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INFORMATION ON OTHER INCIDENTS

HAVEN

Possibility of Making Payments to Certain Claimants

Note by the Director

1 Introduction

The IOPC Fund has taken the position that the majority of the claims arising out of the *Haven* incident are time-barred vis-à-vis the IOPC Fund. As instructed by the Assembly, the Director considers in this document whether the claims that are not time-barred can be paid, wholly or partially.

2 The time-bar issue

The question of whether the majority of the claims arising out of the *Haven* incident are time-barred vis-à-vis the IOPC Fund was considered by the Executive Committee at its 40th session (document FUND/EXC.40/10, paragraphs 3.3.4 and 3.3.7–3.3.14). The Committee noted that only a few claimants, namely the French State, the French communes, the Principality of Monaco and a few Italian claimants, had fulfilled the requirements of Article 6.1 of the Fund Convention by making a notification under Article 7.6. The Committee took the view that all other claims submitted in the limitation proceedings had become time-barred in respect of the IOPC Fund on or shortly after 11 April 1994, in the light of the provisions of Article VIII of the Civil Liability Convention and Article 6.1 of the Fund Convention (document FUND/EXC.40/10, paragraphs 3.3.4 and 3.3.8).

3 Search for a global settlement

3.1 At the 40th of the Executive Committee, a number of delegations expressed their concern that this situation had arisen, since the IOPC Fund had as its purpose to pay compensation to victims of pollution damage. The Committee drew attention to the fact that the situation was due to the complex legal proceedings in Italy resulting from certain claimants maintaining that the IOPC Fund's maximum cover should be calculated on the basis of the free market value of gold instead of on the basis of the Special Drawing Right (SDR), the latter conversion method being in accordance with the internationally accepted interpretation of the Fund Convention. It was noted at that session that claims had been submitted by the Italian Government and other public bodies relating to damage to the environment which, according to Resolution N°3 adopted by the IOPC Fund Assembly, were not admissible under the Civil Liability Convention and the Fund Convention (document FUND/EXC.44/17, paragraph 3.2.2).

3.2 While convinced of the legal validity of the IOPC Fund's position in respect of the time-bar issue, the Executive Committee nevertheless recognised at its 40th session that the on-going legal proceedings in Italy gave rise to some uncertainty as regards the final outcome of this issue. For this reason, and conscious of the desirability of victims of pollution damage being compensated, the Committee instructed the Director to enter into negotiations with all the parties concerned for the purpose of arriving at a global solution of all outstanding claims and issues. The Committee emphasised that any such solution must respect certain conditions which were set out in paragraph 3.3.12 of document FUND/EXC.40/10.

3.3 Having considered all the issues involved, the Committee, at its 43rd session, instructed the Director to continue negotiations with the claimants and authorised the Director to agree, on behalf of the IOPC Fund, to a global settlement within the framework of an amount of some Lit 137 000 million (£53 million) being made available to victims in the context of a global settlement. The amount of Lit 137 000 million would be made up as follows: the shipowner and the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd (UK Club) would contribute the shipowner's limitation fund under the Civil Liability Convention (Lit 23 950 million) plus a without prejudice offer of interest on this amount (Lit 10 000 million) and an additional ex-gratia payment (Lit 25 000 million); the IOPC Fund would contribute the difference between the shipowner's limitation fund and the maximum 60 million SDRs payable under the Fund Convention (Lit 78 694 million). The Executive Committee laid down certain conditions for a global settlement, which were set out in paragraph 3.20 of document FUND/EXC.43/7.

3.4 The Executive Committee took the position that the negotiations with the claimants were without prejudice to the IOPC Fund's position in respect of the question of time-bar, pending a global solution of all outstanding issues.

3.5 At its 44th session, the Executive Committee noted that agreements on the quantum had been reached with the French Government, the Direction Départementale des Services d'incendie et de secours du Var, 31 municipalities in France and Parc National de Port Cros for a total amount of FF23.2 million (£3.0 million). The Committee took note of the agreement in the amount of FF270 035 (£35 300) which had been reached on the quantum of the claim submitted by the Principality of Monaco. The Committee also noted that agreement had been reached between the shipowner and the UK Club and the great majority of the Italian claimants on the quantum of their claims.

