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COMPENSATION
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INCIDENTS INVOLVING THE 1971 FUND

SEA EMPRESS

Note by the Director

1 Introduction

This document submits certain claims to the Executive Committee for consideration, ie claims in the tourism sector, a claim by an angling club and a claim by Wales Tourist Board for promotional expenses.

2 Claims by businesses in the tourism sector

Types of claims

2.1 A number of claims have been presented from tourism related businesses such as hotels, bed and breakfast businesses, caravan parks, restaurants, pubs and shops as well as various beach or sea related activities (a sailing school, a water sport centre, a diving school, an angling shop and providers of boat excursions). Most of these businesses are located in the area affected by the spill and the subsequent clean-up operations. Some tourism related businesses which have submitted claims are located near the coast as far north as Cardigan or Newport, North of Milford Haven, or on the Gower peninsula, south-east of Milford Haven (see map reproduced on page 2 in document 71FUND/EXC.50/12). Another group of claims relate to businesses located within Pembrokeshire at some distance from the coast.

Previous considerations of tourism claims by the Executive Committee

2.2 It should be recalled that at its 35th session, held in June 1993, the Executive Committee considered certain tourism claims in the *Haven* case. The Committee's conclusions are set out in document FUND/EXC.35/10, paragraphs 3.2.4–3.2.9, as reproduced below:

3.2.4 As regards claims for compensation submitted by the owners of hotels, restaurants and shops located along the Italian coast between Genoa and the French border, the Executive Committee recognised that it might be difficult to lay down strict criteria as to which types of claims should be admissible. It was noted that these establishments had not been directly affected by the oil spill. The Committee agreed with the Director that each claim should be considered on its own merits and that the decisive criteria should be whether there was a link of causation between the loss or damage and the contamination resulting from the *Haven* incident. It was noted that tourism in general was influenced by external factors and that there was often a considerable variation from year to year in the number of tourists visiting a given area for reasons which were normally difficult or impossible to establish.

3.2.5 The Executive Committee accepted that, if contamination of the beaches resulted in a reduction in the tourist activity in a given town or village, it would probably affect all establishments of the same kind in the locality. For this reason, the Committee endorsed the Director's position that all hotels, restaurants and shops in the same town or village should be treated equally in principle, independent of their location. As regards shops, it was agreed that it would not be reasonable to make a distinction dependent on the types of goods sold, except in respect of shops selling goods which were not normally bought by tourists (such as furniture and cars).

3.2.6 It was also discussed whether a distinction should be made between villages and towns along the coast between Genoa and the French border whose beaches were polluted, and towns and villages along that coast whose beaches were not contaminated. The Executive Committee agreed with the Director's view that it would be appropriate to give equal treatment in principle to all claims for loss of income submitted in respect of establishments along this coast, independent of whether the particular town or village where they were located was directly affected by the oil from the *Haven*.

3.2.7 The Executive Committee considered in particular claims presented by three retailers (clothes retailer, lingerie shop, stationery/toy shop) in Savona (Italy). In view of the fact that Savona did not depend on beach tourism, its beaches being mainly used by its own citizens, and that the decisive criterion for admissibility should be whether there was a link of causation between the loss and the contamination resulting from the *Haven* incident, the Committee decided that these three retailers did not have valid claims for compensation.

3.2.8 As for the question of the period for which compensation should be granted, the Executive Committee agreed with the Director that each claim should be considered on its own merits also in this regard.

3.2.9 The Executive Committee emphasised that the link between the contamination resulting from the *Haven* incident and the losses allegedly suffered by individual hotels, restaurants and shops in respect of which compensation was claimed differed greatly from one claimant to another. For this reason, in the Committee's view, it was essential that each claim was examined in order to establish that the requirements for admissibility were fulfilled, in particular that relating to the link of causation, and in order to assess the quantum of the alleged loss which could be considered as having been caused by contamination.

