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COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
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Agenda item 3

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INCIDENTS INVOLVING THE 1971 FUND

HAVEN

Search for a global solution

Note by the Director

1 Introduction

1.1 This document sets out the situation in respect of the search for a global solution to all outstanding issues in the *Haven* case.

1.2 As regards the situation in the various legal proceedings, reference is made to document 71FUND/EXC.50/3. It should be noted that in October 1996, the Italian Government brought legal action against the 1971 Fund, claiming compensation for a total of Lit 1 017 369 283 193 (£390 million), of which Lit 883 435 million (£340 million) relates to environmental damage.

2 Considerations of the Assembly and the Executive Committee at previous sessions

2.1 At the Executive Committee's 40th session, held in October 1994, a number of delegations expressed their concern at the situation which had arisen in the *Haven* case, since the 1971 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 1971 Fund's maximum cover should be calculated on the basis of the free market value of gold instead of on the basis of the SDR, the latter conversion method being in accordance with the internationally accepted interpretation of the 1971 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 1971 Fund Assembly, were not admissible under the 1969 Civil Liability Convention and the 1971 Fund Convention (document FUND/EXC.44/17, paragraph 3.2.2).

2.2 It is recalled that the Executive Committee has taken the view that the majority of the claims arising out of the *Haven* incident are time-barred vis-à-vis the 1971 Fund.

2.3 While convinced of the legal validity of the 1971 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 should respect the following conditions:

- (i) the maximum payable under the 1969 Civil Liability Convention and the 1971 Fund Convention was 60 million SDR;
- (ii) claims could only be admissible if a claimant had suffered a quantifiable economic loss and claims for damage to the marine environment *per se* were not admissible;
- (iii) the negotiations should be without prejudice to the IOPC Fund's position in respect of the time-bar;
- (iv) the negotiations should, to the extent possible, take into account the economic interests of those claimants who had respected the requirements laid down in Article 6.1 of the 1971 Fund Convention.

2.4 At its 43rd session, the Committee instructed the Director to continue negotiations with the claimants and authorised him to agree, on behalf of the 1971 Fund, to a global settlement within the framework of an amount of some Lt 137 000 million (£51.5 million) being made available to victims in the context of a global settlement. The Executive Committee referred to the conditions for a global settlement, set out in paragraph 2.3 above. The above-mentioned amount would be calculated as follows:

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

2.5 The Executive Committee noted that, in the Director's view, the proposed global settlement should also include a waiver by the shipowner and his insurer (the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd, UK Club) of any right to indemnification under Article 5 of the 1971 Fund Convention. The representative of the UK Club, speaking also on behalf of the shipowner, stated that the owner and the Club maintained that there were no grounds on which the 1971 Fund could refuse to pay indemnification under Article 5. He also stated that, nevertheless, the shipowner/UK Club would waive the right to indemnification provided that all conditions of the proposed settlement were fulfilled.

2.6 By October 1995, agreements on the quantum had been reached with the French Government and all other French public bodies as well as with the Principality of Monaco. Agreement had by then been reached between the shipowner/UK Club and the great majority of the Italian claimants on the quantum of their claims.

2.7 The Assembly, at its 18th session held in October 1995, 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 1971 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 a decision (document FUND/A.18/26, paragraphs 11.8 and 11.9).

2.8 The issue of a global settlement was again considered by the Assembly at its 19th session, held in October 1996. The Assembly was informed that, following the decision rendered on 5 April 1996 by the judge in charge of the limitation proceedings in which he determined the list of admissible claims (*stato passivo*), the shipowner and the UK Club had started to make payments to a number of claimants, as set out in paragraph 4.10 of document 71FUND/EXC.50/3. By making these payments, the UK Club has become subrogated to the rights of those claimants in the amounts admitted in the *stato passivo*. It was also noted that the settlements made or envisaged by the shipowner/UK Club would result in there being only a few remaining claimants, the main one being the Italian Government.

2.9 The Assembly recalled the conditions of the previous offer of a global settlement, and in particular that – without prejudice to the Fund's position on the question of time bar – this would consist of the Fund's paying the difference between the shipowner's limitation fund under the 1969 Civil Liability Convention (14 million SDR) and the maximum amount payable under the 1971 Fund Convention (60 million SDR). The Assembly also referred to certain conditions for a global settlement which had been laid down by the Executive Committee (document FUND/EXC.43/7, paragraph 3.20). The Assembly noted the statement made by the Italian delegation at the Executive Committee's 50th session (document 71FUND/EXC.50/17, paragraph 3.2.17).