3.6 At its 44th session, the Executive Committee was informed that no agreement had been reached on the proposed global settlement, since the Italian Government had not accepted the offer nor had given an indication that it was looking favourably at the offer. The Committee noted that the Italian authorities wished to continue the study of the offer for a global settlement. Since the conditions set by the Executive Committee for a global solution had not been met, the Committee referred the matter to the Assembly (document FUND/EXC.44/17, paragraph 3.2.26). The Assembly, at its 18th session, expressed its regret that there had been no further reaction by the Italian

Government on the offer of a global settlement made by the shipowner/UK Club and the IOPC Fund. The Assembly interpreted this to mean that the offer had not been accepted by the Italian Government, and decided that any future initiative towards a global settlement had to be taken by the claimants, including the Italian Government. As already decided by the Assembly, the *Haven* Major Claims Fund remained, but no further contributions were levied. The Assembly noted that the terms and conditions of the previous offer of a global settlement were well known. The Assembly stated that, should the claimants, including the Italian Government, wish to revert to a settlement on the terms of that offer, then the matter would have to be referred to the Assembly for decision.

4 Consideration at the Executive Committee's 44th session and at the Assembly's 18th session of the possibility of making payments

4.1 The French delegation expressed the view, at both the 44th session of the Executive Committee and at the 18th session of the Assembly, that it now appeared very difficult for a global settlement to be reached. The delegation stated that, for those claimants who had observed the time-bar provisions of the Fund Convention, the claims should therefore be paid promptly. The French delegation requested that the Director should take the necessary steps in the coming weeks so that compensation could be paid to French claimants immediately after the next session of the Executive Committee. The French delegation also indicated that a similar request would shortly be made in writing to the UK Club. That delegation stated that it was aware of the technical difficulties which its request would cause, but hoped that the understandable hopes of small claimants in France would be taken into account (documents FUND/EXC.44/17, paragraphs 3.2.28 and 3.2.29, and FUND/A.18/26, paragraph 11.13).

4.2 At the Committee's 44th session, the Director stated that, in view of the very complex legal situation, he did not consider that he was able to make any payments to claimants, unless the Assembly or the Executive Committee instructed him to do so. He also stated that he would study the matter further and refer the matter to the Assembly or the Executive Committee for decision (document FUND/EXC.44/17, paragraph 3.2.21).

4.3 The Assembly decided at its 18th session to authorise the Executive Committee to approve at least partial payments to claimants in France, Monaco and Italy who had taken the steps required under the Conventions to prevent their claims from becoming time-barred. The Director was instructed to study this matter further, in consultation with the French delegation, and refer the matter to the Executive Committee at a future session for decision (document FUND/A.18/26, paragraph 11.14).

5 Non time-barred claims

5.1 The claimants who have taken the steps required under the Conventions to prevent their claims from becoming time-barred vis-à-vis the IOPC Fund in the *Haven* case are set out in the table overleaf.

5.2 It should be noted that agreements on the quantum of their claims have not yet been reached with certain Italian claimants whose claims are not time-barred vis-à-vis the IOPC Fund. As indicated in the table overleaf, these claims total Lit 17 686 688 082 (£7.1 million).

Claimant		Claimed		Agreed	
		FFr (or other currency)	Lit	FFr (or other currency)	Lit
FRANCE	French Government	16 284 592.00		12 580 724.00	
	Direction départementale des Services d'incendie et de secours du Var	711 070.89		711 070.89	
	31 Municipalities	77 994 121.35		9 630 031.22	
	Parc National de Port Cros	845 367.28		318 367.27	
	<i>Sub-total</i>	79 550 575.52	25 774 386 468	23 240 193.38	7 529 822 655
MONACO	Principality of Monaco	321 735.00	104 242 140	270 035.00	87 491 340
			25 878 628 608		7 617 313 995
ITALY	Imars		395 860 000		140 000 000
	Trannsmare		718 570 000		650 000 000
	Santoro		568 253 400		450 000 000
	Secol		612 616 320		450 000 000
	Ecolfriuli		1 340 140 000		262 000 000
	Ecolsicilia		118 890 000		50 000 000
	Ecolmare		3 549 787 066		1 738 000 000
	<i>Sub-total</i>		7 304 116 786		3 740 000 000
	Logeco		15 387 444 628		-
	Venha Maritime		1 352 034 750		-
	Venha Maritime	US\$ 224 900	358 715 500		-
UK Club	£ 237 679	588 493 204		-	
<i>Sub-total</i>		17 686 688 082		0	
TOTAL			50 869 433 476		11 357 313 995

