



EXECUTIVE COMMITTEE
34th session
Agenda item 3

92FUND/EXC.34/4
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INCIDENTS INVOLVING THE 1992 FUND

INCIDENT IN GERMANY AND INCIDENT IN SWEDEN

Note by the Director

Summary:

Incident in Germany: The owner of the *Kuzbass* and his insurer appealed against the Court of first instance judgement which had found that the *Kuzbass* was the source of the pollution that affected the coast of Germany in 1996. At a hearing in December 2004 the Appeal Court stated that on the basis of the evidence submitted to date, the prospects of the shipowner/insurer succeeding in the appeal were significantly better than those of the German Government. The Court strongly recommended that the parties reach an out-of-court settlement, as a result of which the shipowner/insurer made a proposal whereby they would pay 18% and the Fund 82% of any proven losses.

At its March 2005 session the Executive Committee authorised the Director to seek an out-of-court settlement with all the other parties involved and conclude such a settlement on behalf of the 1992 Fund, provided that the amount to be paid by the shipowner/insurer was increased above 18%. The shipowner/insurer subsequently offered to increase their contribution to 20%. An assessment of the claim by the German authorities has been carried out and a settlement offer has been made to the German Government.

Incident in Sweden: Several Swedish islands in the Baltic Sea were polluted in September 2000. Subsequent investigations by the Swedish authorities indicated that the oil could have been discharged from the tanker *Alambra* during a ballast voyage to Tallinn, Estonia. The owner of the *Alambra* and his insurer maintained that the oil did not originate from that ship.

The Swedish Government took legal action against the shipowner and the insurer claiming compensation for clean-up costs totalling £385 000. The Government also took legal action against the 1992 Fund maintaining that the Fund would be liable to compensate the Swedish Government if neither the shipowner nor his insurer were held liable to pay compensation.

In June 2006 the Swedish Government and the shipowner/insurer reached an out-of-court settlement. The Swedish Government and the 1992 Fund concluded a settlement agreement whereby the Government undertook to pay the 1992 Fund £5 900 in respect of the Fund's legal and expert costs and agreed to withdraw the proceedings pending in the Court against the Fund.

Action to be taken:

Information to be noted.

1 Incident in Germany

The Incident

- 1.1 From 20 June to 10 July 1996 crude oil polluted the German coastline and a number of German islands close to the border with Denmark in the North Sea. The German authorities undertook clean-up operations at sea and on shore and some 1 574 tonnes of oil and sand mixture was removed from the beaches.
- 1.2 Investigations by the German authorities revealed that the Russian tanker *Kuzbass* (88 692 GT) had discharged Libyan crude in the port of Wilhelmshaven on 11 June 1996. According to the German authorities there remained on board some 46 m³ of oil that could not be discharged by the ship's pumps.
- 1.3 The German authorities approached the owner of the *Kuzbass* and requested that he should accept responsibility for the oil pollution. They stated that, failing this, the authorities would take legal action against him. The shipowner and his P&I insurer, the West of England Ship Owners' Mutual Insurance Association (Luxembourg) (West of England Club), informed the authorities that they denied any responsibility for the spill.

The 1992 Fund's involvement

- 1.4 The German authorities informed the 1992 Fund that, if their attempts to recover the cost of the clean-up operations from the owner of the *Kuzbass* and his insurer were to be unsuccessful, they would claim against the 1992 Fund.
- 1.5 The limitation amount applicable to the *Kuzbass* under the 1992 Civil Liability Convention was estimated at approximately 38 million SDR (£30 million).

