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INTERPRETATION OF THE NOTION OF "RECEIVED" IN ARTICLE 10 OF THE FUND CONVENTION

Note by the Director

Introduction

1 One of the basic concepts of the system of contributions to the IOPC Fund established by the Fund Convention is that contributions are payable by the person who has "received" contributing oil after sea transport. Four storage companies in the Netherlands have argued that the interpretation of the notion "received" in the Fund Convention applied by the IOPC Fund is incorrect. They have been supported by the organisation representing the Dutch storage companies. Two of these companies at first refused to pay the 1991 annual contributions levied on them but later paid under protest. Since the position of these companies raises certain questions of principle, the Director submits the matter to the Assembly for consideration.

2 Following instructions given by other companies, both Dutch and foreign, the storage companies receive oil after sea transport in their tanks. The oil is stored for a period of time, the length of which may vary, and then on instruction by the other company the oil is then sent by ship or other mode of transport including pipelines, to its final destination.

Contribution System

3 Under Article 10.1 of the Fund Convention, contributions to the IOPC Fund shall be made in respect of each Member State by any person who, in the relevant calendar year, has received in the ports or terminal installations in the territory of that State contributing oil carried by sea to such ports or terminal installations.

4 Each Member State is under a duty to ensure, pursuant to Article 13.2 of the Fund Convention, that any obligation to contribute to the IOPC Fund arising under the Convention in respect of oil

received within the territory of that State is fulfilled. The State concerned shall take any appropriate measures under its law, including the imposing of such sanctions as it may deem necessary, with a view to the effective execution of any such obligation, provided, however, that such measures shall only be directed against those persons who are under an obligation to contribute to the IOPC Fund.

5 Under Article 15.1 of the Fund Convention, each Member State shall ensure that any person who receives contributing oil within its territory in such quantities that he is liable to pay contributions to the IOPC Fund appears on a list to be established and kept up to date by the Director. Each Member State shall communicate to the Director the name and address of any person who in respect of that State is liable to pay contributions, as well as data on the relevant quantities of contributing oil received by any such person during the preceding calendar year (Article 15.2). For the purpose of ascertaining who are, at any given time, the persons liable to contribute to the IOPC Fund or of establishing the quantities of oil to be taken into account for any such person when determining the amount of his contribution, the list shall be prima facie evidence of the facts stated therein (Article 15.3).

6 At its 3rd session, the Assembly set up an Intersessional Working Group to consider certain matters relating, inter alia, to the interpretation of Article 10 of the Fund Convention. The Working Group considered in depth the two principal questions of when the oil has to be considered as being "received" and who is the "receiver" of such oil. The Working Group's conclusions are set out in document FUND/A/ES.1/8. The parts of that document relevant for the purpose of the present document are reproduced below:

"6 As to the question of which person has to be included in the report as the "receiver" of oil, it emerged from the information available and the discussions in the Working Group that different solutions had been adopted by Contracting States. The solutions were discussed at length by the Working Group on the basis of the preparatory work leading to the adoption of the Fund Convention. In view of the little documentation available on this subject, different views were expressed as to the meaning of Article 10 and the conclusions to be drawn from its wording. The practical implications of the different systems were examined.

7 There was general agreement in the Working Group on the principle that, whatever system may be adopted by Contracting States, each Contracting State had to ensure that all quantities of contributing oil received in that State were covered by the reporting system. The Working Group was of the opinion that within the scope of Article 10 of the Fund Convention, Contracting States should have a certain flexibility to adopt a practical reporting system allowing an effective and easy checking of the figures and taking into account the peculiarities of the oil movement and the local circumstances of a particular country. All members of the Working Group stressed that they were aware of their Governments' obligations under paragraph 2 of Article 13 of the Fund Convention to ensure that any obligation to contribute to the Fund in respect of oil received within the territory of their States is fulfilled. It was generally agreed that, failing payment by persons reported other than the actual receivers, the actual receivers should ultimately be liable for contributions irrespective of whether the persons reported have their place of business or residence in a Contracting State or not.

