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INCIDENTS INVOLVING THE IOPC FUND

HAVEN

CONVERSION OF (GOLD) FRANCS INTO NATIONAL CURRENCY

Note by the Director

1 Introduction

1.1 As a result of the HAVEN incident which occurred off Genoa (Italy) in April 1991 legal action was taken against the shipowner in the Court of first instance in Genoa. The Court opened limitation proceedings in May 1991 and fixed the limitation amount at Lit 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.

1.2 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.

1.3 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.

1.4 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 Lit 771 397 947 400 (£360 million) (including the amount paid by the shipowner under the Civil Liability Convention), instead of Lit 102 864 000 000 (£47 million), as maintained by the IOPC Fund, calculated on the basis of the SDR.

1.5 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.

1.6 An English translation of the judge's decision was reproduced in Annex I to document FUND/EXC.31/2.

1.7 The IOPC Fund, the shipowner and the UK Club lodged oppositions to the decision of 14 March 1993.

1.8 The oppositions were considered by the Court of first instance which was composed of three judges (including the judge who rendered the decision of 14 March 1992). The Court rendered its judgement on the oppositions on 26 July 1993. In the judgement the Court upheld the decision of 14 March 1993.

1.9 An English translation of the judgement which contains over 200 handwritten pages is being prepared and will be reproduced as an addendum to the present document.

1.10 In view of the importance of the issues dealt with in the judgement of 26 July 1993, the present document sets out the background to the problems and a summary of the decision of 14 March 1992. The document also contains a summary of the IOPC Fund's pleadings in opposition to that decision and the position of other parties. Finally, the document gives a summary of the judgement of 26 July 1993 and of the IOPC Fund's appeal against that judgement.

1.11 It is recalled that the IOPC Fund has supported its pleadings by opinions submitted by eminent lawyers. These opinions are summarised in document FUND/EXC.31/2, paragraph 5.

1.12 It should be noted that the Executive Committee has, at its 31st session, expressed its grave concern as regards the consequences of the judge's decision for the future of the international regime of liability and compensation established by the Civil Liability Convention and the Fund Convention (document FUND/EXC.31/7, paragraph 3.1.5). At its 15th session, the Assembly stated that it shared these concerns (document FUND/A.15/28, paragraph 8.3).

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:

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).

4 The IOPC Fund's Pleadings to the Judge in Charge of the Limitation Proceedings

The reasons set out by the IOPC Fund in its pleadings in the proceedings before the judge in charge of the limitation proceedings 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.

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.

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.

5 Position of the Other Parties Before the Judge

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

5.2 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.

6 Judge's Decision of 14 March 1992

Conversion of (gold) francs

6.1 As mentioned in paragraph 1.4, 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 Lt 771 397 947 400 (£360 million) (including the amount paid by the shipowner under the Civil Liability Convention), instead of Lt 102 864 000 000 (£47 million), as maintained by the IOPC Fund, calculated on the basis of the SDR.

6.2 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

6.3 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.

6.4 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.

6.5 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 Lit 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.

6.6 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.

7 Oppositions Lodged to the Judge's Decision

7.1 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 disagreed 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

<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."

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 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

<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."

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 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.

<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:

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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.

7.2 The shipowner and the UK Club 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 was 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 maintained that for this reason this limit cannot be exceeded by the addition of interest. In addition, they argued 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 was 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 was correct, however, then they agreed 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 Judgement of 26 July 1993

As previously mentioned, the Court upheld the decision of 14 March 1992. The arguments given by the Court can be summarised as follows:

It is noted that the adjective "official" preceding the noun "value" in Article V.9 of the Civil Liability Convention was inserted at the last session of the Diplomatic Conference and that this adjective is not included in the text of the Convention published by the Comité Maritime International (CMI).

In an Italian Act of 1983 the Italian legislators modified unilaterally the 1929 Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air by substituting the SDR for the franc poincaré. The Court of Cassation held, in deciding a case concerning the Hague Rules, that such substitution can be made by the legislator but not by the Courts, since the Courts have no power to change the law. For the same reason, the Court cannot replace the gold franc in the 1971 Fund Convention by the SDR, since the 1976 Protocol thereto has not entered into force.

On the other hand, since the *fixed parity of gold has been abandoned and the gold has lost its official value*, the reference to gold could not mean anything else than the free market value of gold.

Article 1.4 of the Fund Convention is not to be considered as referring to the Civil Liability Convention as amended by the 1976 Protocol thereto.

If the free market value of gold were to be applied also in respect of Article 5 of the Fund Convention, the IOPC Fund would never pay any indemnification to the shipowner, since the limit of the shipowner's liability would always be lower than the starting point of the IOPC Fund's payment of indemnification. This difficulty can be overcome, since the indemnification of the shipowner is determined as a percentage of the shipowner's *limit of liability*. Article 5 must therefore be interpreted on the basis of such a percentage calculation, even if this would result in the IOPC Fund's indemnification of the shipowner being determined in SDR as a percentage of an amount determined in SDR.

The percentage calculation should not be applied in respect of Article 4 of the Fund Convention, because Article 4 (unlike Article 5) applies although the amounts laid down therein are given in absolute figures. It is noted that by converting the gold unit into national currency at its market value, the compensation payable by the IOPC Fund becomes many times higher in relation to the shipowner's limit than it would be if conversion were made at the official value of gold at the time when the original text of the Fund Convention was adopted. This was not intended by the international legislator. This result cannot be avoided, however, after the demise of the fixed gold parities.