2.3 It should be noted that the Executive Committee also considered, at its 35th session, losses allegedly suffered by public bodies (the City of Cannes and the Municipality of Lavandou (France)) resulting from a reduction in tourism during 1991. The conclusions of the Committee were as follows (document FUND/EXC.35/10, paragraphs 3.2.16-3.2.20):

3.2.17 With regard to the part of the claim submitted by the City of Cannes for loss of tax revenue from tourism, the Executive Committee took the view that the City had not shown that the alleged loss resulted from the *Haven* incident. For this reason, the Committee considered that this part of the claim should be rejected.

3.2.18 As regards the part of the claim presented by the City of Cannes relating to extra costs for publicity to counteract the negative effects on the reputation of the City as a tourist resort, the Committee shared the Director's view that it had not been shown that the *Haven* incident had caused any damage to the reputation of the City as a tourist resort. The Committee decided that, for this reason, this part of the claim should also be rejected.

3.2.19 Concerning the claim presented by the Commune of Lavandou relating to loss of tourist tax, the Committee agreed with the Director that the Commune had not shown that the alleged loss was caused by the *Haven* incident and that this claim should therefore also be rejected.

3.2.20 The French observer delegation expressed the view that the rejection of these claims could only be justified by the fact that the losses in respect of which the City of Cannes and the Commune of Lavandou claimed compensation could not be accepted, on the basis of the supporting documents, as losses caused by contamination, ie that the losses resulted from a reduction in tourism significantly greater than the normal fluctuation from one year to another. That delegation noted that, if this was not the reason for rejection, the rejection was at variance with the position taken by the IOPC Fund in previous cases. It was maintained by that delegation that communes which depended only on beach tourism and which could not offset the losses of taxes on tourism by other income would suffer an economic loss which should be compensated if there was a reasonable proximity between the contamination and the loss.

General criteria for admissibility of claims for pure economic loss.

2.4 Since the Executive Committee's consideration of the tourism claims arising out of the *Haven* incident, the 1971 Fund has studied further the admissibility of claims for pure economic loss, ie loss of earnings sustained by persons whose property has not been polluted. The criterion 'link of causation' has been amplified to mean that there must be a reasonable degree of proximity between the contamination and the alleged loss or damage. The Fund's policy in this regard was laid down by the Assembly, at its 17th session in October 1994, through its endorsement of the Report of the 7th Intersessional Working Group (document FUND/A.17/35, paragraph 26.8). This policy can be summarised as follows:

Claims for pure economic loss are admissible only if they are for loss or damage caused by contamination. The starting point is the pollution, not the incident itself. To qualify for compensation for pure economic loss, there must be a reasonable degree of proximity between the contamination and the loss or damage sustained by the claimant. A claim is not admissible for the *sole* reason that the loss or damage would not have occurred had the oil spill not happened. When considering whether the criterion of reasonable proximity is fulfilled, the following elements are taken into account:

- ◆ the geographic proximity between the claimant's activity and the contamination
- ◆ the degree to which a claimant was economically dependent on an affected resource
- ◆ the extent to which a claimant had alternative sources of supply or business opportunities
- ◆ the extent to which a claimant's business formed an integral part of the economic activity within the area affected by the spill.

The 1971 Fund also takes into account the extent to which a claimant was able to mitigate his loss.

Director's considerations

2.5 The Director makes the following analysis as regards the application to the tourism and tourism related claims arising out of the *Sea Empress* incident of the criteria adopted in the *Haven* case and the general criteria applied by the 1971 Fund for the admissibility of claims for pure economic loss.

2.6 The oil from the *Sea Empress* affected a stretch of coast of some 200 kilometres from St David's in the north-west to the Burry inlet in the south-east. The fishing ban stretched along approximately the same stretch of coast. The incident and the pollution resulting therefrom attracted great attention in the media, both in the United Kingdom and abroad. The contamination of the beaches in the area has resulted in a downturn in tourism, which was most pronounced in the months after the incident but continued, at least for certain sectors, during the summer of 1996.