2.10 At the Assembly's 19th session, the Italian delegation made the following statement (document 71FUND/A.19/30, paragraph 17.8):

In the past days the Italian delegation has again stressed the importance of a balanced solution to the *Haven* case which could be beneficial to all concerned. The discussions that have been taking place have emphasised the need to take further steps towards a solution. They have been helpful and we intend to pursue them further in the future.

In this context the Italian authorities, as already made clear, believe that a solution in order to be acceptable must be global, to include the Fund, the Insurers' Consortium and the owners.

The IOPC Fund has been forthcoming in putting forward suggestions and we hope that it will continue to provide its effective support in working out the global settlement we are seeking.

The Italian Government has proved in the past five years in the legal proceedings pending before the Court of Justice that it has advanced no claims in excess of the limits laid down in the 1976 Protocol. The Protocol in this context remains the term of reference for the definition of the *Haven* case with the IOPC Fund in a global settlement which should see an extra effort on the part of the insurers and the owners.

2.11 Professor H Tanikawa of the Japanese delegation made the following statement (document 71FUND/A.19/30, paragraph 17.9):

In view of the statement made by the Italian delegation, the Assembly should instruct the Director to explore, with the Italian Government and the UK Club, the possibility of arriving at a global settlement which, as regards the 1971 Fund, falls within the maximum amount of compensation available, ie the difference between 60 million SDR and 14 million SDR, minus the amounts which the 1971 Fund has paid or might have to pay to other claimants. The Assembly should also instruct the Director to report the results of such exploratory discussions to the Executive Committee. It should be emphasised that such discussions are without prejudice to the 1971 Fund's position in respect of the time-bar issue.

2.12 The Assembly endorsed the statement made by Professor Tanikawa as the position of the 1971 Fund.

2.13 The Assembly authorised the Executive Committee to approve any global settlement within the limits referred to in paragraph 2.3 above (document 71FUND/A.19/30, paragraph 17.11).

3 Recent developments

3.1 As instructed by the Assembly, the Director has held exploratory discussions with the Italian Government concerning the possibility of arriving at a global settlement which fulfills the criteria laid down by the Assembly. These discussions have been held in close co-operation with the UK Club.

3.2 The shipowner/UK Club have continued to settle and pay claims as admitted in the stato passivo. The payments made and to be made by the UK Club are summarised in the Annex. The situation as at 12 February 1997 was as follows:

- (a) Agreements as to the quantum have been reached with the French Government, all other French public bodies and the Principality of Monaco. The claims made by the French public bodies (other than the French Government) have been paid in full by the 1971 Fund (cf 71FUND/EXC.50/3, paragraphs 4.14 and 4.15).
- (b) The 1971 Fund has paid in full the claims of two Italian contractors (Ecolfriuli and Ecolmare) (document 71FUND/EXC.50/3, paragraph 4.19).
- (c) The shipowner and the UK Club have paid all claims submitted by Italian claimants and by private claimants in France for the amounts included in the stato passivo, except the claims referred to under (d) and (e) below. In addition to these amounts, an allowance has been made for interest in respect of those claims where a settlement agreement had expired due to the fact that the Club had been unable to make payments, and in these cases interest has been added for the period between the expiry date and the date of the publication of the stato passivo.
- (d) Agreements have been reached with a number of claimants in the categories referred to under (c) above for Lit 213 917 978 (£80 400). These claims will be paid by the UK Club in the near future.
- (e) Agreement has not been reached with one non-ATI clean-up contractor (Oromare) whose claim has been admitted in the stato passivo at Lit 1 000 million (£384 100), nor with three other claimants whose claims as admitted in the stato passivo total Lit 95 217 891 (£35 800).

3.3 The shipowner and the UK Club have undertaken to waive their claims against the shipowner's limitation fund and the 1971 Fund (Lit 1 354 768 078 + US\$224 900 + £237 679, corresponding to a total of £884 700) if a global settlement is reached.

3.4 In the light of the deliberations which took place on the occasion of the 19th session of the Assembly, discussions have been held between the Director and the Italian Government. Discussions have also taken place between the Director and the UK Club concerning the shipowner's/UK Club's right to indemnification pursuant to Article 5.1 of the 1971 Fund Convention. In the discussions with the Italian Government and the shipowner/UK Club the Director has made it clear that he is not authorised to make any commitment on behalf of the 1971 Fund in respect of a global settlement.

