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## INDEPENDENT INVESTIGATIONS BY THE IOPC FUND INTO THE CAUSE OF INCIDENTS

Note by the Director

### Introduction

1 At its 14th session the Assembly discussed, in the light of the experience gained from certain recent incidents of major importance, whether it would be useful for the IOPC Fund to carry out its own independent investigations into the cause of incidents so as to enable the Fund to form an opinion at an early stage as to whether an incident was due to the fault or privity of the shipowner or whether there were any grounds for taking recourse action against third parties. The Assembly instructed the Director to make a study of this matter for consideration by the Assembly at its 15th session (document FUND/A.14/23, paragraph 8.4).

2 As instructed, the Director has carried out a study of this matter, the result of which is set out in the present document.

### Investigations Carried Out by Public Authorities

3 When a maritime casualty occurs, an investigation is usually undertaken by the coastal State. An investigation is sometimes carried out by the flag State. One important purpose of these investigations is to establish the cause of the incident so as to prevent similar incidents occurring in the future. The results of investigations carried out by public authorities are often referred to the judicial authorities (investigating judge or public prosecutor) which will decide whether any criminal investigation should take place or whether criminal proceedings should be brought against the person responsible for the accident. The results of the investigations by public authorities are not always available to interested parties.

**Investigations Carried Out by Shipowners, P & I Clubs and Third Parties**

4 The shipowner's third party liability insurer (hereinafter referred to as the P & I Club) normally appoints experts to investigate the cause of significant incidents. These experts, who can be lawyers, surveyors or other technical experts, are appointed on behalf of the owner/charterer, usually in anticipation of legal proceedings, to assist the owner/charterer to defend these proceedings. The experts normally report to the owner/charterer through the P & I Club. Sometimes, in the course of the experts' investigation, matters may emerge which may prejudice the shipowner's/charterer's position, such as information which may affect his right to limit his liability or which may deprive him of Club cover. In such circumstances, but usually only where there is a conflict of interest, the shipowner/charterer and the P & I Club will appoint separate surveyors, lawyers or other experts.

5 If a maritime incident causes loss of life or personal injury, the dependents of the dead or injured persons may instruct lawyers to carry out an investigation into the cause of the incident with a view to claiming compensation. If the cargo has been damaged as a result of the incident, the owners of the cargo may instruct experts to investigate the incident in order to enable them to claim compensation for the loss or damage suffered. Other parties who have suffered loss or who may incur liability as a result of the incident may also appoint experts.

**Procedures followed by the IOPC Fund for dealing with Incidents**

6 The IOPC Fund cooperates closely with the P & I Clubs, and this cooperation is based on a Memorandum of Understanding signed on 5 November 1980 by the International Group of P & I Clubs and the IOPC Fund. Under this Memorandum, the Clubs will report to the IOPC Fund each escape or discharge of oil which is likely to involve a claim against the Fund. The parties will exchange views concerning the incident and cooperate with a view to avoiding, eliminating or minimising pollution damage. A special Memorandum of Understanding, signed on 25 November 1985, governs the cooperation between the Japan Ship Owners' Mutual Protection and Indemnity Association (JPIA) and the IOPC Fund. This Memorandum contains provisions in respect of cooperation similar to those in the Memorandum signed by the International Group.

7 When a spill of persistent oil from a laden tanker is reported to the IOPC Fund, the IOPC Fund makes a preliminary assessment, together with the P & I Club concerned, of whether it is likely that the IOPC Fund may become involved in the payment of compensation or indemnification as a result of the incident. If there is a risk that the IOPC Fund may become involved, the Fund invokes the Memorandum of Understanding. Experts are then normally appointed jointly by the IOPC Fund and the shipowner/P & I Club to proceed to the site of the incident and to follow the clean-up operations and other operations undertaken to prevent or minimise pollution. Except in respect of incidents in Japan, the Clubs and the IOPC Fund use for this purpose experts from the International Tanker Owners Pollution Federation Ltd (ITOPF). Dependent upon the circumstances of the particular case, other experts may be sent to the site of the incident, and local experts may be employed. These experts also usually work on behalf of both the shipowner/P & I Club and the IOPC Fund. All the above-mentioned experts report directly both to the shipowner/Club and the IOPC Fund, and any instructions are given jointly by the shipowner/Club and the Fund. In some cases the IOPC Fund has employed its own experts for a particular aspect of the case, where a conflict of interest could arise between the shipowner/P & I Club and the Fund, eg in respect of the relationship between salvage operations and preventive measures.