2.7 For the general public in the United Kingdom, the coastline in the County of Pembrokeshire is recognised as having special scenic value as it is designated as the Pembrokeshire Coastal National Park. This is the only coastal national park in the United Kingdom. The Park covers an area of some 620 square kilometres and stretches along the coast for some 400 kilometres from Cardigan just east of the northern boundary of Pembrokeshire to east of the village of Amroth at the south-eastern boundary of Pembrokeshire. The Pembrokeshire National Park is an important point of reference for the selection of a holiday destination.

2.8 In the Director's view, the criteria adopted by the Executive Committee in the *Haven* case - as amplified in the Report of the 7th Intersessional Working Group - are applicable to the tourism in the directly affected area between the Gower peninsula and St David's. The Director has, therefore, applied these criteria to a number of claims for businesses in the directly affected area. The Director has taken the view, therefore, that - as in the *Haven* case - all hotels, restaurants, shops and other tourism or tourism related businesses in this area should be treated equally. As in the *Haven* case, he has considered it would not be reasonable to make a distinction dependent on the type of goods sold, except in respect of shops selling goods which are not normally bought by tourists (such as furniture and cars). Each claim has been considered on its own merits, and the decisive criterion has been whether there was a link of causation (a reasonable degree of proximity) between the loss or damage and the contamination resulting from the *Sea Empress* incident.

2.9 A particular question arises, however, in respect of businesses in the tourism sector which are not located close to the affected coast but some distance inland. When assessing whether the criterion of proximity is fulfilled, it would in the Director's view in these cases be appropriate to pay special attention to the degree of dependency of the business on the affected resource, ie the polluted beaches. He considers it necessary to assess this aspect for each individual claim. One important element would be the distance between the location of the business and the coast as well as the time required by tourists to reach the beaches. The outcome of this assessment may, in the Director's view, vary depending on the type of business being considered. The Director invites the Executive Committee to consider this issue.

2.10 The 1971 Fund has also received claims from businesses located outside the area directly affected by the oil, ie north of St David's up to Newport and Cardigan and east of the fishing exclusion zone on the Gower peninsula. As stated above, for tourists the whole of Pembrokeshire is a distinct holiday destination. When deciding whether to refrain from taking a holiday in Pembrokeshire due to the oil spill, many potential visitors would not distinguish between the area south of St David's and the area north of that point. For this reason, the Director considers that also businesses in the tourism sector north of St David's could qualify for compensation, provided that there is a reasonable degree of proximity between the oil spill and the reduction in tourism revenue. Also for this area, each claim should in the Director's view be considered on its own merits. The same should, in his view, apply to businesses located on the Gower peninsula. It appears that the further away from the contaminated beaches the business is carried out, the greater the likelihood that the criterion of a reasonable degree of proximity is not fulfilled. The Executive Committee is invited to consider also this issue.

3 Angling club

3.1 At its 49th session, the Executive Committee was informed by the Director that a number of angling clubs in South Wales would present claims for economic loss allegedly suffered as a result of the *Sea Empress* incident.

3.2 The Executive Committee confirmed its position that claims should not be considered until they had actually been submitted.

3.3 One claim of this type for £3 800 has now been submitted. A solicitor representing this claimant has presented the following general information:

The major part of angling in England and Wales is carried out through angling clubs. These clubs are formed for the purpose of making fishing available to their members to which the individual members would not be able to gain access without the club acquiring the fishing rights.

The clubs as legal entities are either unincorporated associations or limited companies. As a general principle clubs look to raise sufficient income to cover their outgoings and therefore cannot be characterised in any way as profit making organisations.

The clubs acquire the angling rights either by freehold purchase of the bank of the river which by law vests the bed to one half the width of the river in the owner, or by purchase of the fishing rights which can be acquired separately from the land itself. Alternatively the fishing rights are leased or licensed from the land owner.

The clubs finance the acquisition of the fishing rights by the annual subscriptions paid by the members. In many cases the price paid for the fishing rights is less than the full market value which reflects long standing relationships between the club and owners and the benefit to the community in having fishing rights available to local people.

