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INCIDENTS INVOLVING THE IOPC FUND

HAVEN

POSSIBLE SOLUTION OF OUTSTANDING ISSUES

Note by the Director

1 Introduction

As instructed by the Executive Committee, the Director has continued the negotiations with various parties for the purpose of arriving at a global solution of all outstanding claims and issues. In particular, discussions have been held between the Italian Government, the shipowner/UK Club and the IOPC Fund. As a result of these discussions, it appears that a solution might be reached along the lines set out below.

2 Conditions laid down by the Executive Committee

2.1 In his discussions, the Director has emphasised that any global solution must respect the conditions laid down by the Executive Committee (documents FUND/EXC.40/10, paragraph 3.3.12 and FUND/EXC.42/11, paragraph 3.2.13), ie that the maximum amount available under the Civil Liability Convention and the Fund Convention is 60 million SDR, that claims could only be admissible if a claimant had suffered a quantifiable economic loss and that claims for damage to the marine environment per se were not admissible.

2.2 The Director has also made it clear that any agreement relating to a global solution would have to be approved by the Executive Committee (document FUND/EXC.42/11, paragraph 3.2.9).

3 Assessment of the quantum of the claims

3.1 On the basis of the settlements already agreed by the shipowner/UK Club and the progress made in the negotiations of the other outstanding claims, it is anticipated that settlement of all claims in the following categories could be reached at a total amount of approximately Lit 37 000 million (£14.3 million):

Individuals and small businesses in Italy
 Region and Municipalities (claims for clean-up and other admissible expenses)
 Clean-up contractors excluding those referred to in paragraph 3.2
 Claimants in France and Monaco

3.2 The following claims would then remain for expenses which in principle are admissible under the Conventions although the quantum is disputed:

	<u>Claimed Amount</u> Lit
ATI consortium	90 000 million
Castalia (Italian clean-up contractor)	17 800 million ^{<1>}
LOGECO (Italian clean-up contractor)	15 400 million
Ministries and other Government bodies	<u>15 700 million</u> ^{<2>}
Total	<u>138 900 million</u>

3.3 In addition, there remain claims from the State of Italy for environmental damage and from the Ligurian Region and a number of municipalities for damage to touristic image and environmental damage. These claims have been considered as inadmissible in principle.

4 Amount available to claimants

4.1 As the IOPC Fund has maintained, the maximum amount of compensation available under the Civil Liability Convention and the Fund Convention is 60 million SDR which, converted according to the value of the Lire on the date of the establishment of the shipowner's limitation fund (29 May 1991), corresponds to Lit 102 643 800 000.

4.2 Without prejudice to the IOPC Fund's position on time-bar, the amounts available under the Civil Liability Convention and the Fund Convention are set out below:

	Lit
Shipowner's limitation amount	23 950 220 000
Amount payable by IOPC Fund	<u>78 693 580 000</u>
Maximum amount payable under the Conventions, viz 60 million SDR	<u>102 643 800 000</u>

4.3 The IOPC Fund has argued that the bank guarantee constituting the shipowner's limitation fund should also cover interest and that the interest should accrue to the benefit of the IOPC Fund. The shipowner/UK Club have maintained that no interest is payable. The Court of first instance held that the bank guarantee should cover interest but that the interest should accrue to the benefit of claimants.

<1> Granted by arbitration award

<2> Including some duplications

Both the IOPC Fund and the shipowner/UK Club have appealed against this decision. However, the shipowner/UK Club has offered, without prejudice to their position, to pay interest at the legal rate on the limitation fund, if this amount can be made available to the claimants as part of a global settlement.

4.4 The 1984 and 1992 Protocols to the Fund Convention expressly state that interest should be to the benefit of victims (Article 4.4(d))^{<3>}. The States participating in the 1984 Diplomatic Conference wished to amend the Fund Convention on this point, since it appeared unfair that interest should be to the benefit of the IOPC Fund and not to the victims (cf IMO documents LEG/CONF.6/20, LEG/CONF.6/21, LEG/CONF.6/C.2/SR.17 and LEG/CONF.6/C.2/SR.30).

4.5 As stated above, the IOPC Fund does not agree with the Court's interpretation of the 1971 Fund Convention on this point. However, in the light of the deliberations of the 1984 Diplomatic Conference, the Executive Committee may wish to consider accepting, in this case, that interest on the shipowner's limitation amount should go to the benefit of the victims. If this position were to be taken, it should be made clear that it would be without prejudice to the IOPC Fund's position under the 1971 Fund Convention in future cases.

4.6 The shipowner/UK Club has offered to make available an additional amount of Lit 25 000 million (£9.7 million) as an ex-gratia payment in an effort to assist in arriving at a global solution. The shipowner/UK Club has made it clear that this offer is entirely without prejudice and without any admission of liability of any parties in any proceedings, and that the offer is subject to the conditions indicated below being satisfied.