Exchange rates of 27 November 1995 used in this table:

FFr1 = Lit 324

US\$1 = Lit 1 595

£1 = Lit 2 476

6 Request by the French Government

6.1 Following the statement made by the French delegation at the Executive Committee and Assembly sessions in October 1995, the French Government has made a formal request to the IOPC Fund regarding payment to French claimants. In its request, the French Government has stated that, in its view, it would not be possible to find a solution acceptable to the victims on a purely technical basis. It is mentioned in the request that the uncertainty in respect of the on-going court proceedings would not permit partial payment of those claims in respect of which an agreement on the quantum had been reached. It is also noted by the French Government that the shipowner's insurer would not be able to make any payment until the Italian courts had established the admissible amount of all claims and, in particular, the claims relating to damage to the marine environment. The French Government has maintained that, in these circumstances, only a payment by the IOPC Fund based on equity would meet the concerns expressed by the French delegation and supported by a number of other delegations.

6.2 The French Government has suggested that payments could be made in stages. It has been proposed that firstly, during the weeks following the 46th session of the Executive Committee, the IOPC Fund could pay in their entirety the claims presented by the 31 French municipalities, the Direction départementale des Services d'incendie et de secours du Var and Parc National de Port Cros. The French Government has further suggested that the question of payment to the French State, as well as the payment of interest and legal costs to all French claimants should be referred to a future session of the Executive Committee, after the court of first instance in Genoa has issued its decision on the list of established claims ("stato passivo"). The Government has stated that such a solution would be equitable and would take account of the technical difficulties for the IOPC Fund of making payments.

7 Director's analysis

7.1 The French Government's requests refers only to the French claimants. The Director takes the view, however, that the question of payment to claimants whose claims are not time-barred vis-à-vis the IOPC Fund will have to be considered not only for the French claimants but also for the claimants in Monaco and Italy who have also fulfilled the requirements of Article 6.1 of the Fund Convention.

7.2 In its consideration of this issue, the Executive Committee may wish to take into account the implications that any decision may have for the on-going court proceedings in Italy. The Committee may also wish to consider whether such a decision might constitute a precedent for future cases.

7.3 The maximum amount payable under the Fund Convention is 900 million (gold) francs, including any amount actually paid by the shipowner and his insurer under the Civil Liability Convention. In the IOPC Fund's view, the figure of 900 million (gold) francs should be converted into Italian Lire through the Special Drawing Right (SDR), and the limit would then be 60 million SDR; the conversion should be made on the basis of the value of the SDR in Italian Lire on the date of the constitution of the shipowner's limitation fund (29 May 1991), giving an amount of Lit 102 643 800 000. The Court of first instance of Genoa has held, however, that the conversion from (gold) francs into Italian Lire should be made using the free market value of gold as at 29 May 1991, giving an amount of Lit 771 397 947 400. The IOPC Fund has appealed against this decision, and the judgement of the Court of Appeal is expected in early 1996.

