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COMPENSATION
FUND

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INCIDENTS INVOLVING THE IOPC FUND

Oil spill from unidentified source in Morocco

Note by the Director

1 Introduction

1.1 In March 1995 the IOPC Fund was informed of an oil spill which had occurred on 30 November 1994 in the port of Mohammedia (Morocco). The Moroccan authorities claimed compensation for clean-up costs totalling Dhr 2.6 million (£196 900). The authorities did not give any indication as to the source of the spill but stated that the oil could only have come from the sea, either as a result of the escape of ballast water, the cleaning of tanks, or accidental pollution.

1.2 This claim gives rise to the question of whether the Fund Convention applies to spills of this type when the source of the spill has not been identified.

1.3 Under Article 4.1 of the Fund Convention, the IOPC Fund is obliged to pay compensation for pollution damage, inter alia, where the victim is unable to obtain compensation because "no liability arises under the Civil Liability Convention". One of the situations in which no liability would arise under the Civil Liability Convention is where the identity of the ship which caused the damage is not known, since in that case no shipowner can be held liable under that Convention. In respect of such cases, Article 4.2(b) of the Fund Convention provides, however, that the IOPC Fund will not be obliged to pay compensation if "the claimant cannot prove that the damage resulted from an incident involving one or more ships".

1.4 In view of the importance of the questions involved, the Director has considered it appropriate to submit to the Assembly for consideration whether the IOPC Fund is liable to pay compensation in respect of the Moroccan oil spill.

1.5 This issue was considered by the Assembly at its 16th session in connection with a claim made by the Portuguese Government as a result of a spill from an unknown source in Portugal (documents FUND/A.16/21 and FUND/A.16/32, paragraph 24).

2 Relevant Provisions of the Civil Liability Convention and the Fund Convention

2.1 The relevant provision of the Fund Convention in respect of this claim is Article 4.2(b) which reads:

"The IOPC Fund shall incur no obligation to pay compensation if:

- (a); or
- (b) the claimant cannot prove that the damage resulted from an incident involving one or more ships."

2.2 "Ship" is defined in the Fund Convention, by reference to Article 1.6 of the Civil Liability Convention, as follows:

"Ship" means any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo."

2.3 The preparatory work to these provisions are summarised in the Annex to this document.

3 Previous consideration by the Assembly of the Issue

3.1 As mentioned above, the Assembly considered at its 16th session the admissibility of claims arising out of a spill from an unknown source in Portugal.

3.2 The Assembly noted the general agreement among the delegations at the 1971 International Conference which had adopted the Fund Convention that the IOPC Fund should only be required to pay compensation for damage which was caused by a ship as defined in the Fund Convention (ie a vessel or other craft actually carrying oil in bulk as cargo). The Assembly agreed with the Director that the claimant had to prove that pollution damage resulted from a particular incident and that this incident involved a ship or ships as defined in the Civil Liability Convention and the Fund Convention. The Assembly also agreed with the Director that the claimant could not discharge the burden of proof imposed upon him by the Convention solely by proving that there was a strong likelihood that the damage was caused by a ship as defined or that the damage could not have been caused other than by such a ship (document FUND/A.16/32, paragraph 24.3).

3.3 Several delegations expressed the view that the text of the Fund Convention on this point was unsatisfactory since it imposed a very heavy burden of proof on the claimant and that this was particularly onerous for claimants in developing countries (document FUND/A.16/32, paragraph 24.4).

3.4 In the light of the analysis of oil samples carried out on behalf of the IOPC Fund, the Assembly shared the Director's view that it had not been shown in the particular case under consideration that the oil had come from a ship as defined in the Civil Liability Convention and the Fund Convention, ie a vessel carrying oil in bulk as cargo. On the basis of the Director's analysis of the preparatory works relating to Article 4.2(b) of the Fund Convention, the Assembly decided that the IOPC Fund was not obliged to pay compensation in respect of the oil spill to which the Portuguese Government's claim related (document FUND/A.16/32, paragraph 24.5).

