INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
38th session
Agenda item 3

FUND/EXC.38/2
20 January 1994

Original: ENGLISH

# INCIDENTS INVOLVING THE IOPC FUND

## PATMOS

Note by the Director

## 1 The Incident

On 21 March 1985, the Greek tanker PATMOS (51 627 GRT), carrying 83 689 tonnes of crude oil, collided with the Spanish tanker CASTILLO DE MONTEARAGON (92 289 GRT), which was in ballast, off the coast of Calabria in the Straits of Messina (Italy). Approximately 700 tonnes of oil escaped from the PATMOS. Most of the spilt oil drifted on the surface of the sea and dispersed naturally. Only a few tonnes of oil came ashore on the Sicilian coast. The Italian authorities undertook extensive operations in order to contain the spilt oil and to prevent it from polluting the Sicilian and Calabrian coasts.

## 2 Claims for Compensation

2.1 Claims were lodged against the limitation fund, totalling Llt 76 112 040 216 (£30.4 million). Most of the claims were settled out of court. The aggregate amount of the claims accepted by the courts during the limitation proceedings or settled out of court during the appeal proceedings is Llt 9 436 318 650 (£3.7 million). These claims have been paid by the UK Club.

2.2 The owner of the PATMOS and the owner's insurer, the United Kingdom Steamship Assurance Association (Bermuda) Ltd (UK Club), established a limitation fund with the Court of Messina. The Court fixed the limitation amount at Llt 13 263 703 650 (£5.3 million).

## 3 Appeal Proceedings

### 3.1 Claims subject to appeal

3.1.1 A claim of Llt 20 000 million (£8.0 million), later reduced to Llt 5 000 million (£2.0 million), was submitted by the Italian Government for alleged damage to the marine environment. The Italian Government did not provide any documentation indicating the kind of damage which had allegedly been caused or the basis on which the amount claimed had been calculated. The IOPC Fund Assembly had in 1980 unanimously adopted a Resolution stating that "the assessment of compensation to be paid by the IOPC Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models". In view of this Resolution, the IOPC Fund opposed this claim.

3.1.2 The Court of first instance rejected this claim stating that the State had not suffered any economic loss. In addition, the Court rejected an item of the Italian Government's claim relating to certain activities of the fire brigade of Messina on the grounds that the primary purpose of these activities was not the prevention of pollution. The Italian Government appealed against this decision.

3.1.3 Appeals were also lodged by three other claimants whose claims had been rejected by the Court of first instance.

### 3.2 Italian Government's claim

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

3.2.2 The position of the IOPC Fund to claims of this kind is dealt with in document FUND/WGR.7/4.

3.2.3 The Italian Government's claim was dealt with by the Court of Appeal in a non-final judgement, rendered in 1989. In that judgement the Court stated that the owner of the PATMOS, the UK Club and the IOPC Fund were liable for the damage covered by the claim made by the Italian Government. The Court appointed three experts with the task of ascertaining the existence, if any, of damage to the marine resources off the coasts of Sicily and Calabria consequent on the oil pollution; if such damage existed, they should determine the amount thereof or, in any case, supply any useful element suitable for the equitable assessment of the damage.

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

3.2.5 In a report submitted in March 1990, the court experts held that, except in respect of fishing activities, there was a lack of data to evaluate the economic impact on other activities and that a precise assessment of the damage to such activities was impossible. In the view of the experts, the evaluation should be carried out by the Court. The experts quantified the damage to the fishing activities at not less than Llt 1 000 million (£400 000).

3.2.6 In their pleadings to the Court, the IOPC Fund, the owner of the PATMOS and the UK Club pointed out that the Court had instructed the experts to deal with damage which could not be assessed in monetary terms. They argued that the court experts had exceeded their mandate, since the damage allegedly suffered by fishermen and the tourist industry was not damage to the marine resources but economic loss. It was pointed out that, in any event, the experts had admitted that the

damage to the tourist industry could not be quantified. The owner, the Club and the IOPC Fund referred to the fact that, as regards the damage to the environment properly speaking, the experts had used expressions such as "non-existent", "negligible", "modest", "of short duration" and "reversible".

3.2.7 As ordered by the Court, the experts produced a second report in April 1992 in which they stated that their conclusions were only hypothetical and not confirmed by factual evidence. The quantity of water affected by the oil was estimated, and the experts then considered how the oil might affect the plankton and the development and growth of fish. A mathematical formula was used to calculate a quantity of fish which allegedly were not born or did not develop, due to lack of nutrition. The experts stated that only a percentage of the quantity of fish not having come into existence would have been caught. The experts gave a nominal value to the quantity which would have been caught. An allowance was also made for the days when fishing was banned following the incident, to take account of loss of earnings. The experts excluded damage to the beaches because neither the authorities nor the tourist operators had submitted claims.

3.2.8 The conclusion of the experts was based on the assumption that 2 000 tonnes of oil were spilled and that 5 000 million $m^3$ of sea water were polluted, thus causing a concentration of oil exceeding 0,1 mg/litre. The IOPC Fund, the shipowner and the UK Club have argued that there is no evidence that 2 000 tonnes were spilled and that 5 000 million $m^3$ were affected. They point out that under Italian law the equitable assessment of the damage is permitted only when the existence of the damage is proved, but it is impossible or very difficult to prove the quantum thereof. The IOPC Fund, the owner and the Club have also maintained that a part of the pollution did not concern the Italian territorial waters but the high seas, and that any damage outside the territorial sea falls outside the scope of the Civil Liability Convention and the Fund Convention.