The proposed claim to be made by angling clubs will reflect on the one hand the payment of money for which no benefit has been had and on the other, income which has been lost. Both the wasted expenditure and the lost income result directly from the closure of the fisheries from 17 March to 3 May 1996, which amounts to 21.86% of the season which closes on 17 October. As well as rent for angling rights there are other items of fixed expenditure such as rates payments of water bailiffs and other out of pocket expenses such as advertising closure of the fishery.

3.4 The angling club has stated in support of its claim:

This angling club, which has angling rights for migratory fish (ie salmon and sea trout) in the Cleddau River, has a membership ceiling of 30. In previous years this figure has always been reached. In 1996, however, prospective members were dissuaded from joining because of the effects of the *Sea Empress* incident, and only eleven members joined the club, ie 19 members less than the previous years. Since the membership fee is £200 per annum, the club has suffered a loss of £3 800.

3.5 It will be recalled that salmon and migratory trout were subject to a fishing ban imposed by the Welsh Office during the period 20 March - 3 May 1996 (cf. document 71FUND/EXC.50/12, paragraph 4.5).

3.6 The claiming angling club carries out its activities in the Cleddau River some 20 kilometres north-east of Milford Haven. It has alleged having suffered loss of income in the form of reduced membership fees as a result of the fishing ban. In the Director's view, these losses would in principle be admissible.

3.7 In his assessment of the loss, the Director would take into account the extent to which the angling club was able to mitigate its loss, by for instance, a reduction in the expenses incurred by the club by virtue of the reduced membership.

4 Wales Tourist Board Claim

Wales Tourist Board

4.1 Wales Tourist Board (WTB), a body established under an Act of 1969, is funded by the Welsh Office of the United Kingdom Government. The Board is responsible for the development and marketing of tourism throughout Wales.

Tourism industry in Pembrokeshire

4.2 In a submission to the 1971 Fund in April 1996, Wales Tourist Board stated that the tourism industry in Pembrokeshire generated approximately £200 million per year. The Board stated that the media images of substantial slicks of oil in the sea, oil-coated wildlife and heavily polluted tourist beaches remained vivid. The Board maintained that to offset the effects of these images on tourism, and claims for economic loss from tourist businesses, a closely-targeted marketing campaign was required. The Board stated that there had been a most serious and abrupt cessation of enquiries and that bookings appeared to have dropped to a quarter since the *Sea Empress* grounding. It also argued that a successful marketing campaign would rebuild the tourist image as quickly as possible, minimise the economic damage to the tourist industry and minimise the level of compensation claims arising from a loss of business. The Board mentioned that a number of media initiatives had already taken place and that it needed support for a major reassurance campaign which should be launched as soon as it was certain that the beaches and other tourist attractions were free from oil. Without a major reassurance campaign there was likely, in the Board's view, to be a significant decline in the level of tourism, with a loss of income of the order of £15 million in the local Pembrokeshire economy, some of which would be the subject of compensation claims.

The claim

4.3 Wales Tourist Board has presented a claim relating to the cost of the following four promotional activities designed to reduce the impact of negative publicity generated in the aftermath of the *Sea Empress* incident and to rebuild the image of the area prior to the beginning of the 1996 tourist season:

1.	Short term employment of a specialist crisis management agency to advise on methods of combatting negative publicity and implement initial public relations work.	£9 871
2.	Sponsorship of special supplements in regional newspapers targeting day and short break visitors. The supplements were published on 28 March 1996, just before the Easter holiday.	£10 000
3.	Radio campaign on 1 March 1996, St David's Day, directed to target market areas in the United Kingdom.	£5 000
4.	Extra costs of the Green Sea Campaign promoting the environmental quality of the coast as well as the quality of the sea water around Wales to highlight the success of the clean-up operations around the coast.	£5 000
	TOTAL:	<u>£29 871</u>