8 The experts mentioned above have the task of dealing with the technical aspects of the case, ie to follow any clean-up and salvage operations and advise the shipowner/Club and the IOPC Fund of the reasonableness of the operations carried out so as to enable the shipowner/Club and the IOPC Fund to assess the claims for compensation. The experts are also available to give advice to the authorities in the State concerned as to the best methods of dealing with the spill. They are often instructed by the shipowner/Club and the IOPC Fund to examine the claims documents and give their

opinion on the claims. It should be emphasised that these experts do not express any opinion as to the cause of the incident or the liabilities of the various parties involved.

9 Although ITOPF is funded by tanker owners through the P & I Clubs, the advice of its staff members is recognised as being both objective and impartial. Over the years ITOPF has acted jointly for the P & I Clubs and the IOPC Fund on numerous occasions, and there has never arisen any conflict of interest between the shipowner/Club and the IOPC Fund in respect of the activities of the ITOPF experts. In some cases, ITOPF experts have been appointed by the IOPC Fund alone when there was no P & I Club covering the shipowner's liability for pollution damage caused by the incident.

#### Investigations by the IOPC Fund into the Cause of Incidents

10 The cause of the incident may be of interest to the IOPC Fund for several reasons. An investigation may show that the incident occurred as a result of the actual fault or privity of the shipowner, in which case he would not be entitled to limit his liability (Article V.2 of the Civil Liability Convention). The investigation may reveal facts which could be invoked by the owner in order to exonerate him from any liability pursuant to Article III.2 of the Civil Liability Convention. The incident may have been caused by a third party, for example a colliding vessel, and the IOPC Fund may then consider it appropriate to take recourse action against that third party in order to recover any amount which the Fund has paid in compensation or indemnification. If that third party is the owner of a colliding vessel, the question arises as to whether this shipowner is entitled to limit his liability under the applicable international convention or national law. The investigation may show that the IOPC Fund is exonerated from its obligation to pay compensation in accordance with Article 4.2 of the Fund Convention, because the pollution damage resulted from an act of war or a similar act or was caused by oil escaping from a warship or another State owned ship on non-commercial service. The pollution damage may have resulted, wholly or partially, either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person. The IOPC Fund may then be exonerated wholly or partially from its obligation to pay compensation to such person (Article 4.3 of the Fund Convention). If it is established that the pollution damage resulted from the wilful misconduct of the shipowner himself, the IOPC Fund is exonerated from its obligation to indemnify the shipowner for part of his liability (Article 5.1 of the Fund Convention). Finally, the investigation may show that, as a result of the actual fault or privity of the owner, the ship did not comply with the requirements laid down in one of the instruments included in the list contained in Article 5.3(a) of the Fund Convention; the IOPC Fund may then be exonerated wholly or partially from its obligation to indemnify the shipowner for part of his liability.

11 Over the years the IOPC Fund has made its own investigations into the cause of an incident in cases where the Director has considered it in the Fund's interest to do so. Various methods have been used in this context. In some cases, for example the VOLGONEFT 263 and HAVEN incidents, the IOPC Fund has appointed its own experts at a very early stage in order to make an independent assessment as to the cause of the incident. In the TANIO case, the IOPC Fund and the French Government jointly carried out an extensive investigation into the cause of the incident. In other cases, for example the TOLMIROS and AMAZZONE incidents, the IOPC Fund has waited for the results of the investigation carried out by the public authorities of the State concerned. After having examined the results of this investigation, the IOPC Fund decided to appoint its own experts for the purpose of assisting the Director in his assessment of the findings of the investigation by the public authorities. In many cases (eg the BRADY MARIA and the THUNTANK 5 incidents), the Director has accepted the findings of the investigations carried out by the public authorities, and in these cases the IOPC Fund has not made any further investigations of its own.

12 In the AGIP ABRUZZO case, the IOPC Fund's Italian lawyers have followed the official investigations into the cause of the incident so as to establish whether the IOPC Fund should take recourse action against the owner of the ferry which collided with the AGIP ABRUZZO, or take any

other legal action. As regards the HAVEN incident, the IOPC Fund followed closely from a very early stage through its lawyers the official investigations into the cause of the incident and appointed an independent technical expert for this purpose.