8 On the basis of the understanding reached, the Working Group came to the conclusion that the existing divergencies in reporting practices would not lead to practical problems; and that, for the time being, it was not necessary to pursue this matter further."

7 The report of the Working Group was considered by the Assembly at its 1st extraordinary session. With regard to the question of which person had to be included in the oil reports as the

"receiver" of oil, the Assembly agreed that, within the scope of Article 10 of the Fund Convention, Member States should have a certain flexibility to adopt a practical reporting system allowing an effective and easy checking of the figures and taking into account the peculiarities of the oil movement and the local circumstances of a particular country. The Assembly emphasised that, failing payment by persons reported other than the physical receivers, the physical receivers should ultimately be liable for contributions irrespective of whether the persons reported have their place of business or residence in a Member State or not (document FUND/A/ES.1/13, paragraph 10, pages 7-8).

Position of Some Companies in the Netherlands

8 In letters to the IOPC Fund received early in 1992, two storage companies in the Netherlands argued that they could not be considered as receivers of contributing oil since they were only storage companies receiving the oil on behalf of other persons. The IOPC Fund was informed by these companies that they intended to discuss this matter with the Ministries concerned and for this reason requested the IOPC Fund to postpone the due date of payment of the 1991 annual contributions from 1 February to 31 May 1992.

9 In his reply, the Director stated that the levy of contributions was based on the reports submitted by the Government of the Netherlands in accordance with Article 15 of the Fund Convention. He also drew attention to the fact that the date of payment indicated in the invoices was, in accordance with the decision of the IOPC Fund Assembly, 1 February 1992; according to the Internal Regulations of the IOPC Fund, interest should be charged on unpaid annual contributions at the rate indicated in the letter accompanying the invoice. He informed the companies that the IOPC Fund Secretariat could not grant an extension of the time for payment, nor waive the interest on payments made after that date. These companies then informed the Director that they were not going to pay the amounts levied within the prescribed period.

10 In April 1992, the Ministry of Economic Affairs of the Netherlands notified the Director that the four storage companies concerned had made reservations in respect of the figures supplied to the Ministry for contributing oil received in 1991. The above-mentioned organisation representing the Dutch storage companies informed the Director that these companies, when submitting their reports, had stated that the reports were submitted without obligation, under protest and under the explicit reservation of all rights and defences, since the companies took the position that they could not be considered as "receivers" of oil under Article 10 of the Fund Convention nor under the applicable Dutch legislation.

Director's Notification to the Government of the Netherlands

11 In view of this situation, on 15 April 1992 the Director notified the Government of the Netherlands, in accordance with Internal Regulation 3.9, that two companies in the Netherlands had refused to pay their contributions and requested advice on the action to be taken to ensure that the obligations of these contributors were fulfilled. The Director drew the attention of the Government to the fact that the IOPC Fund would have to consider taking legal action against the defaulting companies in order to recover the amounts due plus interest, if payments were not effected in the near future.

12 Article 13.3 of the Fund Convention deals with the situation where a person who is liable to make contributions to the IOPC Fund does not fulfil his obligation and is in arrears for a period exceeding three months. The Director should in such cases take appropriate action against this person on behalf of the IOPC Fund with a view to recovering the amount due. However, where the defaulting contributor is manifestly insolvent or the circumstances otherwise so warrant, the Assembly may, upon recommendation of the Director, decide that no action should be taken or continued against the contributor.

13 In his communication to the Government of the Netherlands, the Director also pointed out that reported quantities could not be subject to reservations. He stated that the quantities reported by the Government of the Netherlands in respect of the oil receipts in 1991 for the four companies concerned would be included in the list referred to in Article 15.1 of the Fund Convention for the purpose of the assessment of the 1992 annual contributions.

Payments received from Defaulting Companies

14 In June 1992, the Director was informed that the two storage companies which had so far refused to pay the 1991 contributions had decided to pay the amounts levied upon them (plus interest) under protest. These companies stated that the payments could not be considered as a recognition of any obligation to pay these contributions, and they reserved their right to reclaim any amount paid to the IOPC Fund. The contributions were paid on 30 June and 8 July, respectively.