Legal actions

- 1.6 In July 1998 the Federal Republic of Germany brought legal actions in the Court of first instance in Flensburg against the owner of the *Kuzbass* and the West of England Club, claiming compensation for the cost of the clean-up operations for an amount of DM2.6 million or €1.3 million (£881 000).
- 1.7 The 1992 Fund was notified in November 1998 of the legal actions. In August 1999, the 1992 Fund intervened in the proceedings in order to protect its interests.
- 1.8 In order to prevent their claims against the Fund becoming time barred at the expiry of the six-year period from the date of the incident, the German authorities took legal action against the 1992 Fund in June 2002. The 1992 Fund applied successfully to the Court to stay the proceedings in respect of this action, pending the outcome of the action by the German authorities against the shipowner and the West of England Club.
- 1.9 In December 2002 the Court of first instance rendered a part-judgement in which it held that the owner of the *Kuzbass* and the West of England Club were jointly and severally liable for the pollution damage. The Court acknowledged that the German authorities had failed to provide conclusive evidence that the *Kuzbass* was the vessel responsible, but that the circumstantial evidence pointed overwhelmingly to that conclusion. The Court did not deal with the quantum of the losses suffered by the German authorities and stated that this issue would be considered at the request of one of the parties, but not until the judgement on the liability issue had become final.
- 1.10 The shipowner and the West of England Club appealed against the judgement. In the appeal they argued that the Court of first instance had followed incorrect and irregular procedures in that essential parts of the records of the hearing in December 2002 did not properly reflect the statements made at the hearing. The appellants further maintained that the Court had taken

evidence from the public prosecutor's office in relation to the criminal investigation without a court order and without giving them the opportunity to comment on the evidence.

- 1.11 The main grounds for the appellants' appeal as regards substantive issues were that the *Kuzbass* could not have reached the alleged dumping area in the time available, that the chemical analyses of the pollution samples did not provide conclusive proof that the oil originated from the *Kuzbass* and that there were three other vessels in the southern North Sea at the relevant time that had previously carried cargoes of Libyan crude oil and which could therefore have caused the pollution.
- 1.12 The German authorities submitted a statement of response to the appellants' grounds for appeal, which reiterated the circumstantial evidence that had led the Court of first instance to conclude that the *Kuzbass* was the source of the pollution and also addressed the points raised by the appellants in their appeal.
- 1.13 In January 2004 the Fund also submitted a statement of response, which was largely along the same lines as that of the German authorities.
- 1.14 At a hearing in December 2004, the Schleswig-Holstein Appeal Court indicated that on the basis of the evidence submitted to date, it was far from convinced that the *Kuzbass* was the source of the pollution, and in particular drew attention to other potential ship sources that the German authorities had failed to investigate. The Court also raised doubts regarding the correctness of the circumstantial evidence and the Court of first instance's interpretation of that evidence. The Court of Appeal stated that on the basis of the documentation submitted to date, the prospects of the shipowner/West of England Club succeeding in the appeal were significantly better than those of the German Government. The Court strongly recommended that the parties reach an out-of-court settlement to the effect that the shipowner and the West of England Club would pay the German Government €120 000 (£81 000) and that the recoverable costs would be shared between the German Government and the shipowner/West of England Club on a 92%-8% basis. This recommendation would imply that the 1992 Fund should pay the balance of the admissible amount of the German Government's claim. However, the Court also granted the parties the possibility of submitting further briefs and presenting witnesses.
- 1.15 The Appeal Court ordered the continuation of the case. However, in early February 2005 the Director, in consultation with representatives of the German Government, held without prejudice discussions with the West of England Club with a view to reaching an out-of-court settlement.
- 1.16 Following the March 2005 session of the Executive Committee, all the parties made applications to the Appeal Court to cancel the hearing scheduled for 6 April 2005. The Court granted the request and a new hearing will only be held only at the request of one of the parties.

Consideration by the Executive Committee in March 2005

- 1.17 At its March 2005 session the Executive Committee, pursuant to Rule (iv) of the Rules of Procedure, held a closed session attended only by representatives of 1992 Fund Member States, to consider whether the 1992 Fund should reach an out-of-court settlement of the case.
- 1.18 The Director proposed that, in the light of the evidence available and the indications by the Court of Appeal as regards the probable outcome of the legal proceedings, he should be authorised to reach out-of-court settlements with the other parties.
- 1.19 The Committee noted that whilst there had been good grounds for suspecting that the *Kuzbass* was the source of the pollution, the evidence was largely circumstantial, and that in presenting their case the German authorities had sought to convince the Court of first instance that this evidence was sufficient to switch the burden on the shipowner to prove that the *Kuzbass* was not the source of the pollution.

