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

Note by the Director

Introduction

1 At its 15th session, the Assembly considered the problems that had arisen due to the fact that certain storage companies in the Netherlands which had been reported by the Dutch Government as having received contributing oil argued that the interpretation of the notion of "received" in the Fund Convention applied by the IOPC Fund was incorrect and that they should not be under any obligation to pay contributions to the IOPC Fund.

2 The present documents states the problems involved and sets out the developments since the 15th session.

Factual Situation

3 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.

4 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 sent by ship or other mode of transport including pipelines, to its final destination.

Contribution System

5 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.

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).

Administrative Proceedings in the Netherlands

8 One Dutch company (Paktank Nederland BV) appealed before an Administrative Court according to Dutch legislation. It 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.

9 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".

10 Paktank 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.

11 The appeal made by Paktank was considered as an objection under the applicable administrative legislation and was first dealt with by the Ministry of Economic Affairs.

12 An oral hearing on the appeal was held on 8 September 1992. The IOPC Fund had submitted pleadings prior to this hearing. At the hearing the IOPC Fund was represented and presented its views on the issues raised by the appeal.

13 The Minister of Economic Affairs rendered his decision on 28 September 1992. In this decision the appeal lodged by Paktank was rejected.

14 The reasons given by the Minister for his decision can be summarised as follows:

The States party to the Fund Convention have always been aware of the fact that the system of contributions under the Fund Convention must be workable. For this reason a broad concept of the notion of "receiver" had been applied. The system leaves the

States parties to the Fund Convention a flexibility to provide in their national legislation that the physical receiver who stores oil on behalf of another person should be regarded as the receiver under Article 10 of the Convention. The Record of Decisions of the 1st extraordinary session of the IOPC Fund Assembly confirms that various persons can be regarded as "receiver" under Article 10 of the Fund Convention and that the States parties to the Convention have a certain flexibility in setting up the reporting system, in particular to make a choice between receivers where several persons can be regarded as such. The narrow concept of the notion of "receiver" maintained by Paktank is therefore rejected. Consequently, the Royal Decree of 18 August 1982 is not in conflict with Article 10 of the Fund Convention. The choice of the physical receiver is only made for cases where it is impossible or very difficult to trace the person for whom storage takes place. The Decree is a valid part of the national legislation and must be enforced by the Minister without any questioning of the effect or the reasonableness thereof.

Director's Position as Presented to the 15th Session of the Assembly

15 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.

16 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 document presented to the Assembly at its 15th session the Director took the view that the reports submitted by the Government in respect of these companies were correct and that the IOPC Fund should therefore maintain its position that the storage companies in the Netherlands were liable to pay contributions in respect of any quantities of contributing oil actually received by them.

Consideration by the Assembly at its 15th Session

17 The Assembly confirmed the position taken at its 1st extraordinary session as to the interpretation of the concept of "receiver" (document FUND/A.ES/1/13, paragraph 10, pages 7-8). In particular, 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. The Assembly also agreed with the Director that the storage companies in the Netherlands were liable to pay contributions in respect of any quantities actually received by them.

18 The Assembly noted with satisfaction that the Ministry of Economic Affairs of the Netherlands had rejected an appeal made by Paktank, which had been included in the reports of the Government of the Netherlands to the IOPC Fund as a receiver of contributing oil during 1990, requesting that it be decided that the company was not liable to pay contributions to the IOPC Fund since it should not be considered as a "receiver" of oil for the purpose of Article 10 of the Fund Convention. The Director was instructed to pursue the IOPC Fund's position if this company were to appeal against this decision to the Administrative Court.

Proceedings Before the Administrative Court

19 Paktank appealed against the decision of the Minister of Economic Affairs to the Administrative Court.

20 The IOPC Fund has requested the opportunity of being heard as a third party in the proceedings, but no decision has so far been made in respect of this request.

21 The arguments presented by PAKTANK in the appeal proceedings were mainly the same as those previously submitted in the proceedings before the Ministry with the following additions:

During the negotiations which led to the adoption of the Civil Liability and the Fund Convention the relevant circles of persons were confined to the two risk factors involved in the carriage of oil by sea, namely, the ship and the cargo. This established not only the economic base but also the legal framework of the liability. PAKTANK does not fall within this framework. With respect to the cargo, this clearly related to the owner of the oil or the person on whose account and at whose risk the oil was being carried, namely oil company and oil dealers. Storage companies therefore fall outside this framework. The drafters of the Fund Convention did not opt for a broad definition of "receiver" from the viewpoint of practical enforceability. Instead it was clear that the concept of "receiver" was confined to the party with the financial interest in the oil. The various Contracting States have interpreted the notion of "receiver" in Article 10 of the Fund Convention differently, but in the sense of referring to the oil cargo interest. The flexibility referred to in the Record of Decisions of the 1st extraordinary session of the Assembly does not involve an interpretation of that concept but permits a flexible system of reporting by the Contracting States. The concept of physical receiver cannot mean anything but the party for whom the oil is taken into storage. PAKTANK only leases storage space to the physical receiver. The Record of Decisions has no legal significance concerning the interpretation of the Fund Convention. The resolution adopted by the Assembly concerning the application of the reporting system does not constitute an agreement in the sense of Article 31 (3)(a) or (b) of the Vienna Convention on the Law of Treaties.

22 It is expected that the Administrative Court will render its judgement during 1994.

23 The Director intends to follow the administrative proceedings and to present the IOPC Fund's position to the Court, if permitted to do so.

Storage Companies' Position In Respect of the Oil Receipts Report for 1992

24 Paktank and one other storage company have filed objections to the report of the Ministry of Economic Affairs of the Netherlands in respect of the quantities of contributing oil received by them in 1992. They suggested that the question in respect of the 1992 oil receipts should be kept pending until the question of the 1991 receipts had been decided by the Courts. The Ministry of Economic Affairs has agreed to this procedure.

25 It should be noted that three other storage companies in the Netherlands share the views of Paktank and paid the 1992 annual contributions based on the 1991 oil receipts under protest. Paktank and two of the other companies have made similar reservations to the IOPC Fund in respect of the reports on oil receipts during 1992.

Action to be Taken by the Assembly

26 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 in respect of the proceedings before the Administrative Court of Appeal in the Netherlands.
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