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OIL POLLUTION
COMPENSATION
FUND

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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 and also affected France and Monaco. Some 1 350 claims for compensation have been submitted to the Court of first instance in Genoa.

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. 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. It is expected that the judge will establish the list of admissible claims ("stato passivo") during the first half of 1995.

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).

1.4 The Executive Committee has taken decisions at its 34th, 35th and 36th sessions on a number of questions of principle as regards the admissibility of claims. In this regard reference is made to the documents presented by the Director to these sessions and the respective Records of Decisions. No new questions of principle have arisen which require decisions by the Committee.

2 Claims situation

2.1 The claims presented to the Court other than those relating to damage to the environment total approximately Lit 765 000 million (£314 million) plus FF97.5 million (£11.6 million).

2.2 A number of these claims are, however, duplications. The duplications are mainly due to the fact that the State of Italy and a number of contractors and sub-contractors have presented claims in respect of the same operations. In its evaluation of the claims, the IOPC Fund has tried to establish the aggregate amount of the claims (other than those relating to damage to the marine environment) after elimination of duplications. It appears that the duplications total some Lit 455 000 million (£187 million). After deducting that amount from the total figure, a balance of some Lit 310 000 million (£127 million) remains in respect of claims other than those relating to damage to the marine environment. It should be noted that the figures given above should not be taken in any way as representing the position of the IOPC Fund as regards the admissibility of respective claims, nor as regards the reasonableness of the amounts claimed.

2.3 The Italian Government and some other public bodies have presented claims relating to damage to the environment. The situation in respect of this issue was reported to the Executive Committee at its 34th session (document FUND/EXC.34/2, paragraph 5).

2.4 The claim documents submitted by the Italian Government did not originally indicate the kind of "environmental damage" which was allegedly sustained, nor did they give any indication as to the method used to calculate the amount claimed, Lit 100 000 million (£40 million). The Italian Government informed the IOPC Fund that it had not been possible to describe the environmental damage because the study of the effects of the incident on the marine environment had not yet been completed. The Government also stated that the figure given in the claim was only provisional.

2.5 The Region of Liguria has requested that the figure in the Italian Government's claim relating to environmental damage, Lit 100 000 million, be increased to Lit 200 000 million (£80 million). The Region has maintained that the amount should be apportioned between the various territorial entities which have directly suffered or are suffering ecological damage. Two provinces and 14 communes have included items relating to environmental damage in their respective claims. None of these claims contain any description of the alleged damage, and the claims setting out an amount do not explain how these amounts have been calculated.

2.6 On 28 June 1994, the Italian Government quantified the alleged damage to the environment as follows:

- (i) restoration of 43 hectares of phanerogams; Lit 266 042 million (£109 million);
- (ii) consequences of the erosion of the beaches due to the damage to the phanerogams; not quantified but left to the assessment of the Court on the basis of equity;
- (iii) wreck removal; Lit 20 000 million (£8.2 million);
- (iv) damage restored by the natural biologic recovery of the resources; Lit 591 364 million (£242 million) for the sea and Lit 6 029 million (£2.5 million) for the atmosphere, or a total of some £245 million.
- (v) irreparable damages to the sea and atmosphere; not quantified but left to assessment by the Court on the basis of equity; and
- (vi) compensation for inflation and interest

2.7 The total amount of the items of the Italian Government's claim which has been quantified is Lit 883 435 million (£362 million).

2.8 The IOPC Fund has, jointly with the shipowner and the UK Club, submitted extensive pleadings relating to all claims subject to the limitation proceedings. In particular, in April 1994 the IOPC Fund presented pleadings on the claims relating to damage to the environment in which the Fund's position in principle in respect of such claims was set out.

2.9 A summary of the position of the IOPC Fund, the owner and the Club will be presented to the judge in connection with the final hearing to be held on 3 October 1994.

