



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
49th session
Agenda item 3

71FUND/EXC.49/2
17 June 1996

Original: ENGLISH

INCIDENTS INVOLVING THE IOPC FUND

HAVEN

Note by the Director

1 Introduction

1.1 At its 48th session, the Director informed the Executive Committee of two court decisions in respect of the Haven incident which occurred on 11 April 1996 off Genoa (July). The first of these decisions, a judgement rendered on 30 March 1996 by the Court of Appeal in Genoa, related to the method to be used for the determination of the maximum amount payable by the IOPC Fund in national currency (document FUND/EXC.48/3). In the second decision, rendered on 5 April 1996, the judge in the court of first instance in Genoa in charge of the limitation proceedings relating to this incident determined the admissible claims for compensation ("stato passivo") (document FUND/EXC.48/4).

2 Conversion of unit of account

2.1 The amounts in the 1969 Civil Liability Convention and the 1971 Fund Convention were expressed in (gold) francs (Poincaré francs). Under the Civil Liability Convention, the amounts expressed in (gold) francs should be converted into the national currency of the State in which the shipowner established the limitation fund 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. In 1976 Protocols were adopted to both Conventions. Under these Protocols, the (gold) franc was replaced as the monetary unit by the Special Drawing Right (SDR) of the International Monetary Fund (IMF). The 1976 Protocol to the Civil Liability Convention entered into force in 1981, whereas the 1976 Protocol to the Fund Convention came into force in 1994, ie after the *Haven* incident.

2.2 An important legal question has arisen in the limitation proceedings in the Court of first instance in Genoa, namely 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 taken it for granted that the conversion should be made on the basis of the SDR. It was maintained by some claimants, however, that the conversion should be made by using the free market value of gold, since there was no longer

any official value of gold and the 1976 Protocol to the Fund Convention which replaced the (gold) franc with the SDR was not in force.

2.3 The IOPC Fund's main argument in support of its position is that the inclusion of the word "official" in the definition of the unit of account laid down in the original text of the 1969 Civil Liability Convention was made deliberately to ensure stability in the system, and that it was clearly meant to rule out the application of the free market value of gold. The unit of account in the Fund Convention is defined by a reference to the Civil Liability Convention. In the IOPC Fund's view this reference must be considered to refer to the Civil Liability Convention as amended by the 1976 Protocol thereto. The IOPC Fund has maintained that for this reason the conversion must be made on the basis of the SDR not only in respect of the Civil Liability Convention but also in respect of the Fund Convention. The Fund has pointed out that the application of different units of account in the Civil Liability Convention and the Fund Convention would lead to unacceptable results, particularly as regards the relationship between the portion of liability to be borne by the shipowner and that to be borne by the IOPC Fund on the basis of Article 5.1 of the Fund Convention.

2.4 A detailed presentation of the issues involved and the arguments of the parties is set out in document FUND/EXC.36/3.

2.5 It will be recalled that a judge of the court of first instance in Genoa, who is in charge of the limitation proceedings, held in March 1992 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 (£313 million) (including the amount paid by the shipowner under the Civil Liability Convention), instead of Lit 102 643 800 000 (£42 million), as maintained by the IOPC Fund, calculated on the basis of the SDR.

2.6 An opposition to this decision lodged by the IOPC Fund was considered by the Court of first instance (which was composed of three judges, including the judge who had rendered the decision in 1992). In July 1993 the Court upheld the decision of March 1992.

2.7 In its judgement the Court of Appeal confirmed that the maximum amount payable by the IOPC Fund should be calculated by the application of the free market value of gold, giving an amount of Lit 771 397 947 400 (£313 million), including the amount payable by the shipowner under the Civil Liability Convention.

2.8 The main points of the Court of Appeal's judgement are as follows:

The IOPC Fund had maintained that, since most of the claims were time-barred vis-à-vis the IOPC Fund, the total amount of the claims against the Fund did not exceed 60 million SDR and that for this reason it was not necessary for the Court to take any position as to the method of conversion. The defence of time-bar was rejected by the Court which held that the intervention of the IOPC Fund under Article 7.4 of the Fund Convention had the same effect as a notification under Article 7.6.

The Court of Appeal confirmed the position of the Court of first instance that the demise of the official value of gold did not allow national courts, when calculating the maximum amount payable under the Fund Convention, to substitute the SDR for the (gold) franc before the entry into force of the 1976 Protocol to that Convention. The Court also held that the entry into force of that Protocol did not apply retroactively. For this reason the Court of Appeal stated that the gold unit could be converted only at its market value.

2.9 The IOPC Fund is entitled to appeal to the Supreme Court of Cassation against the judgement by the Court of Appeal relating to the conversion of the unit of account laid down in the 1971 Fund Convention within 60 days of having been formally notified of the judgement by a party to the proceedings. So far no such notification has been made. It should be noted that the running of any period for lodging an appeal is suspended during the period 1 August – 15 September.

