should be considered as "damage caused by contamination" to the extent that such reduction is caused by the HAVEN incident. These operators have suffered an infringement in their recognised legal right, viz to operate the facility on the beach. For this reason, the Director is of the opinion that claims for loss of profit suffered by the operators of beach facilities as a result of a reduction in the number of clients are in principle admissible.

3.2.11 As regards the owners of hotels, restaurants and shops, the situation is less clear since these establishments have not been affected directly by the oil. The question is then what criteria to apply in respect of such establishments. For example, it could be argued that the establishment should be located on or fairly close to the beach in order for the IOPC Fund to accept that the damage was caused by contamination. On the other hand, it could be maintained that the mere fact that a beach in a particular village or town is polluted might affect the number of tourists coming to the area; any reduction in tourism would cause loss of income not only to those establishments (hotels, restaurants and shops) located on or close to the beach but also to all other establishments in the locality.

3.2.12 Although it may be difficult to lay down strict criteria as to which types of claims should be admissible, the Director believes it would be appropriate, nevertheless, to submit some general considerations in this regard to the Executive Committee for examination. In any event, in the Director's view, each claim should be considered on its own merits.

3.2.13 Firstly, the Director considers that it would not be appropriate, in respect of establishments in the same town or village, to distinguish between establishments located on or very close to the beach and those located a little further from the beach, say 100–500 metres away. If contamination of the beaches results in a reduction in the tourist activity in a given town or village, it would probably affect all establishments of the same kind in the locality. For this reason, the Director takes the view that all hotels, restaurants and shops in the same town or village should be treated equally independent of their location. As regards shops, he also believes that it would not be reasonable to make a distinction dependent on the types of goods sold, except in respect of shops selling capital goods (such as furniture and cars) which are not normally bought by tourists. It appears that this approach corresponds to the position taken by the IOPC Fund in the TANIO case.

3.2.14 An important question is whether a distinction should be made between villages and towns along the coast between Genoa and the French border whose beaches were polluted, and towns and villages along that coast whose beaches were not contaminated. The oil originating from the HAVEN polluted a number of beaches along the coast from Genoa to the border, but some remained unaffected. It would be appropriate, in the Director's view, to give equal treatment in principle to all claims for loss of income submitted by establishments along this coast, independent of whether the town or village where they are located was directly affected by the oil from the HAVEN.

3.2.15 It should be emphasised, however, that in the Director's view each claim should be considered on its own merits, and the decisive criterion should be whether there is a link of causation between the damage and the contamination resulting from the HAVEN incident. For example, three retailers (clothes retailer, lingerie shop, stationery/toy shop) in Savona claim compensation for loss of income due to reduction in tourism. Savona, a town with 60 000 inhabitants, does not depend on beach tourism, the beaches in Savona being mainly used by the citizens of that town. In the Director's view, these three retailers do not have valid claims relating to loss of income.

3.2.16 It should also be noted that tourism in general is influenced by external factors. There is often a considerable variation from year to year in the number of tourists visiting a given area for reasons which are normally difficult or impossible to establish, eg weather, recession, currency fluctuations, change of habits, popularity of alternative tourist areas, war situations in certain areas. Statistics on tourism in the Ligurian region indicate that there was a downward trend in tourism for the period 1989 to 1991. The Director is at present seeking to obtain official statistics concerning the development of tourism in the area concerned.

3.2.17 It goes without saying that each claimant whose claim is accepted in principle would have to substantiate the damage suffered. Documentation will have to be provided in respect of their 1991 income and also in respect of their income for previous years (say, 1989 and 1990). Other factors will also have to be taken into account for the assessment of compensation, eg trends in tourism. As stated above, the general criteria must be that there is a link of causation between the alleged loss and the contamination resulting from the HAVEN incident.

3.2.18 Another question is the period for which compensation should be granted. One solution would be to accept loss of income during the period when there was actual pollution on the beaches, for some areas up to the end of May and for others up to July 1991. In the Director's view such an approach would not be reasonable since tourists plan their holidays well in advance, often early in the spring. The Director considers that each claim should be considered on its own merits also in this regard. This proposed approach corresponds to the position taken by the IOPC Fund in the TANIÖ case.