4.4 It is possible that Wales Tourist Board will present claims for the costs of further activities.

Criteria for admissibility of claims to prevent or minimise pure economic loss

4.5 At its 17th session the Assembly endorsed the position taken by the 7th Intersessional Working Group (documents FUND/A.17/35, paragraph 26.8 and FUND/A.17/23) that measures to prevent or minimise pure economic loss which would fall within the definition of "pollution damage" as interpreted by the 1971 Fund should be considered as preventive measures, provided they fulfilled the following requirements:

- the costs of the proposed measures were reasonable;
- the costs of the measures were not disproportionate to the further damage or loss which they were intended to mitigate;
- the measures were appropriate and offered a reasonable prospect of being successful; and
- in the case of a marketing campaign, the measures related to actual targeted markets.

Previous considerations by the Executive Committee in respect of Wales Tourist Board

4.6 It will be recalled that the Executive Committee at its 48th session took note of a request made by Wales Tourist Board that the 1971 Fund should contribute towards a marketing campaign intended to offset the decline of tourism caused by the *Sea Empress* incident. The Committee also took note of a budget for such a campaign totalling £550 000 submitted by the Board, as set out in document FUND/EXC.48/2/Add.2.

4.7 The Committee noted the view expressed by the Director that it might be appropriate for Wales Tourist Board to take measures to reduce the effects of the *Sea Empress* incident on the tourism industry. It was also noted that, since the request had been received only the day before the session, the Director had not been able to examine, together with the 1971 Fund's experts, whether the proposed measures fulfilled the criteria for admissibility laid down by the Assembly and the Executive Committee, in particular whether these measures were appropriate and would have reasonable prospects of being successful. It was also noted that many of the items included in the proposed campaign did not relate to actual targeted markets but were of a general nature, and that the Director had therefore expressed the view that the cost of carrying out some elements of the planned campaign as presented could not form the basis of an admissible claim.

4.8 The Executive Committee agreed with the Director that if Wales Tourist Board were to develop further its plan for a marketing campaign, the Director should be prepared to discuss with the Board on a without prejudice basis, with the assistance of the 1971 Fund experts, whether and to what extent any measures which the Board might wish to take could be considered as fulfilling the criteria for admissibility.

4.9 The Executive Committee reiterated its position that in principle the 1971 Fund should not consider claims for marketing activities until the activities have been carried out and the results could be assessed. The Committee referred to the discussions on this point in the 7th Intersessional Working Group (document FUND/A.17/23, paragraph 7.2.43).

4.10 Wales Tourist Board's claim was again considered at the Executive Committee's 49th session. The Committee noted that Wales Tourist Board had not yet provided the necessary information and documentation on a number of points. The Committee was therefore not in a position to decide on the admissibility of the various items of the proposed marketing campaign. The Committee authorised the Director to approve the items of this campaign which fulfilled the criteria referred to in paragraph 4.5 above, as and when they had been carried out (document FUND/EXC.49/12, paragraph 3.8.18).

Assessment of the claim

Crisis management agency (£9 871)

4.11 Wales Tourist Board employed an agency specialising in crisis management for a period of 11 days, just after the *Sea Empress* incident took place, to advise on the best measures to minimise the

negative media impact on the tourism in the area. The agency prepared a short, medium and long-term crisis management strategy, set up a telephone help line to assist and reassure tourists, arranged for TV and radio interviews for the Chief Executive of Wales Tourist Board and briefed the United Kingdom tourist authorities, the Prince of Wales and the tourist industry to ensure that a common reassuring message was communicated to the public.

4.12 The 1971 Fund's and the Skuld Club's tourism experts have stated that Wales Tourist Board acted wisely in employing a specialist crisis management agency to advise it on the appropriate steps to be taken immediately after the incident to reduce the negative impact of the incident on the tourism industry. The experts have expressed the view that such immediate action was important since the incident occurred at a time when many people are deciding where to take their summer holidays. In their view the prompt intervention of this crisis management agency helped Wales Tourist Board to minimize the impact of the initial negative media coverage. The 1971 Fund's experts believe that the use of this agency clearly contributed to reducing the negative impact of the oil spill in the minds of tourists and thereby reduced the economic losses of the tourism industry, although this reduction cannot be quantified. The experts have also considered that the cost for the services of this agency was reasonable.