7.4 As set out in the table in paragraph 5.1 above, agreements have been reached by the IOPC Fund, the shipowner and the UK Club with the French claimants and with the Principality of Monaco on the quantum of their claims for a total of Lit 7 617 million (£3.1 million). Of the Italian claims which are not time-barred, agreements on the quantum have been reached in the amount of Lit 3 740 million (£1.5 million), whereas agreements have not yet been reached with certain claimants whose claims total Lit 17 687 million (£7.1 million). Agreements on the quantum of the claims have also been reached between the shipowner/UK Club and the majority of the remaining claimants whose claims, in the IOPC Fund's view, are time-barred vis-à-vis the Fund for a total of Lit 17 800 million (£7.2 million), and it is likely that these claims will be included in the stato passivo for the amounts agreed. The remaining claims other than those relating to environmental damage, including that presented by the State of Italy, total over Lit 100 000 million (£40.4 million). As regards environmental damage, the part of the claim of the State of Italy which has been quantified is for Lit 883 435 million (£357 million); in addition, there are some items where the quantification of the damage is left to the court to decide on the basis of equity. The Region of Liguria and some provinces and municipalities have also included in their claims items relating to environmental damage.

7.5 In view of the very high aggregate amount of the claims and the uncertainty as regards the position which will ultimately be taken by the Italian courts on a number of issues, it would not be possible, in the Director's opinion, to make any meaningful calculation of a pro rata reduction of the payments which could be made to claimants who took the steps required in the Fund Convention to prevent their claims from becoming time-barred vis-à-vis the IOPC Fund. If the percentage were

to be fixed at such a level as to guarantee that all claimants would receive the same percentage of their established claims whatever the outcome of the court proceedings, the percentage would have to be set at such a low level that it would not be attractive to the claimants. For this reason, the Director is unable to make any proposal for payment to the claimants whose claims are not time-barred of a certain percentage of the agreed amounts.

7.6 If the Executive Committee were to consider that the IOPC Fund should make payments in full or in part to the claimants who have taken the steps required to prevent their claims from becoming time-barred vis-à-vis the IOPC Fund, or to some of these claimants, several important issues would have to be addressed.

7.7 Firstly, each of these claimants should in principle receive a proportional payment from the shipowner's limitation fund (Lit 23 950 220 000, corresponding to £9.7 million). In view of the on-going legal proceedings, it appears that the Court of first instance in Genoa would not permit the limitation fund to be used for any such payments. It is unlikely that the UK Club, which established the limitation fund on behalf of the shipowner, would be prepared to make any such payments. Payments of these claims would therefore have to be made entirely by the IOPC Fund.

7.8 Although convinced of the legal validity of the IOPC Fund's position in respect of the time-bar issue, the Executive Committee has nevertheless recognised that the legal proceedings in Italy give rise to some uncertainty as regards the final outcome of this issue. Depending on the outcome of these proceedings, the total amount of the established claims against the Fund could be fixed by the Italian courts at an amount which exceeds the total amount available under the Civil Liability Convention and the Fund Convention. In such a situation, each claim should be reduced pro rata. If, in such a hypothetical situation, the IOPC Fund had paid a number of claimants more than their pro rata share, a complex legal situation would arise.

7.9 The Executive Committee may nevertheless wish to consider paying the claimants referred to in paragraph 5.1 in full or in part – or some of them –, in view of the fact that these claimants have taken the steps prescribed in the Fund Convention to prevent their claims from becoming time-barred vis-à-vis the IOPC Fund.

7.10 As regards the French claimants, the significance of the difficulties referred to in paragraphs 7.7 and 7.8 above would, in the view of the Director, be reduced if payments were made only to the 31 French municipalities, the Direction départementale des Services d'incendie et de secours du Var and Parc National de Port Cros, as proposed by the French Government in its request (cf paragraph 6.2 above). If payment were limited to these 33 claimants, the problems relating to a possible overpayment by the IOPC Fund could be the subject of discussions at a later stage between the French Government and the Fund concerning the payment of the Government's claim.

7.11 So far no request for payment has been received from the non-French claimants who have taken the steps required to prevent their claims from becoming time-barred vis-à-vis the IOPC Fund. If such requests were to be made, the Director takes the view that the risks for the IOPC Fund of overpayment would have to be considered in the light of the situation in respect of these claimants.

8 Action to be taken by the Executive Committee

The Executive Committee is invited to consider whether and, if so, to what extent, the IOPC Fund should make payments to those claimants who have taken the steps required under the Conventions to prevent their claims from becoming time-barred vis-à-vis the IOPC Fund.