3.5 A summary of the Preparatory Works to Article 4.2(b) of the Fund Convention and the Director's analysis of the problem in the context of the Portuguese spill, as set out in document FUND/A.16/21, paragraphs 6-8, are reproduced in the Annex. An extract of the relevant parts from the Official Records of the 1971 International Conference which adopted the Fund Convention is contained in the Annex to document FUND/A.16/21.

4 The claim in the Moroccan case

4.1 In a letter to the Moroccan authorities, the Director drew the attention to Article 4.1 of the Fund Convention.

4.2 In their reply, the Moroccan authorities maintained that in all probability, in view of the quantity of oil involved, the oil originated from a laden tanker. The authorities referred to a survey report in which it was stated that the results of laboratory tests, the colour of the oil and its smell showed that it was a crude oil from an unknown source.

4.3 The IOPC Fund's experts examined the documentation presented by the Moroccan authorities. The experts expressed the opinion that the investigation carried out to determine the oil type was not adequate to establish whether the oil in question was a crude oil or a fuel oil. They stated that the main argument invoked by the Moroccan authorities as evidence that the pollutant was a crude oil appeared to be the odour and the size of the spill, but that no attempt had been made to estimate the quantity spilled. The experts agreed that crude oils have distinctive smells, and noted that a strong odour associated with the spill was reported both by the Port Authority and its surveyor. They maintained, however, that smell was a very subjective test. The experts also stated that it was not possible, on the basis of the information available, to determine any source of the alleged pollution.

4.4 On the basis of the opinion of the Fund's experts, the Director informed the Moroccan authorities in December 1995 that it had not been established that the oil originated from a ship as defined in the Fund Convention (ie a laden tanker) and that for this reason the IOPC Fund could not accept the claim for compensation.

4.5 In a letter dated 20 March 1996, the Moroccan authorities have reiterated their view that the analysis of the samples shows clearly that the oil in question was a crude oil which could not have originated from any source other than a tanker.

4.6 Having reconsidered the elements presented by the Moroccan authorities, the IOPC Fund's technical experts have taken the view that the analysis carried out by the Moroccan laboratory gives a series of characteristics of an oil sample, which might be generated from a product or fuel analysis carried out within a refinery laboratory. The experts have considered that the data provided is insufficient to identify whether the oil is a crude oil, a fuel oil, a refinery product or weathered derivative of any of these products. They have also stated that, in order to identify the oil type, at least a gas chromatographic analysis would be required, possibly coupled with mass spectrometry, but in their view even such techniques cannot always provide a definitive result.

4.7 In the light of the advice given by the IOPC Fund's technical experts, the Director takes the view that it has not been shown in the particular case under consideration that the oil came from a ship as defined in the Civil Liability Convention and the Fund Convention, ie a vessel carrying oil in bulk as cargo. On the basis of the preparatory works relating to Article 4.2(b) of the Fund Convention, the Director considers that the IOPC Fund is not obliged to pay compensation in respect of the oil spill to which the Moroccan authorities' claim relates.

5 Action to be Taken by the Executive Committee

The Executive Committee is invited to:

- (a) consider the information contained in this document; and
- (b) give the Director such instructions as it may deem appropriate in respect of the Moroccan incident dealt with in the present document.

ANNEX

Text reproduced from paragraphs 6–8 of document FUND/A.16/21

6 Preparatory Works to Article 4.2(b) of the Fund Convention

6.1 In the draft of the Fund Convention prepared by the Working Group of the Legal Committee of IMO (at that time IMCO) which formed the basis of the discussions at the 1971 International Conference which adopted the Fund Convention, Article 4.2 read as follows:

"The Fund shall incur no obligation under the preceding paragraph if:

- (a); or
- (b) the identity of the ship that has caused the damage has not been established."

During the work within the Legal Committee, the United States had made a proposal to delete this sub-paragraph.