4.13 The Director takes the view that the cost of employing the crisis management agency fulfils the criteria for admissibility and that this part of the claim should be accepted.

Supplements in regional newspapers (£10 000)

4.14 The tourism season in Pembrokeshire starts at the end of March or early April. Tourism in the area at the beginning of the season consists mainly of short-break and day visitors, and the majority of these visitors come from within Wales. Wales Tourist Board is claiming for the cost of supplements to two Welsh regional newspapers (Western Mail and South Wales Echo) published on 28 March before the Easter Holiday (weekend of 6-8 April 1996) recommending short breaks and day visits to Pembrokeshire.

4.15 The tourism experts engaged by the 1971 Fund have expressed the view that the newspapers have a circulation well targeted to the prime audience for the Easter Holiday reaching most households in South and Mid Wales. They have stated that the newspapers have a substantial circulation and large number of readers (circulation 64 602 and 79 189, respectively; number of readers 167 000 and 216 138 respectively). The 1971 Fund's tourist experts have considered the costs incurred by Wales Tourist Board as reasonable.

4.16 The Director considers that this activity also fulfils the criteria for admissibility referred to in paragraph 4.5 above and proposes, therefore, that this item should be admitted.

Radio campaign (£5 000)

4.17 This radio campaign was carried out on 1 March which is St David's day, the day of Wales' patron saint. Wales Tourist Board decided to take advantage of St David's day in order to capture media attention. The Board selected over 100 United Kingdom radio stations covering the main markets from where the Pembrokeshire tourists come and offered live interviews with Board spokesmen about holidays in the area. Twenty-three stations took up the offer. These interviews lasted in total 2 hours 26 minutes. If the corresponding radio time had been bought for advertising, the experts of the Fund and the Club estimate the cost at some £100 000.

4.18 The 1971 Fund's tourism experts have expressed the view that the costs claimed represent excellent value because the radio messages helped to counteract the mainly negative media coverage which took place in the two weeks immediately following the incident.

4.19 The Director considers that the radio campaign fulfils the criteria for admissibility referred to in paragraph 4.5 above and proposes therefore that this item should be admitted.

Green Sea Campaign (£5 000)

4.20 The Green Sea Campaign is a marketing activity which was planned well before the *Sea Empress* incident. Its aim is to improve the coastal environment and water quality in Wales in order to obtain 50 European Union 'Blue flag' awards for clean Welsh beaches by the year 2000. The launch of the campaign was scheduled for 1 March in North Wales but it was delayed until 1 May due to the *Sea Empress* incident. In order to counteract the negative image created by the *Sea Empress* incident, the campaign launched in North Wales was this year launched also in Tenby, one of the towns most severely affected by the oil. Wales Tourist Board invited representatives from the media (TV, radio and newspapers) to attend the additional launch of the Green Sea Campaign in Tenby in order to see how clean the beaches were and to obtain good photographic coverage of the coast line restored to normal. Wales Tourist Board has estimated that the additional cost of this activity resulting from it taking place also in Tenby amounted to £5 000.

4.21 The 1971 Fund's tourism experts have stated that they have not so far received satisfactory evidence of this expenditure and that they therefore cannot yet express any opinion on this item of the claim. For this reason, the Director considers it premature to take any decision as regards this item.

5 Action to be taken by the Executive Committee

The Executive Committee is invited to:

- (a) take note of the information contained in this document;
 - (b) give the Director instructions as the Committee may deem appropriate in respect of
 - (i) the admissibility of tourism claims (paragraphs 2.9 and 2.10 above);
 - (ii) the claim submitted by an angling club (paragraph 3.6 - 3.9 above); and
 - (iii) the claim by Wales Tourist Board for the costs of promotional activities (paragraph 4.11 - 4.21 above);
-