3.2.9 The Court of Appeal rendered its judgement in January 1994.

3.2.10 As regards the Italian Government's claim relating to damage to the marine environment, the Court granted the State of Italy compensation in the amount of Llt2 100 million (£830 000). The reasons for the judgment can be summarized as follows:

> The Court does not accept the position taken by the IOPC Fund, the shipowner and the UK Club that there is no evidence of the quantity of oil spilled or of the water volume affected. It accepts the conclusion of the court experts on these points
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> The Court notes that the experts had not taken into account that part of the polluted area was outside the territorial waters. The Court states that the State of Italy has no title under the Civil Liability Convention, nor under general principles of law, to bring an action for compensation for damage outside the territorial waters. It is estimated by the Court that the area outside the territorial waters represent 20% of the polluted area.
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> The Court considers that the use of dispersants made by the Port authority of Messina was improper. The amount of compensation should therefore be reduced, as a result of contributary negligence on the part of the party suffering the damage, pursuant to Article III.3 of the Civil Liability Convention and Articles 1227 and 2056 of the Italian Civil Code.
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> The Court does not accept the court experts' view that only loss of fish which would have been caught should be taken into account for the purpose of assessing the amount of compensation. In the Court's opinion, the total quantity of fish not having come into existence as well as damage to plancton and benthos should form the basis of that assessment, since the claim relates to damage to the environment in terms of loss of enjoyment suffered by the collectivity.
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> The Court does not admit the claim in respect of interest and devaluation.

3.2.11 It appears that the Court of Appeal has assessed the amount of compensation on the basis of a certain quantity of fish which was not brought into existence as a result of the pollution, at a price of Llt8 000 per kg. The Court may also have taken into account damage to plancton and benthos. There is, however, no indication in the judgement how the amount awarded in compensation has been calculated, and the judgement does not set out the extent of reduction of the compensation due to contributory negligence.

3.2.12 The Italian Government had also appealed in respect of an item of its claim for Llt46 980 000 (£118 550) relating to certain activities of the fire brigade of Messina. This claim had been rejected by the Court of first instance on the grounds that the activities carried out were part of the task for which the fire brigade had been set up and would therefore not give any right to compensation; in addition, these activities had been carried out after the state of local emergency had ceased.

3.2.13 The Court of Appeal stated that the activities of the fire brigade were carried out for the purpose of preventing fire during the transshipment of the crude oil from the PATMOS to other vessels. The Court considered that since the activities related to the removal of the crude oil, they should be considered as anti pollution measures. The Court of Appeal also stated that the fact that the measures were taken after the state of emergency had ceased was irrelevant. For this reason, this item of the claim was accepted.

3.3 Other Claims

3.3.1 The appeal of a company (Nettunia Srl) was rejected by the Court of Appeal on procedural grounds. This claim for Llt8 055 600 (£3 180) had in the limitation proceedings been presented by the State of Italy. After this claim had been rejected by the judge in charge of the limitation proceedings, Nettunia lodged opposition. The Court of Appeal stated that Nettunia had no title to lodge opposition or appeal, since it had not presented any claim in the limitation proceedings. The Court noted that the State had not been entitled to present the claim, since it had not acquired Nettunia's right by subrogation. The Court of Appeal added that Nettunia's claim was inadmissible, since the fire services carried out by the company were not undertaken to prevent pollution but in order to ensure the safety of the ship.

3.3.2 Appeal had been lodged by a port chemist having submitted a claim for Llt522 700 000 (£206 400) in respect of fees relating to the issuing of gas free certificates and some inspections by helicopter. The Court took the view that these activities had the purpose of salving the ship and cargo and not to prevent pollution, and rejected this claim.

3.3.3 The Court of Appeal also rejected a claim for Llt157 533 284 (£62 200) by the Corporation of Pilots of the Court of Messina. The activities of the pilots mainly consisted in checking of the mooring of the PATMOS during the discharge of the cargo. The Court held that even if some of these activities might have served the purpose of preventing pollution, the primary purpose of these activities was salvage. For this reason, the Court of Appeal rejected this claim.

## 4 Appeal to the Supreme Court of Cassation

4.1 As set out in paragraph 3.2.4 above, the IOPC Fund has reserved its right of appeal against the Court of Appeal's decision as to the question of principle addressed in the non-final judgement rendered in 1989 in connection with appeal against the final judgement of that Court.

4.2 As a result of the judgement of the Court of Appeal, the total amount of the accepted claims is Llt11 583 298 650 (£4 574 760), which is below the limitation amount applicable to the PATMOS (Llt13 263 703 650). Since the PATMOS was flying the flag of a State (Greece) which at the time of the incident was not party to the Fund Convention, the shipowner is not entitled to indemnification under Article 5.1 of the Fund Convention. If the judgement of the Court of Appeal stands, the IOPC Fund will therefore not be called upon to make any payments of compensation or indemnification. Consequently, the IOPC Fund is not entitled to appeal against the judgement.

4.3 The Director does not know whether any other party will appeal against the judgement.

## 5 Action to be Taken by the Executive Committee

The Executive Committee is invited to take note of the information contained in this document.