3.5 A meeting was held in London on 14 February 1997 between the Director and representatives of the Italian Government and of the shipowner/UK Club to discuss the possibilities of reaching a global settlement of all outstanding issues in the *Haven* case. The solution discussed would result in the 1971 Fund paying the Italian State approximately Lit 70 000 million (£26.3 million), an amount which would be equivalent to the difference between 60 million SDRs and the limitation amount applicable to the shipowner of 14 million SDRs, less the amounts paid or payable by the 1971 Fund to other claimants. The amount to be paid by the UK Club to the Italian State would represent the balance on the shipowner's

limitation fund (Lit 23 950 220 000) plus interest thereon (estimated at Lit 9 069 403 286) after all other claims have been settled and paid plus a further amount to be paid *ex gratia* to the Italian State (in addition to the amount already paid *ex gratia* by the shipowner/UK Club to certain local public bodies).

3.6 In the Director's view, a solution along the lines set out in paragraph 3.5 above would fulfill the conditions laid down by the Assembly and the Executive Committee, namely that such a global settlement as regards the 1971 Fund would fall within the total amount that would be available under the 1969 Civil Liability Convention and the 1971 Fund Convention, i.e. 60 million SDRs, that the 1971 Fund's payment is made only in respect of quantifiable economic loss actually suffered by a claimant and that the 1971 Fund does not pay compensation for damage to the marine environment *per se*.

3.7 In the global settlement under discussion, all legal actions in the Italian courts would be withdrawn. It is recalled that, at its 48th session, the Executive Committee instructed the Director to take the necessary steps to appeal to the Supreme Court of Cassation against the Court of Appeal's judgement on the method of conversion of (gold) francs into national currency (document FUND/EXC.48/6, paragraph 4.1.6). The 1971 Fund is entitled to appeal to the Supreme Court of Cassation against the judgement by the Court of Appeal relating to the conversion of the unit of account laid down in the 1971 Fund Convention within 60 days of having been formally notified of the judgement by a party to the proceedings or within one year from the date of the judgement. So far no such notification has been received. However, the period of one year expires on 30 March 1997. The 1971 Fund is at present lodging its appeal and is notifying the appeal to all other parties in the same way as was done in respect of the appeal against the Court of first instance's judgement on this issue.

3.8 The question is whether the 1971 Fund should reserve its right to pursue its appeal in the Supreme Court of Cassation on the method of conversion even if a global settlement is reached. The 1971 Fund's Italian lawyer has advised the Director that once all claims have been settled and paid, it would not be possible to pursue this issue in the Supreme Court of Cassation, since there would no longer be any dispute. In the light of this advice, the Director takes the view that, if a global settlement is concluded and becomes binding on all parties, the 1971 Fund should withdraw its appeal.

4 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document;
- (b) to instruct the Director to pursue the discussions with the Italian Government, always without prejudice to the 1971 Fund's position on the issue of time-bar; and
- (c) to give the Director such other instructions in respect of the issues involved as the Committee may deem appropriate.

ANNEX

Payments made by the shipowner/UK Club

I	Municipalities and other local public bodies	Lit	Lit
	Paid	1 326 709 464 ^{<1>}	
	To be paid for agreed claims	104 661 268	
	One further claim to be agreed (claim 31)	<u>26 000 000</u>	
			1 457 370 732 ^{<2>}
II	Fishermen		
	Paid	8 914 718 715	
	To be paid for agreed claims	<u>20 580 000</u>	
			8 935 298 715
III	Yachts and tourism		
	Paid	4 574 662 219	
	To be paid for agreed claims (including claim 698 for \$34 368)	88 676 710	
	Claim 707 (to be agreed) FFr 225 070	<u>65 562 891</u>	
			4 728 901 820
IV	Non ATI Contractors		
	Paid	13 824 212 610	
	To be agreed:		
	• Oromare (amount included in stato passivo)	1 000 000 000	
	• Claim 25 (amount included in stato passivo)	<u>3 655 000</u>	
			14 827 867 610
V	Interest paid or agreed to be paid (cf paragraph 3.2 (a))		<u>1 816 722 120</u>
	Total		
	Paid or to be paid by the UK Club on the claims referred to under I-V above		31 473 901 966
	Shipowner's limitation amount	23 950 220 000	
	Interest thereon (at banking rate)	<u>9 069 403 286</u>	
		33 019 623 286	

<1> This amount includes Lit 700 million (£236 150) in respect of the claim by the Region of Liguria for tourism promotion, which has been considered by the 1971 Fund as not admissible (document FUND/EXC.44/17, paragraphs 3.2.11 and 3.2.12).

<2> These payments do not include the *ex gratia* payment made to some local public bodies in Italy.