6.2 The 1971 International Conference considered several proposals to amend this paragraph, in addition to the above-mentioned proposal that it be deleted.

6.3 The Federal Republic of Germany proposed that Article 4.2(b) should be amended to read as follows:

- "(b) the claimant cannot prove that the damage was caused by a particular incident of a ship."

6.4 In its submission to the International Conference, the Federal Republic of Germany stated that the proposal did not mean any change in substance but only intended to improve the wording. In the view of that delegation the proposed wording clarified that the claimant had to prove only that the oil spill was caused by the incident of a ship. According to that delegation, it would not be necessary to give evidence of the fact that the oil escaped from one identified ship, which might be difficult if two or more ships were involved in one specific accident. The delegation emphasised that it was for the claimant to prove these facts.

6.5 In a document submitted at the Conference by the Danish, Finnish, Norwegian and Swedish delegations, it was proposed to insert an Article 4 bis reading as follows:

- "4 bis (1) The Fund shall pay compensation to a person who suffers pollution damage in a Contracting State as a result of the escape or discharge of oil from an unidentified ship if and to the extent that the total amount of damage in that Contracting State resulting from a single incident exceeds [15] million francs.
- (2) For the purposes of this Article, where oil is found on or in the sea or on the sea-shore the origin of which has not been established, it shall be sufficient for the claimant to show that it is probable that the oil escaped or was discharged from an unidentified ship. The pollution damage shall be deemed to have resulted from a single incident if the claimant shows that the damage in question arose from a single occurrence or a single series of occurrences having the same origin.
- (3) Claims under this Article may only be made by the government of the Contracting State in which the damage occurred acting on its own behalf and on behalf of all other persons suffering damage within that State.

- (4) The distribution of any sums recovered under this Article between claimants shall be decided in accordance with the national law of the relevant Contracting State.
- (5) The aggregate amount of compensation payable by the Fund under this Article in respect of any one incident shall not exceed the limit provided for in Article 4 paragraphs 4 and 6.
- (6) If any difference arises in relation to the payment of compensation it shall, notwithstanding Article 7, be decided by the Court referred to in Article []."

6.6 The question dealt with in Article 4, paragraph 2(b) of the proposed Convention was subject to considerable discussions in the Committee of the Whole of the International Conference. The outcome of the discussions was that the proposals made by the United States and the four Nordic delegations were rejected, whereas the proposal by the Federal Republic of Germany was adopted with some important drafting amendments. These discussions are reflected in the Official Records of the Conference published by the Inter-Governmental Maritime Consultative Organization (pages 355-361 and 384-389). [The relevant parts are reproduced in the Annex to the present document.]

7 Discussions at the 1971 International Conference

7.1 The decision of the 1971 International Conference which adopted the Fund Convention to relieve the IOPC Fund of the obligation to pay compensation in the cases referred to in Article 4.2(b) of the Fund Convention was a carefully considered one. With only a few exceptions, there was general agreement among the delegations at that Conference that the IOPC Fund should only be required to pay compensation for damage which was caused by a ship as defined in the Fund Convention, ie a vessel or other craft actually carrying oil in bulk as cargo.

7.2 The original draft provision on the subject, as presented to the Conference, stated that the IOPC Fund would not be obliged to pay compensation for pollution damage "if the identity of the ship that caused the damage has not been established". The delegation of the Federal Republic of Germany proposed that this provision be amended so as to provide that the IOPC Fund would not be obliged to pay compensation for damage "if the claimant cannot prove that the damage was caused by a particular incident of a ship". In an accompanying note, that delegation explained that its proposal did "not mean any change in substance, but only [intended] to improve the wording".