15 In his acknowledgement of these payments, the Director informed the companies that the IOPC Fund did not accept their reservations as to the right to reclaim any money paid to the Fund.

Administrative Proceedings in the Netherlands

16 In May 1992, the IOPC Fund was informed by the Government of the Netherlands that one of the two companies paying under protest (Paktank Nederland BV) had appealed before an Administrative Court according to Dutch legislation. Paktank had requested that the Court should state that the company was not liable to pay contributions to the IOPC Fund and that the Court should therefore annul the notification made by the Government of the Netherlands which stated that the company had received contributing oil during 1991, and indicated the quantities involved.

17 It should be noted that in the Netherlands there is an Act implementing certain provisions of the Fund Convention (Act of 14 May 1981, n°294). This Act contains, inter alia, certain provisions relating to receipts of contributing oil, but mainly in the form of references to the Fund Convention. A Royal Decree of 18 August 1982 concerning reports on oil receipts (1982 n°491) was also issued which contains some provisions relating to the notion of "receipts of oil".

18 Paktank has objected to being considered as a "receiver" of oil for the purpose of Article 10 of the Fund Convention. The arguments presented by Paktank in support of its position can be summarised as follows:

Even before the Netherlands ratified the Fund Convention, the Dutch storage companies had objected to the interpretation of the notion of "received" adopted by the IOPC Fund and the Government of the Netherlands. Until 1990, the contributions to the IOPC Fund were not very high. However, the 1991 contributions represented considerable amounts, and there is a risk of high contributions in the future. A storage company cannot pass the contributions on to the companies for which it stores the oil. The contributions to the IOPC Fund represent a considerable percentage of the storage fees received by Paktank, whereas they only represent an insignificant share of the price of oil. The person for whom the storage is carried out should be considered as the "receiver" in Paktank's case. This must be the normal meaning of the word "receiver". The Fund Convention uses the expression "has received" and not "has taken receipt of" or "discharged" or "stored". The background to the Fund Convention and its preamble make it clear that the intention was that the financial burden of the contributions should fall upon the oil companies. It is the oil companies and not the storage companies which have financial interests in the oil. Storage companies have nothing to do with the transport of oil. As to the term "receiver", the Act of 1981

(n°294) only refers to Article 10 of the Fund Convention. However, the Decree of 1982 (n°491) elaborates on the notion of "receiver". It includes under this notion those who receive contributing oil on behalf of or for somebody else. Under Dutch law, the storage companies have thus become collecting agencies in respect of foreign companies. The Dutch legislation goes beyond Article 10 of the Fund Convention on this point. The obligation to contribute can only be based on the Convention.

19 The appeal made by Paktank will be considered as an objection under the applicable administrative legislation and will first be dealt with by the Ministry of Economic Affairs which will pass a formal decision on this objection. The IOPC Fund will avail itself of the possibility of presenting its views in the proceedings in the Ministry.

20 The decision by the Ministry of Economic Affairs is subject to appeal to the Administrative Court.

Director's Position

21 The notion of "receiver" is a basic concept in the contribution system under the Fund Convention, and the Assembly has taken a position as to the interpretation of this concept. The position of the Assembly, as well as the text of the Convention itself, are based on the idea that contributions are to be paid by the actual (physical) receiver of the oil after sea transport.

22 The oil quantities reported by the Government of the Netherlands have been physically received by the four companies in question. For this reason, the ultimate liability for payment of contributions in respect of these quantities rests with these companies, as stated by the Assembly (see paragraph 7 above). In the view of the Director, the reports submitted by the Government in respect of these companies are correct. He considers, therefore, that the IOPC Fund should maintain its position that the storage companies in the Netherlands are liable to pay contributions in respect of any quantities of contributing oil actually received by them. The Director intends to pursue this position in the administrative proceedings, subject to any instructions given by the Assembly.

Action to be Taken by the Assembly

23 The Assembly is invited to:

- (a) take note of the information contained in this document;
 - (b) consider the interpretation of the notion of "received" in Article 10.1 of the Fund Convention; and
 - (c) give the Director such instructions as it deems appropriate in respect of the position taken by the storage companies in the Netherlands.
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