2.10 At its 48th session, the Executive Committee instructed the Director to take the necessary steps to appeal to the Supreme Court of Cassation (document FUND/EXC.48/6, paragraph 4.1.6). The IOPC Fund's Italian lawyers are making the necessary preparations to this effect.

2.11 The judgement of the Court of appeal has been translated into English, except those parts which are not of direct interest to the IOPC Fund since they relate to purely procedural matters. In view of the length of the translation (51 pages), the text has not been distributed as an IOPC Fund document. However, interested delegates can obtain copies of the translation from the IOPC Fund Secretariat.

3 List of established claims ("stato passivo")

3.1 It should be recalled that the Executive Committee has taken the position that the majority of the claims arising out of the *Haven* incident are time-barred vis-à-vis the IOPC Fund. The Committee has noted that only a few claimants, namely the French State, the French municipalities, the Principality of Monaco and a few Italian claimants, had fulfilled the requirements of Article 6.1 of the Fund Convention by making a notification under Article 7.6. The Committee has taken the view that all other claims submitted in the limitation proceedings had become time-barred in respect of the IOPC Fund on or shortly after 11 April 1994, in the light of the provisions of Article VIII of the Civil Liability Convention and Article 6.1 of the Fund Convention (document FUND/EXC.40/10, paragraphs 3.3.4 and 3.3.8).

3.2 Some 1 350 Italian claimants presented claims relating to damage other than damage to the environment. These claims totalled approximately Lit 765 000 million (£321 million)^{<1>}, including a claim by the Italian Government for Lit 261 000 million (£110 million).

3.3 The Italian Government also presented a claim relating to damage to the marine environment. The items of this claim which have been quantified by the claimant total Lit 883 435 million (£371 million). The claim contains in addition several important items where the quantification has been left to the Court to decide on the basis of equity, namely the consequences of beach erosion caused by damage to phanerogams, and irreparable damage to the sea and the atmosphere. Some other public bodies also included items relating to environmental damage in their claims.

3.4 Agreements on the quantum of the claims were reached between the shipowner/the UK Club and most Italian claimants, for a total of Lit 21 500 million (£9 million). It was not possible to reach agreements with the Italian Government, some of the local authorities and four clean-up contractors. In addition, there are a large number of claims which have not been supported by any documentation or only by insufficient documentation.

3.5 The French Government, 31 French municipalities and two other public bodies in France presented claims for compensation, totalling FFr79 550 576 (£10.3 million). These claims were settled at FFr23 240 193 (£3.0 million).

3.6 The Principality of Monaco presented a claim for FFr321 735 (£41 800) which was settled at FFr270 035 (£35 100).

3.7 The admissible claims established by the judge in charge of the limitation proceedings are summarized in tabular form in the Annex to the present document.

3.8 It should be noted that the list of admissible claims has been established in the context of the limitation proceedings initiated by the shipowner and the UK Club. The IOPC Fund has intervened in these proceedings, pursuant to Article 7.6 of the Fund Convention.

<1> The conversion of currencies in this document has been made on the basis of the rates of exchange applicable on 4 April 1996.

3.9 In his decision the judge made an observation to the effect that the IOPC Fund's position in respect of the time-bar issue was clearly groundless, since in his view the intervention of the IOPC Fund under Article 7.4 of the Fund Convention had the same effect as a notification under Article 7.6.

3.10 The claims in respect of which agreement on quantum had been reached between the claimants and the shipowner/UK Club were admitted for the agreed amounts, since these amounts had not been challenged.

3.11 The judge stated that the numerous claims which were not documented could not be admitted.

3.12 The judge held that the municipalities were not entitled to compensation for "damage to touristic image". In his view, only individual tourism operators could claim compensation for such loss of image to the extent that this resulted in a loss in the claimant's economic activity. He stated that the municipalities could be entitled to compensation for the cost of promoting tourism to the extent that it was proved that, as a consequence of the incident, such expenses were not effective or expenses were incurred after the incident to promote the touristic image.

3.13 As regards the claims for environmental damage, the judge held that the Civil Liability Convention and the Fund Convention did not exclude such damage. He stated that only the State of Italy was entitled to compensation for environmental damage and that consequently the local authorities had no right to such compensation. He took the view that the environmental damage could not be quantified according to a commercial or economic evaluation. He assessed this damage as a proportion (approximately 1/3) of the cost of the clean-up operations. The amount arrived at by this assessment would, in his view, represent the damage which was not repaired by these operations.

3.14 The judge held that the amounts determined by him should be increased by interest at the legal rate (10% per annum) from the date when the respective damage was sustained to the date of payment. Many of these amounts should also be increased to compensate for devaluation, on the basis of an official index relating to the cost of living.