3.3 Losses Suffered by Tourist Agent

A claim for Lit 920 million (£422 000), later reduced to Lit 280 million (£129 000), has been submitted by an Italian travel agent/accommodation bureau in Finale Liguria which arranges bookings of holiday flats and hotel rooms at the request of foreign travel agents. The claim relates to:

- (a) economic loss consisting of loss of commission resulting from a reduction in the number of holiday flats and hotel rooms booked through the agency;
- (b) economic loss due to the fact that tourists cancelled reservations of hotel rooms and holiday flats which the claimant had already rented from the flat or hotel owner;
- (c) economic loss suffered in the claimant's capacity as an operator of inclusive tours for tourists due to a decrease in the reduction of participants in these tours; and
- (d) cost of an extra advertising campaign to counteract the negative impact of the HAVEN incident on his business.

3.3.1 The losses allegedly suffered which are referred to under (a), (b) and (c) above were not a direct result of the HAVEN incident but an indirect result of the contamination of certain parts of the coast. In the view of the Director, however, these losses are not different in character from the losses suffered by owners of hotels or shops in the same area. For this reason, the Director considers that these items of the claim should be accepted in principle. It should be noted that in the TANIÖ case the IOPC Fund accepted two claims from estate agents for loss of income resulting from a reduction in rental from holiday lettings.

3.3.2 The item relating to the cost of an extra advertising campaign (item (d) above) is being examined further and will be dealt with in an addendum to the present document.

3.4 Claim for Reimbursement of Mooring Fees and Insurance Costs Presented by Yacht Owner

3.4.1 A yacht owner, who during the summer of 1991 had his boat moored in Arenzano (Italy), has claimed compensation for an amount of Lt 19 931 656 (£9 130) relating to part of the mooring fees and insurance premiums for the year 1991. The owner of the boat in question has alleged that he was prevented from using his boat during a certain period of time and that this non-use was due to the HAVEN incident.

3.4.2 In a document presented to the Executive Committee at its 34th session, the Director stated that he was of the opinion that the claim for reimbursement of part of the mooring fees and insurance premiums was not admissible under the Civil Liability Convention and the Fund Convention, since the mooring fees and insurance premiums would have been incurred whether or not the HAVEN incident had taken place. The loss suffered by the boat owner was in the Director's view "loss of enjoyment of use of his boat" (document FUND/EXC.32/4, paragraph 3.17).

3.4.3 During the discussions in the Executive Committee, some delegations took the view that losses of this kind did not fall within the definition of "pollution damage" laid down in the Civil Liability Convention. The Italian delegation considered that such losses should be admissible and maintained that the Italian Courts would accept claims relating to loss of enjoyment of use of property when directly connected to the event. The Executive Committee decided to postpone its consideration of this claim to its 35th session (document FUND/EXC.34/9, paragraphs 3.1.10 - 3.1.11).

3.4.4 Having taken further advice on the position of Italian law on this point, the Director has come to the following conclusions. Costs of the kind covered by this claim are not recoverable under Italian law in relation to liability in torts, ie third party liability of the kind governed by the Civil Liability Convention and the Fund Convention. These costs would have been incurred by the claimant whether or not the HAVEN incident had occurred. There is therefore no link of causation between the pollution damage and these costs. In the light of these considerations, the Director takes the view that this claim should be rejected.

3.5 Loss Suffered by Public Bodies as a Result of Reduced Tourist Activity

3.5.1 The City of Cannes (France) has submitted a claim which, inter alia, relates to loss of income resulting from a reduction of tourism during 1991. The claim lists various kinds of losses, as follows:

	FFr	
(a) Loss of professional tax	35 000 000	(£4 200 000)
(b) Loss of tax on casinos	11 000 000	(£1 300 000)
(c) Loss of tax on individual tourists	1 800 000	(£200 000)
(d) Loss of additional tax on registration	4 200 000	(£500 000)
(e) Loss of tax on various entertainments	<u>3 900 000</u>	(£500 000)
	<u>55 900 000</u>	(£6 700 000)

3.5.2 The City of Cannes has also claimed compensation in the amount of FFr6.8 million (£820 000) for extra costs incurred for publicity to counteract the negative effects of the pollution on the reputation of the City as a tourist resort.

3.5.3 A claim relating to alleged loss of tourist tax resulting from a reduction in tourist activity in the amount of FFr350 000 (£42 000) has been submitted by the Commune of Lavandou in France.

3.5.4 In the TANIO case, the Executive Committee rejected a claim from a commune for loss of tax revenue due to a reduction in the income of businessmen as a result of the incident. The Committee stated that it might be very difficult for a public authority to prove that a loss of tax revenue had actually occurred as a direct result of a pollution incident. The Committee considered that the documentation submitted in support of this claim was insufficient (documents FUND/EXC.10/5, paragraph 3.3.5, and FUND/EXC.10/WP.1, paragraph 2.3).