3 Maximum Amount Payable by the IOPC Fund

3.1 In March 1992 the judge of the Court of first instance in Genoa in charge of the limitation proceedings rendered a decision as to the maximum amount available under the Civil Liability Convention and the Fund Convention. The IOPC Fund had always taken for granted that the conversion of the maximum amount of 900 million (gold) francs laid down in the Fund Convention should be made on the basis of the Special Drawing Right (SDR) of the International Monetary Fund. The judge held, however, that the maximum amount payable by the IOPC Fund should be calculated by application of the free market value of gold which would give an amount of Lit 771 397 947 400 (£316 million), including the amount paid by the shipowner under the Civil Liability Convention, instead of Lit 102 864 000 000 (£42 million), as maintained by the IOPC Fund calculated on the basis of the SDR. The IOPC Fund lodged opposition against this decision. The judge's decision was upheld by the Court of first instance in a judgement rendered on 26 July 1993.

3.2 The IOPC Fund has appealed against this judgement and has presented extensive pleadings to the Court of Appeal in Genoa on this issue. The Court of Appeal is expected to render its judgement during 1995.

3.3 In the appeal proceedings, the Principality of Monaco has in its pleadings stated that it agrees with the judgement referred to above. The Director has drawn the attention of the Government of Monaco to the fact that Monaco had taken part in the 15th session of the Assembly at which the Assembly expressed its grave concern as regards the consequences of the decision rendered by the judge in charge of the limitation proceedings for the future of the international regime of compensation established by the Civil Liability Convention and the Fund Convention, and that the Assembly had stated that the universally accepted interpretation of the Fund Convention was that the limit of the IOPC Fund's cover should be determined by using the SDR. After the Court had rendered its judgement, the Executive Committee expressed the same concerns at its 36th session, at which Monaco participated as observer. The Director has invited the Government of Monaco to explain the reasons for the position taken by Monaco in the appeal proceedings, in view of the fact that Monaco had not previously indicated that its position on this issue differed from that taken by the IOPC Fund.

4 Discussions with the Italian Government

4.1 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).

4.2 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. 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).

4.3 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.

5 Discussions with the French Government

5.1 Discussions have been held with the French Government concerning its claim which amounted to FFfr16 284 864 (£1 938 700). The claim was considered in detail at a meeting held in London on 5 and 6 September 1994. At that meeting agreement was reached between the French Government, on the one side, and the IOPC Fund, the shipowner and the UK Club, on the other side, on the admissible quantum of the claim, viz FFfr12 580 724 (£1 497 700). The agreement is subject to the approval of the judge in charge of the limitation proceedings.

5.2 The reduction in the amount claimed related mainly to certain reconnaissance flights which the IOPC Fund considered were not justified and to the rates for two French Navy vessels which in the Fund's view were disproportionate to the operations carried out. In addition, a reduction was made in the amount claimed for certain operations at sea which were carried out after the date when the operations in the Fund's view were no longer required.

6 Claims of the French Communes

6.1 Claims totalling FFfr78 410 591 (£9.3 million) have been presented to the Court in Genoa by 32 French communes and one other public body. These claims relate almost exclusively to shoreline clean-up activity and loss of income in the tourist industry. One of the public bodies (Parc National de Port Cros) has claimed compensation for damage to the marine environment.

6.2 Correspondence has been exchanged between the communes (including Parc National de Port Cros) and the IOPC Fund, the shipowner and the UK Club. As a result of this correspondence, agreement has been reached with 21 communes on the quantum of their claims, for a total amount of FFfr6 656 969 (£792 500). These agreements are subject to the approval of the judge in charge of the limitation proceedings.

6.3 Discussions are continuing with the remaining 11 communes.

7 Question of Time-Bar

7.1 Claims for compensation against the IOPC Fund are time-barred when three years have elapsed from the date when the damage occurred, unless the claimants take certain legal steps. In the HAVEN case, the three-year period expired on or shortly after 11 April 1994. The question has arisen of whether or not the majority of the claims arising out of the HAVEN incident are time-barred vis-à-vis the IOPC Fund.

Relevant Provisions in the Conventions

7.2 The question of time-bar is governed by Article VIII of the Civil Liability Convention as regards the shipowner and his insurer and by Article 6.1 of the Fund Convention with respect to the IOPC Fund. Articles 7.4 and 7.6 of the Fund Convention are also of interest in this context. These provisions read:

Article VIII of the Civil Liability Convention

"Rights of compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage. Where this incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence."