3.15 The judge's decision was rendered after proceedings of a summary nature. The judge remarked that the amounts included in the stato passivo which had not been agreed by the parties should be considered as an indication to the parties of a balanced solution which could form the basis of an agreement to avoid lengthy and costly proceedings.

3.16 Any oppositions to the stato passivo will be considered by the Court of first instance, composed of three judges (including the judge in charge of the limitation proceedings). A first hearing will be held on 28 November 1996.

3.17 At its 48th session the Executive Committee instructed the Director to lodge opposition in respect of those claims admitted by the judge which, in view of the criteria for admissibility laid down by the Assembly and the Committee, were not admissible in principle, in particular the Italian Government's claim for environmental damage, as well as any other admitted claims if the Director considered this appropriate. The Committee stated that the time bar issue should also be addressed in the opposition (document FUND/EXC.48/6, paragraph 4.1.7).

3.18 The IOPC Fund's Italian lawyers are making the necessary preparations for filing oppositions, in accordance with the Committee's instructions.

3.19 The Director intends to lodge opposition mainly in respect of the following claims.

1 The Italian Government's claim for environmental damage

The IOPC Fund's position in respect of claims of this type has been laid down by the Assembly and the Executive Committee.

2 VAT

The State had paid certain clean-up operators. The invoices of the contractors added VAT, and the amounts charged in VAT were paid by the State to these contractors, who paid the amounts received for VAT to the State. The judge held that the State was entitled to compensation for the amounts it had paid in VAT to those contractors. In the IOPC Fund's view this is not correct, since the result would be that the State would receive the same amount twice.

3 ATI contract

The major part of the clean-up operations was carried out by a consortium of companies (ATI) under contract with the Italian Government. The State's obligations under the contract were subject to arbitration proceedings between the State and ATI. The judge awarded the full amount determined in the arbitration award. Neither the contract nor the award is binding for the IOPC Fund. The IOPC Fund considers that the tariffs laid down in the contract and which were accepted in the arbitration award are too high and that in addition some of the measures undertaken were unreasonable.

4 Castalia (clean-up contractor)

Certain clean-up operations were carried out by an Italian company, Castalia, under contract with the Italian Government. The State's obligation to pay for these operations was the subject of arbitration proceedings. The judge granted Castalia the amount determined in the arbitration award. The IOPC Fund has the same objections as in respect of the ATI contract.

5 The shipowner and the UK Club

The judge has admitted claims by the shipowner and the UK Club which have not been substantiated by sufficient documentation. The IOPC Fund has requested that such documents should be submitted. It is hoped that on production of these documents an agreement can be reached as to the quantum of these claims.

6 Interest and devaluation

The judge held that the amounts determined by him should be increased by interest at the legal rate (10% per annum) from the date when the respective damage was sustained to the date of payment. He also held that these amounts should be increased to compensate for devaluation, on the basis of an official index relating to the cost of living, which for the period April 1991 - February 1996 (the latest date for which figures are available) would correspond to an increase of some 25%. It appears that this is in principle correct under Italian law, but the IOPC Fund's lawyers want to study this matter further. In particular, in respect of those claims where agreements were reached out-of-court between the shipowner/UK Club and the claimants further investigations are required as to the propriety of interest and devaluation.

7 Time-bar

The time bar issue will also be addressed in the IOPC Fund's opposition (cf paragraph 3.1 above).

3.20 It is expected that some of the claimants will also lodge oppositions.

4 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 in respect of the appeal to the Supreme Court of Cassation in respect of the conversion of the unit of account as it may deem appropriate; and
- (c) give the Director such instructions on the opposition proceedings concerning the list of established claims as the Committee may deem appropriate.

* * *

LIST OF ADMISSIBLE CLAIMS^{<1>}

A	Fishermen	Lit
1	Claims by 148 fishermen agreed by the shipowner/UK Club; admitted by the judge for the amounts agreed	8 913 000 000 (£3.7 million)
2	Claims by one fishermen/fishery co-operative; the shipowner/UK Club had not succeeded in contacting this claimant; admitted by the judge for	20 580 000 (£8 600)
3	Claim by one fisherman which was not supported by any documentation; rejected by the judge	0
Sub-total of A		8 933 580 000 (£3.7 million)
B	Yachts	
1	Claims by 32 owners of yachts agreed by the shipowner/UK Club; admitted by the judge for the amounts agreed	64 000 000 (£26 900)
2	Claims by 3 owners of yachts which had been assessed by the shipowner/UK Club at LIT4 220 000, admitted by the judge for	7 740 000 (£3 200)
Sub-total of B		71 740 000 (£30 100)
C	Tourism and tourism related businesses	
1	Claims by 239 operators in the tourism sectors (bagni, hotels, restaurants, bars, shops, etc) agreed with the shipowner/UK Club; admitted by the judge for the amounts agreed at Lit 4 329 000 000 and US\$34 368 ^{<1>}	4 382 614 080 (£1.8 million)
2	Claims by 4 operators in the tourism sectors. The claims were considered by the shipowner/UK Club as admissible for a total of Lit30 603 987; admitted by the judge for a total of Lit 216 302 385. The difference relates almost entirely to claims for costs of clean-up in a marina, which the Club accepted for Lit 19 million whereas the judge admitted Lit 200 million.	216 302 835 (£90 800)