7.3 In fact the text proposed by the delegation of the Federal Republic of Germany was much more than a drafting improvement on the original draft. It addressed issues which had not been dealt with sufficiently or at all in the original draft provision. The proposed text made it clear that the IOPC Fund would be obliged to pay compensation for any particular damage only if it was proved that the oil which caused the damage had escaped or been discharged as a result of an "incident" involving "a ship", both these terms being defined in the Fund Convention (by reference to the relevant definitions in the Civil Liability Convention). It also made it clear that the burden of proving these facts was on the person claiming compensation from the IOPC Fund. The delegation of the Federal Republic of Germany stated that, unlike the original draft, its text did not require the claimant to establish the precise identity of the ship which actually caused the pollution. In the view of the German delegation, proof of the fact "that the oil escaped from one identified ship" might be difficult "if two or more ships are involved in one specific accident".

7.4 It appears that these basic elements of the provision proposed by the delegation of the Federal Republic of Germany were clearly understood by all delegations during the debates, although they were

by no means acceptable to all the delegations. Several unsuccessful attempts were made to remove or modify the provision. One proposal (by the United States delegation) was to delete the provision altogether. A proposal by the Nordic countries sought both to lighten the burden of proof on the claimant and to limit the application of the provision to major cases of pollution damage, ie damage exceeding a specified threshold.

7.5 The proposal to delete the provision was opposed by many delegations on several grounds. It was argued by some delegations that deletion of the provision would place insuperable difficulties on courts "in deciding the validity of a claim where the offending ship was not identified". Other delegations also claimed that deletion of the provision would have the effect of including within the scope of the Fund Convention damage which was not caused by ships carrying oil as cargo, such as damage originating from on- or off-shore installations. These objections were not seriously challenged by those who supported the proposal to delete the provision. Indeed, the delegation proposing the deletion (the United States delegation) noted that even after deletion of the provision, it "would still be necessary for a victim to meet the burden of proof that the oil came from a ship". This delegation also stressed that its proposal was not "intended to allow for all occurrences of oil in the sea".

7.6 Some other delegations favoured the deletion of the provision because it required a claimant to establish the identity of the ship which caused the damage, a requirement which they considered unnecessarily burdensome, especially for claimants in developing countries. It was explained, however, that while this might be a plausible objection to the original draft text, it was not valid in relation to the text proposed by the delegation of the Federal Republic of Germany which, as that delegation had pointed out, "was intended to bring out clearly that the victim must establish as the basis of his claim that the damage was occasioned by pollution emanating from a ship as defined in the Convention, without necessarily being obliged to establish the identity of the ship concerned".

7.7 Similarly the proposal by the Nordic countries to replace the provision with a new Article which would reduce the burden of proof on the claimant and restrict the application of the Article to major claims (ie those above a specified threshold) did not attract sufficient support. The first part of the proposal was opposed by many delegations. The result of the inclusion of that part would have been that, where the origin of the oil causing damage had not been established, such damage would be deemed to be compensable by the IOPC Fund if the victim or victims show that it is probable that the damage resulted from one single incident involving one or more ships. The objection raised against this proposal was that it could lead to situations in which the IOPC Fund would be obliged to pay compensation for "damage which might not have been caused by a ship". It was insisted that the Fund Convention should "confine itself to the idea that it must be established that a ship was responsible for the damage" before the IOPC Fund would be obliged to pay compensation. In this context it was pointed out that the Fund Convention was "based on the idea that the Fund would not be required to compensate for damage resulting from just any kind of oil spill on the sea".

7.8 The second part of the Nordic proposal would have imposed an obligation on the IOPC Fund to pay compensation in such cases but only if the damage exceeded a certain stipulated amount. This part of the proposal was unacceptable to the majority of delegations and it was accordingly rejected by the Conference.

7.9 It was after this exhaustive consideration of all the relevant issues, and after the International Conference had rejected all other proposed alternatives, that the Conference finally adopted the text proposed by the delegation of the Federal Republic of Germany, subject to drafting refinement. As redrafted the new provision established the basic conditions which have to be fulfilled before the IOPC Fund would be obliged to pay compensation for pollution damage where the identity of the ship concerned cannot be established, namely that the claimant must prove that the damage resulted from an incident (ie an occurrence or series of occurrences) involving one or more ships (ie a sea-going vessel or other seaborne craft actually carrying oil in bulk as cargo). The reference in the proposed text to a "particular incident" was amended to "an incident involving one or more ships". This

amendment was not intended to change the meaning of the provision, which is that proof must be given that the pollution originated from an incident which involved a ship or ships as defined in the Convention.