Article 6.1 of the Fund Convention

"Rights to compensation under Article 4 or indemnification under Article 5 shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 7, paragraph 6, within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage."

Article 7.4 of the Fund Convention

"Each Contracting State shall ensure that the Fund shall have the right to intervene as a party to any legal proceedings instituted in accordance with Article IX of the Liability Convention before a competent court of that State against the owner of a ship or his guarantor."

Article 7.6 of the Fund Convention

"Without prejudice to the provisions of paragraph 4, where an action under the Liability Convention for compensation for pollution damage has been brought against an owner or his guarantor before a competent court in a Contracting State, each party to the proceedings shall be entitled under the national law of that State to notify the Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the court seized and in such time and in such a manner that the Fund has in fact been in a position effectively to intervene as a party to the proceedings, any judgement rendered by the court in such proceedings shall, after it has become final and enforceable in the State where the judgement was given, become binding upon the Fund in the sense that the facts and findings in that judgement may not be disputed by the Fund even if the Fund has not actually intervened in the proceedings."

Relevant Provisions in Italian Legislation

7.3 The Civil Liability Convention and the Fund Convention were implemented into Italian Law by the Act of 6 April 1977, N°185. In Article 3 of that Act, the Government was given the authority to issue decrees having the effect of laws adopted by Parliament for the purpose of laying down provisions necessary for the fulfilment of the obligations arising out of these Conventions (so-called "delegated legislation").

7.4 Such delegated legislation is contained in a Decree of 27 May 1978, N°504. Article 11 of this Decree reads:

"Cases relative to the liability of the owner of the ship for oil pollution damage, pursuant to the Civil Liability Convention, fall within the competence of the Tribunal in the district of which the pollution occurred. In case of pollution of territorial waters and areas within the district of more than one Tribunal, the competence rests with the Tribunal first sought.

For the procedure of limitation of the owner's liability according to Article V of the Civil Liability Convention, the provisions of Book IV, Title IV of the Code of Navigation apply if they are not inconsistent with the provisions of that Convention. The procedure of limitation is initiated before the Tribunal competent according to paragraph 1 of this Article.

The establishment of the fund, according to the formalities referred to in Article V of the Civil Liability Convention, is made with the Chancery of the Tribunal competent to decide cases on the liability of the owner.

The same Tribunal as the one referred to in paragraph 1 of this Article is competent to decide all the cases initiated for oil pollution damage according to Article 2 of the Fund Convention."

7.5 As regards Book IV, Title IV of the Code of Navigation, Article 628 is of particular interest and reads:

"Within the period fixed in the judgement opening the procedure, the appointed judge, after having heard the owner and the claimants, determines the "stato attivo" on the basis of the statement of value^{<1>} and of the documents indicated in article 621. He can ex officio order technical ascertainment in view of the revision of the value of the vessel as stated by the owner or on the amount of the freight and other rewards, in which case he fixes a date for the deposit of the report of evaluation and suspends the procedure, if appropriate, up to the date of the deposit".

Analysis of the Italian Legislation

7.6 The Director has been advised that only the limitation proceedings against the owner (and his insurer) are governed by Title IV of Book IV of the Code of Navigation. Only the last paragraph of Article 11 of the Decree referred to in paragraph 7.4 above applies to the IOPC Fund, and this provision governs only the competent court.

7.7 The question could be raised whether Title IV of Book IV (Articles 620-642) of the Code of Navigation could not be applied to the IOPC Fund by analogy, in view of the similarity of the situation of the claimants vis-à-vis the shipowner/insurer and that vis-à-vis the IOPC Fund. In both cases there are a large number of claims which compete for a limited amount of compensation.

7.8 According to legal advice given to the IOPC Fund, such an application by analogy is not possible in respect of Article 628, since that Article is an exceptional provision. Article 14 of the Preliminary Provisions of the Civil Code provides, inter alia, that laws which constitute exceptions to general rules are not applicable by analogy to cases other than those expressly foreseen therein. Article 628 is an exceptional provision since it gives a single judge the power to determine the "stato attivo" (ie the amount available for distribution) without any request, whereas the Code of Civil Procedure (Article 99) lays down the general principle that a person who wants to exercise a right must submit his request to the competent judge. Furthermore, if no opposition is lodged against the "stato attivo" as determined by the single judge in charge of the limitation proceedings, his decision will become final and binding. The general rule is, however, that all judgements are made by the tribunal (ie by three judges).