^{<1>} The conversion of currencies in this table has been made on the basis of the rates of exchange applicable on 4 April 1996.

3	Claims by 12 operators in the tourism sector where no agreement on the quantum had been reached with the shipowner/UK Club, since the documents presented were considered insufficient to substantiate the claims; the judge considered these claims partially substantiated and admitted them for a total of	106 220 000 (£44 600)
4	Claims by 159 operators in the tourism sector which were not supported by any documentation; these claims had not been considered by the shipowner/UK Club; they were rejected by the judge	0
	Sub-total of C	4 705 136 915 (£2.0 million)
D	Contractors (other than ATI)	
1	Claims by 13 contractors which had been agreed by the shipowner/UK Club; admitted by the judge for the amounts agreed representing the part payable directly to the contractors in addition to the part payable to the State which is included in the States's claim.	5 652 000 000 (£2.4 million)
2	Claims by 6 contractors which had not been agreed by the shipowner/UK Club admitted by the judge for Lit 10 757 580 000 payable directly to the contractor; an amount of Lit 14 511 030 823 should be paid to the State as reimbursement of advance payment to these contractors, and this amount is included in the State's claims.	10 757 580 800 (£4.5 million)
	Sub-total of D	16 409 580 800 (£6.9 million)
E	State of Italy	
1	Ministry of Merchant Marine	5 334 475 490 (£2.2 million)
2	Ministry of Defense	2 995 835 675 (£1.3 million)
3	Ministry of Civil Protection	181 151 860 (£76 000)
4	Ministry of Interior	648 561 388 (£272 200)

5	Ministry of Environment for environmental damage	40 000 000 000 (£16.8 million)	
	Ministry of Environment, expenses	500 000 000 (£209 800)	
6	ATI contract	78 181 470 883 (£32.8 million)	
7	22 other contractors (advance payments made by the State)	17 419 226 750 (£7.3 million)	
	Sub-total of E	145 260 722 046 (£61 million)	
F	Regions, provinces and municipalities		
1	6 claims (one region and 5 municipalities) which had been agreed by the shipowner/UK Club were admitted by the judge for the amounts agreed	858 000 000 (£360 100)	
2	17 claims had not been agreed; they were admitted by the judge for Lit 599 371 604; further amounts totalling Lit 457 535 014 were admitted by the judge as reimbursement to the State for advance payments, and this amount is included in the claim for the State.	599 371 664 (£251 500)	
	Sub-total of F	1 457 371 664 (£611 600)	
G	Claimants in France and Monaco⁽¹⁾	FFr	Lit
1	French State	12 580 724	3 891 304 156 (£1 633 000)
2	31 Municipalities, one other public body (Parc National de Port Cros) and Service départementale d'incendie et de secours; agreed by the IOPC Fund and shipowner/UK Club and admitted by the judge for the amounts agreed	10 659 469	3 297 046 817 (£1 383 600)
3	Principality of Monaco; agreed by the IOPC Fund and shipowner/UK Club and admitted by the judge for the amount agreed	270 035	83 525 676 (£35 050)
4	Small businesses in France, not agreed by Shipowner/UK Club, admitted by the judge for	237 458	73 447 387 (£30 800)
	Sub-total of G	23 747 686	7 345 324 036 (£3.1 million)
H	Shipowner/UK Club		
1	Shipowner	1 354 768 078 (£568 500)	

2	Shipowner US\$224 900	350 844 000 (£147 200)
3	UK Club £237 679	566 365 289 (£237 669)
	Sub-total of H	2 271 977 367 (£953 400)

	Summary	Lit	£(rounded figures)
A	Fishermen	8 933 580 000	3 700 000
B	Yachts	71 740 000	30 100
C	Tourism and tourism related businesses	4 705 136 915	2 000 000
D	Contractors (other than ATI)	16 409 580 800	6 900 000
E	State of Italy	145 260 722 046	61 000 000
F	Regions, provinces and municipalities	1 457 371 664	611 600
G	Claimants in France and Morocco	7 345 324 036	3 100 000
H	Shipowner/UK Club	2 271 977 367	953 400
	Total	186 455 432 828	78 247 000