It is admitted that the general opinion of States is that (gold) franc should be substituted by the SDR, as is shown in the preparatory works leading to the adoption of the IOPC Fund Resolution N°1. However, the opinion of States does not change the law. It is also noted that in the TANIO case all parties agreed that the SDR should be used as unit of account, in spite of the fact that neither of the 1976 Protocols had entered into force at that time. This calculation was, however, only based on an agreement between the IOPC Fund and the P & I Club involved, on the one hand, and the main claimant (the French Government), on the other. The fact remains that the Fund Convention does not mention the SDR.

The substitution of the SDR for the gold franc could not be made by Resolution N°1. By adopting the 1976 Protocols, the international legislator took the view that a Diplomatic Conference had to be convened to make this substitution and that a Resolution of the IOPC Fund Assembly was not sufficient. In addition, any amendment to an international convention must be implemented into Italian law by an Act of Parliament, and the Resolution was not implemented by such a procedure.

It was held that the Court had no power to annul a decision of an international body, such as the IOPC Fund.

The bank guarantee submitted by the UK Club must be increased by interest, since the guarantee must be equivalent to a cash deposit. Such interest must not be deducted from the compensation due from the IOPC Fund. The interest is not due under the Civil Liability Convention but under Italian domestic law, and is therefore not included in "the amount of compensation actually paid under the Civil Liability Convention for pollution damage".

9 The IOPC Fund's Appeal

9.1 In its deed of appeal the IOPC Fund has repeated the arguments developed in the proceedings before the Court of first instance. The IOPC Fund has emphasised the following points:

The word "official" was inserted in Article V.9 of the Civil Liability Convention for the express purpose of preventing the use of the free market value of gold for the conversion of the gold franc into national currency. The intention of the legislator is essential for the interpretation of the law, both according to the Article 12 of the Preliminary Provisions of the Italian Civil Code and Article 31.4 of the Vienna Convention on the Law of Treaties. Any reference to the 1929 Warsaw Convention, the 1955 Montreal Protocol thereto, the 1924 Hague Rules and the jurisprudence relating to these treaties is irrelevant, since these treaties do not contain the word "official" and the legislator had not expressed any clear intent in respect of the method of conversion.

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.

After the demise of the gold parity there are two possible solutions: either Article 1.4 of the Fund Convention must be filled in by the reference to the new wording of Article V.9 of the Civil Liability Convention, as amended by the 1976 Protocol thereto, or the legislative gap must be filled by an interpretation by analogy with the Civil Liability Convention as amended by the 1976 Protocol. The analogy is imposed by the close link between the Conventions. The two Conventions cannot have different units of account. The use of the free market value of gold has been prohibited by the legislator. For this reason, to substitute the SDR for the "official value of gold" would not constitute a change of the law. The "opinions" as to the use of SDR expressed

by States are not "opinions" but "expressions of will" by States which are relevant pursuant to Article 31.3(a) and (b) of the Vienna Convention on the Law of Treaties.

By acknowledging that the indemnification of the shipowner under Article 5 of the Fund Convention must be determined in SDR, the Court introduces in fact two units of account in the Fund Convention: gold at its market value in Article 4 and the SDR in Article 5. This is contrary to Article 1.4 which provides for only one unit of account. By introducing the SDR as a unit of account in Article 5 the Court also contradicts its statement that the courts cannot change the unit of account in the Fund Convention.

The maximum amount payable by the IOPC Fund was originally 2.14 times higher than the limit of the shipowner's liability, and after the IOPC Fund Assembly had doubled the maximum amount payable by the Fund it was 4.28 times higher. An application of the free market value of gold in respect of the maximum amount payable by the Fund would result in that amount being 32 times higher than the shipowner's limit. This would destroy the equitable balance between shipping interests and oil interests which the international legislator had intended to achieve.

Resolution N°1 did not modify the Fund Convention but interpreted the provisions concerning the unit of account in the new situation resulting from the demise of the gold parity or filled the legislative gap resulting from that demise.

In Article 4.6 of the Fund Convention it is stated that when amending the maximum amount payable by the IOPC Fund, the Assembly should take into account inter alia "changes in the monetary values". This confirms that the limit of the IOPC Fund's cover cannot be determined according to the value of gold as a commodity.

As regards the annulment of the decisions by the Assembly in 1979 and 1989 to increase the IOPC Fund's cover, it should be noted that the IOPC Fund is not only an international organisation but pursuant to Article 2.2 of the Fund Convention also a legal person in the Italian domestic legal system.

With respect to the question relating to interest on the bank guarantee, any amounts (including any interest) paid to victims are paid under the Civil Liability Convention, not under domestic law. The interest must therefore be deducted from the maximum amount payable by the IOPC Fund.

9.2 The IOPC Fund will submit extensive pleadings to the Court of Appeal at a later stage of the proceedings.

10 Action to be Taken by the Executive Committee

The Executive Committee is invited to consider the information contained in this document and to give the Director such instructions in respect of the appeal proceedings as it may deem appropriate.