8 Director's Analysis of the Problem

8.1 In view of the wording adopted by the International Conference and the reasons given for that wording, the Director considers that the following conclusions could be drawn with regard to the obligation of the IOPC Fund to pay compensation for pollution damage in cases where there is no liability in respect of a specific ship because no such ship can be identified.

8.2 The IOPC Fund is not relieved of the obligation to pay compensation for the damage solely because the identity of the ship from which the polluting oil escaped or was discharged has not or cannot be established. It is clear that it was not the intention of the International Conference that the claimant should be required to establish the precise identity of the ship which caused the pollution. It may well be that, in the majority of cases, it will not be possible to prove that the pollution resulted from "an incident involving one or more ships" without also identifying the particular ship or ships involved. In some situations, as for example a collision involving two laden tankers, it will be fairly easy to prove the causal link between the pollution and a specific maritime incident involving one or more ships, and it would then not be necessary to establish the precise identity of the tanker whose oil actually caused the damage.

8.3 In the Director's view, it will depend on the facts of the particular case whether the IOPC Fund has an obligation to pay compensation in a given case. For the Fund to be obliged to pay compensation, it must be established by the claimant that the damage resulted from an incident, and that this incident involved a ship or ships falling within the scope of the Fund Convention, ie one or more tankers or any other sea-going craft carrying oil in bulk as cargo.

8.4 These two elements of the burden of proof on the claimant are necessarily interrelated and equally essential. This means that the claimant must prove both elements, viz that a particular incident caused the damage, and that this incident involved a ship or ships as defined in the Fund Convention (by reference to Article I.1 of the Civil Liability Convention). The relevant provision in the Fund Convention requires therefore more than that the claimant should prove that the damage was caused by a ship in the ordinary sense of the word. It requires proof that the ship concerned is a ship in respect of which the IOPC Fund has an obligation to pay compensation. This burden of proof can be discharged either by identifying the ship or ships from which the polluting oil escaped or was discharged or, at the very least, by specifying the particular incident from which the pollution is claimed to have resulted.

8.5 In the Director's view, the claimant cannot discharge the burden of proof required solely by proving that there is a strong likelihood that the damage was caused by an incident involving a ship as defined or that the damage could not have been caused other than by such a ship. To permit a claimant to obtain compensation on such grounds would appear to be contrary to the intention of the International Conference in adopting the text after careful consideration. The records of the International Conference show that the Conference specifically decided against a system under which the IOPC Fund would be obliged to pay compensation solely on the probability that the damage might have been caused by a ship as defined in the Convention.

8.6 It is worth noting that, under Article 4.2(a) of the Fund Convention, the IOPC Fund is relieved of the obligation to pay compensation for pollution caused by warships or other ships "owned or operated by a State" and used "only on Government non-commercial service" at the time of the incident. The IOPC Fund also has no obligation to pay compensation for pollution damage which is caused by bunker oil from an unladen tanker or which results from the tank washings by an unladen

tanker, nor for pollution caused by oil from a vessel which is not a tanker. Whilst the Convention places the burden of proving that the pollution was caused by a warship or other state-owned ship on the Fund, no such burden of proof is imposed on the Fund in respect of spills from unladen tankers or from ships other than tankers. In any event, the Fund will not be in a position to present its defences where no details of the incident on which the claim is based are provided by the claimant. It is only after a claimant has provided some evidence that the damage covered by his claim resulted in fact from an incident involving a ship that the IOPC Fund can reasonably be expected to determine whether it is under an obligation to pay compensation under the Fund Convention in the particular case.