3.5.5 It should be noted that the City of Cannes is a major tourist resort. There are significant variations in tourist activities on the French riviera from one year to another, even without an oil pollution incident or other events which give rise to negative publicity. In the Director's view, the City has not shown that the alleged loss was caused by the HAVEN incident. For these reasons, the Director takes the position that, on the basis of the documents submitted, the alleged loss of income resulting from a reduction in tourism during 1991 should not be considered as "damage caused by contamination", and that this part of the claim should therefore be rejected.

3.5.6 As regards that part of the claim presented by the City of Cannes which relates to extra costs for publicity, in the Director's view it has not been shown that the HAVEN incident caused any damage to the reputation of the City of Cannes as a tourist resort. For this reason, the Director proposes that this part of the claim should also be rejected, leaving aside the question as to whether costs for publicity of this kind would have been admissible if it were established that the HAVEN incident had caused damage to the reputation of the City as a tourist resort.

3.5.7 As for the claim presented by the Commune of Lavandou, the Commune has not shown, in the Director's view, that the alleged loss of tourist tax was caused by the HAVEN incident. He proposes, therefore, that this claim should also be rejected.

4 Conversion of Gold Francs and Environmental Damage

4.1 The Court of Genoa is dealing with two other issues of great importance to the IOPC Fund, viz the method of conversion of (gold) francs into national currency, and the admissibility of a claim presented by the Italian Government relating to damage to the environment. The former question is of decisive importance for the determination of the maximum amount available under the Civil Liability Convention and the Fund Convention. The situation in respect of these issues was reported to the Executive Committee at its 34th session (document FUND/EXC.34/2, paragraphs 4 and 5).

4.2 The question relating to the method of conversion of the (gold) franc will be dealt with by the Court at a hearing to be held on 18 June 1993, and the judgement on this issue is expected by the end of July 1993.

4.3 There have been no developments since the Committee's 34th session in respect of the Italian Government's claim relating to environmental damage.

5 Discussions with the Italian Government

5.1 At the Executive Committee's 34th session, the Italian delegation drew attention to the fact that although nearly two years had passed since the HAVEN incident, no payments had been made which was causing considerable financial hardship to victims in Italy. The Italian delegation stated that, in view of the complexity of the on-going court proceedings, it might take many years before these proceedings could be brought to an end. This delegation stated that, for this reason, the Italian Government was ready to enter into discussions with the other parties involved in the incident in order to find acceptable compromise solutions to the various issues, thereby making it possible to settle the whole incident out of court (document FUND/EXC.34/9, paragraph 3.1.2).

5.2 Several delegations stated that they shared the concerns of the Italian delegation as regards the delay in payment to victims and the risk of protracted litigation. For this reason, they supported

the Italian proposal that discussions should be held for the purpose of exploring the possibilities of out-of-court settlements. These delegations nevertheless drew attention to the fact that this case had given rise to *several questions of principle of great importance* and that it might be difficult to find acceptable solutions on these points (document FUND/EXC.34/9, paragraph 3.1.3).

5.3 The Executive Committee, recognising the great complexity of the issues involved, instructed the Director to enter into discussions with the Italian and French Governments for the purpose of exploring the possibilities of out-of-court settlements in respect of claims arising out of the HAVEN incident. The Director was also instructed to report the results of these discussions to the Committee in due course (document FUND/EXC.34/9, paragraph 3.1.4).

5.4 In accordance with the instructions given to him by the Executive Committee, the Director has entered into discussions with the Italian Government. So far these discussions have focused on establishing the main problems involved. The intention of the Italian Government and the IOPC Fund is that the discussions will continue in the near future.

6 Action to be Taken by the Executive Committee

The Executive Committee is invited to:

- (a) take note of the information contained in this document;
 - (b) give the Director such instructions as it may consider appropriate in respect of the handling of claims arising out of this incident; and
 - (c) give the Director such instructions as it may deem appropriate in respect of claims relating to losses suffered by:
 - (i) owners of hotels, restaurants, beach facilities and shops (paragraph 3.2);
 - (ii) tourist agent (paragraph 3.3);
 - (iii) reimbursement of mooring fees and insurance costs for yacht (paragraphs 3.4);
and
 - (iv) public bodies as a result of reduced tourist activities (paragraph 3.5).
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