4.7 The offer of an additional amount of Lit 25 000 million (£9.7 million), in the form of an ex-gratia payment to be made by the shipowner/UK Club and their offer to pay interest on the shipowner's limitation fund together with a waiver by the IOPC Fund of its right to that interest, would result in a total amount of some Lit 137 000 million (£53 million) being made available to victims calculated as follows:

	Lit
60 million SDR	102 643 800 000
Interest on the shipowner's limitation fund, calculated at the legal rate of 10% per annum would give approximately	<u>10 000 000 000</u>
Sub-total	112 643 800 000
 Additional amount offered by the shipowner/UK Club as an ex gratia payment	 <u>25 000 000 000</u>
Total	<u>137 643 800 000</u>

4.8 It appears that a global settlement might be possible within the framework of an amount of some Lit 137 000 million. Such a settlement should in any case be subject to the following conditions:

- (a) Except as regards the shipowner's/UK Club's ex-gratia payment of Lit 25 000 million, payments would be made only to the extent that a claimant had suffered a quantifiable economic loss and no payment would be made in respect of claims for damage to the marine environment per se.

^{<3>} Article 4.4(d) of the 1971 Fund Convention as amended by the 1992 Protocol thereto reads:

(d) Interest accrued on a fund constituted in accordance with Article V, paragraph 3, of the 1992 Liability Convention, if any, shall not be taken into account for the computation of the maximum compensation payable by the Fund under this Article.

- (b) All parties to the on-going legal proceedings in Italy would withdraw their actions for compensation, irrespective of the grounds upon which the claims might be based, and irrespective of the identity of the defendant, including the claims submitted in the limitation proceedings and the claims for compensation presented in the criminal proceedings.
- (c) The IOPC Fund, the State of Italy and other claimants would terminate all proceedings in respect of the decision of the Court of first instance opening the limitation proceedings, in which they challenge the right of the shipowner (Venha Maritime Ltd) to limit his liability. All parties would also withdraw their oppositions to the "stato attivo", ie whether interest accrues on the shipowner's limitation fund and the method for the determination of the maximum amount available under the Fund Convention.
- (d) The IOPC Fund would withdraw its legal actions against all other parties for the purpose of recovering any amount that the IOPC Fund might have to pay as a result of the incident.
- (e) The State of Italy would give an undertaking to hold harmless the shipowner, the UK Club and the IOPC Fund against any claims by the enterprises forming ATI and their sub-contractors, Castalia and LOGECO, and the Italian territorial public entities to the extent that any of these parties do not formally withdraw their actions in accordance with sub-paragraphs (b) and (c) above.

4.9 It is proposed that, if the Executive Committee were to decide that the IOPC Fund should be party to a settlement along the lines set out above, a deadline should be set for the acceptance of the offers made by the shipowner/UK Club and the IOPC Fund. It is suggested that the Chairman be authorised to extend this period, if he were to consider it appropriate to do so.

4.10 In the Director's view, the proposed settlement should also include a waiver by the shipowner and the UK Club of any right to indemnification under Article 5 of the Fund Convention. The shipowner and the UK Club have maintained that there are no grounds on which the IOPC Fund can decline to pay indemnification under Article 5. Nevertheless, they have indicated that, entirely without prejudice to this position, they would waive the right to indemnification provided that all the conditions of the proposed settlement are fulfilled.

4.11 It should be emphasised that any negotiations with claimants for the purpose of arriving at a global settlement should be without prejudice to the IOPC Fund's position in respect of the time-bar until such global settlement is reached, if any.

5 Haven Major Claims Fund

5.1 In 1991 and 1992, the Assembly decided to levy annual contributions to the *Haven* Major Claims Fund for £15 million and £10 million, respectively. The IOPC Fund has incurred considerable expenses in terms of fees in connection with the *Haven* incident. The assets of this Major Claims Fund have been invested and significant amounts have accrued in interest. The balance on the *Haven* Major Claims Fund was £28 018 647 at 31 December 1994. The maximum amount payable from the General Fund (£764 798) has already been used for the payment of fees and other expenses.

5.2 It is estimated that the balance on the *Haven* Major Claims Fund will have increased to £28.3 million by 1 October 1995, after the addition of interest accrued in 1995 on the investment of its assets and deductions for fees and other expenses incurred during 1995.

5.3 The proposal for a global settlement would result in the IOPC Fund paying Lit 78 693 580 000 to claimants (ie the difference between 60 million SDR and 14 million SDR). The cost for the IOPC Fund of purchasing the necessary amount in Lire would obviously depend on the rate of exchange when the purchase was made. To purchase this amount in Lire would have cost £30 395 357 based on the

rate of exchange on 5 June 1995, £1 = Lit 2 589^{<4>}. This would have necessitated an additional levy to this Major Claims Fund of approximately £2.1 million.

5.4 If the IOPC Fund had to pay indemnification to the shipowner (SDR 5 666 667 or Lit 9 694 137 236), an additional amount of £3 744 356 would be required, based on the rate of exchange on 5 June 1995.

6 Action to be taken by the Executive Committee

The Executive Committee is invited to:

- (a) take note of the information contained in the present document;
 - (b) decide whether the IOPC Fund should accept a global solution along the lines set out in paragraphs 4.7-4.10 above; and
 - (c) give the Director such instructions in respect of the negotiations with claimants as it may deem appropriate.
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The consequences of currency fluctuations can be illustrated by the fact that, if the purchase had taken place on 23 March 1995 (rate of exchange £1 = Lit 2 753), ie shortly before the 42nd session of the Executive Committee, the cost of purchasing Lit 78 693 580 000 would have been £28 584 664. This purchase would have been almost covered by the balance on the Major Claims Fund.