13 With regard to incidents occurring in Japan, the IOPC Fund has normally waited for the results of the official investigations by the maritime court into the cause of the incident. However, in some collision cases (the HOSEI MARU and KAIKO MARU N°86 incidents) the IOPC Fund appointed a lawyer to investigate the cause of the incident so as to enable the Director to decide whether it would be appropriate to take action to break the tanker owner's right of limitation and to take recourse action against the owner of the other vessel involved in the incident.

14 In several cases the result of the investigation has resulted in the IOPC Fund taking steps to recover amounts paid by it to victims. In the TANIO case, the IOPC Fund took legal action against the shipowner and six other persons. As a result of an out-of-court settlement, the IOPC Fund recovered approximately £9.5 million from the defendants. In the AMAZZONE case, the IOPC Fund took legal action against the shipowner, the charterer and the P & I insurer. Also in this case, the matter was settled out of court on terms very favourable for the IOPC Fund. In eight collision cases (six in Japan, one in Sweden and one in the Federal Republic of Germany), the IOPC Fund recovered from the owner of the colliding vessel part of the amount paid by the Fund in compensation and/or indemnification.

15 In this context reference should be made to the position taken by the Executive Committee in the context of its appraisal of the experience gained from the TANIO incident. The Committee stated that, except in collision cases, the IOPC Fund should only take recourse action in cases where there are very strong reasons for taking such action and where, in addition, there was a considerable likelihood of success (document FUND/EXC.20/6, paragraph 4.2).

#### Director's Analysis of the Problem

16 As is set out above, the IOPC Fund has over the years carried out its own investigations into the cause of incidents in cases where the Director felt it appropriate to do so in order to safeguard the IOPC Fund's interests. As the Director understands the instruction given to him by the Assembly, the Assembly invited him to study whether the IOPC Fund should take a more active role in this regard and normally appoint its own experts at an early stage.

17 If as a general rule the IOPC Fund were to appoint its own experts to investigate the cause of an incident, this would have the advantage that the Fund would follow more closely the developments from an early stage. However, such a procedure would also, in the Director's opinion, have certain drawbacks.

18 It may be comparatively costly for the IOPC Fund to appoint its own experts in all or most cases. Experience shows that in a large majority of cases involving the IOPC Fund, the question of the cause of the incident is of relatively little direct interest to the IOPC Fund from the point of view of the Fund's obligation to pay compensation or indemnification.

19 Another difficulty for the IOPC Fund is how to obtain adequate resources for carrying out meaningful investigations into the cause of incidents. The Director does not believe that the IOPC Fund should employ any experts on a permanent basis for this purpose but should, as has been done in the past, engage experts on a case by case basis. It should be noted that, at least in some parts of the world, the expertise available to investigate causes of major incidents is comparatively limited. It would therefore not always be easy for the IOPC Fund to obtain high quality independent experts, since

the experts available may already have been engaged by the shipowner, the P & I Club or the authorities of the State concerned. Experts appointed by the IOPC Fund may often find practical difficulties in carrying out a meaningful investigation. They may, for example, be excluded from access to relevant documents and may not be allowed to board the ship in question. The Director believes that the IOPC Fund will have to rely to a large extent on the results of the investigations carried out by the authorities of the countries concerned. However, it is important that, as has been done in the past, the IOPC Fund follows these investigations very closely and in case of need appoints its own legal or technical experts.

20 As mentioned above, the IOPC Fund cooperates very closely with the P & I Clubs and thereby also with the shipowners involved. This cooperation has been extremely valuable and is, in the Director's view, one of the main reasons why the IOPC Fund has been able to operate with a very small secretariat. If the IOPC Fund were to appoint as a matter of routine its own independent experts to investigate the cause of the incidents, this cooperation may be prejudiced.

#### **Director's Conclusions**

21 In view of the considerations set out above, the Director considers that the IOPC Fund should continue with the flexible policy followed so far, ie to appoint legal and technical experts to investigate the cause of a particular incident involving the IOPC Fund in cases where the Director feels it is in the best interest of the Fund to do so.

#### **Action to be Taken by the Assembly**

22 The Assembly is invited to:

- (a) take note of the information contained in this document; and
  - (b) give the Director such instructions as it deems appropriate as to the policy to be followed by the IOPC Fund in respect of investigations into the cause of incidents involving the Fund.
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