7.9 On the basis of this reasoning, the judge in charge of the limitation proceedings made a mistake in rendering a decision on the maximum cover of the IOPC Fund. Such a decision could not be taken in the limitation proceedings, since Article 628 of the Code of Navigation does not apply to claims against the IOPC Fund. The decision of the single judge on the IOPC Fund's maximum cover is, therefore, non-existent and so is the judgement by the Court of first instance confirming that

^{<1>} Under the Italian Navigational Code, the limitation amount is equal to the value of the ship at the end of the voyage; such value may not be lower than one fifth and not higher than two fifths of the value at the beginning of the voyage.

decision. The IOPC Fund has raised this point in the proceedings before the Court of Appeal on the gold issue.

Analysis of Article 6.1 of the Fund Convention

7.10 According to Article 6.1 of the Fund Convention, there are two ways for a claimant to avoid or interrupt the time-bar as regards the IOPC Fund, namely by bringing legal action against the IOPC Fund or by making a notification under Article 7.6 of the Fund Convention.

7.11 Only a few claimants have fulfilled the requirements of Article 6.1 by making a notification under Article 7.6 to the IOPC Fund, namely the French State, the French communes, the Principality of Monaco and a few Italian claimants²².

7.12 The IOPC Fund intervened in the limitation proceedings on 14 June 1991, pursuant to Article 7.4 of the Fund Convention. The Director has been advised that such intervention cannot result in the time-bar against the IOPC Fund being interrupted.

7.13 According to the consistent jurisprudence of the Italian Supreme Court of Cassation, acts referred to in a statute as having the effect of interrupting time limits fixed by law are exclusive and not only examples. For this reason, acts which are not expressly mentioned in the relevant legislation do not have the effect of interrupting the time limit. It appears that this principle of Italian domestic law should apply also to Article 6.1 of the Fund Convention which forms part of Italian law.

7.14 The jurisprudence of the Supreme Court of Cassation holds that formal notification cannot be substituted for by knowledge of a fact acquired by the party concerned in any other way.

7.15 The Director has been advised that the various written pleadings presented by the claimants in the limitation proceedings also vis-à-vis the IOPC Fund cannot be considered as actions against the IOPC Fund. These pleadings only contain legal arguments but not a specific request for money. The powers of attorney given to the various lawyers by the claimants cover only the limitation proceedings against the shipowner and his insurer. In order to enable the lawyers to act against any other party, such as the IOPC Fund, the lawyers would need additional powers of attorney.

7.16 The question could be raised whether the time limit could be considered as having been interrupted in respect of the IOPC Fund by "the Fund's acknowledgement of debt". In the limitation proceedings against the owner, the IOPC Fund has accepted that some claims are partially founded, but these acknowledgements total only an amount far below the shipowner's limitation amount. The IOPC Fund has thus acknowledged only the debts of the shipowner and his insurer.

7.17 An important question is the point of departure for the three-year period limit. According to Italian jurisprudence, in case of a non-contractual situation the time-bar period starts to run from the moment when the damage started. Consequently, in the HAVEN case the three year period started to run when the escape of oil from the HAVEN occurred or shortly thereafter.

Conclusions

7.18 In view of the legal advice received, the Director is of the opinion that the claims submitted in the limitation proceedings became time-barred in respect of the IOPC Fund on or shortly after 11 April 1991, except for the claims referred to in paragraph 7.11 above.

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One Italian claimant notified the IOPC Fund only of the judgement opening the limitation proceedings but not of his claim, and this notification could not, therefore, be considered as notification of the action against the owner. Most fishermen started legal action against the IOPC Fund, but this action was dismissed by the judge, and since the fishermen did not appeal against the judge's decision, the claims are time-barred.

8 **Action to be Taken by the Executive Committee**

The Executive Committee is invited to:

- (a) take note of the information contained in the present document; and
 - (b) give the Director such instructions as it may deem appropriate in respect of claims arising out of this incident, in particular in respect of the time-bar issue.
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