- 1.20 The Committee noted that the shipowner and the West of England Club had made a proposal for an out-of-court settlement involving all parties whereby the shipowner and the West of England Club would pay 18% and the 1992 Fund 82% of any proven losses suffered by the Federal Republic of Germany as a result of the incident.
- 1.21 The Committee noted that the 1992 Fund had received documentation in support of the claim by the German Government and that the Fund's experts were examining the documentation for the purpose of carrying out an assessment. It was also noted that the Government would, under German law, be entitled to interest at the legal rate on any proven losses and that any settlement agreement would have to include the question of apportionment of the legal costs incurred by the respective parties.
- 1.22 A number of delegations expressed their disappointment in respect of the developments in the legal proceedings, but acknowledged that evidence against the shipowner and the West of England Club was lacking in a number of key areas. Those delegations agreed with the Director's analysis of the situation and supported his recommendation that the 1992 Fund should seek an out-of-court settlement with the other parties.
- 1.23 Some delegations expressed their gratitude to the German authorities for their efforts in trying to identify the ship responsible for the pollution before seeking compensation from the 1992 Fund.
- 1.24 The Committee decided to authorise the Director to seek an out-of-court settlement with all other parties involved (ie, the Federal Republic of Germany, the shipowner and the West of England Club) and conclude such a settlement on behalf of the 1992 Fund, provided the amount to be paid by the shipowner and the West of England Club was increased above the 18% currently on offer.

Developments subsequent to the March 2005 session

- 1.25 Following the March 2005 session the West of England Club and the shipowner increased their offer from 18% to 20%. The Director considered that under the circumstances there was no possibility to persuade them to increase the offer beyond 20%, and in the light of the decision by the Executive Committee, therefore decided to accept the proposed settlement offer.
- 1.26 In July 2005 the 1992 Fund and the West of England Club, with the assistance of ITOPF, completed a preliminary assessment of the claim submitted by the German authorities. The claim was provisionally assessed at DM1.8 million or €932 000 (£632 000) pending receipt of further information in respect of some claim items.
- 1.27 In February 2006 the German authorities provided additional documentation in support of their claim, as a result of which the Fund and the West of England Club were able to increase the assessed amount to DM2.1 million or €1.1 million (£745 000).
- 1.28 It is expected that a settlement agreement between the Fund and the West of England Club and the German Government will be reached in the very near future.

2 Incident in Sweden

The incident

- 2.1 Between 23 September and early October 2000 persistent oil landed on the shores of Fårö and Gotska sandön, two islands to the north of Gotland in the Baltic Sea, and thereafter on several islands in the Stockholm archipelago. The Swedish Coastguard, the Swedish Rescue Service Agency and local authorities undertook clean-up operations, which resulted in the collection of some 20m³ of oil from the sea and from the shore.

- 2.2 Investigations by the Swedish authorities indicated that the oil could have been discharged within the Swedish Exclusive Economic Zone to the east of Gotland, possibly from the Maltese tanker *Alambra*, which had passed the area at the assumed time of the oil spill on a ballast voyage to Tallinn (Estonia). According to the Coastguard, analyses of oil samples from the polluted islands matched those of samples taken from the *Alambra*.
- 2.3 The *Alambra* was entered in the London Steam-Ship Owners' Mutual Insurance Association Ltd (London Club). The shipowner and the insurer have maintained that the oil did not originate from the *Alambra*.

Limitation of liability

- 2.4 The limitation amount applicable to the *Alambra* under the 1992 Civil Liability Convention is 32 684 760 SDR (£26 million).

Claims for compensation

- 2.5 The Swedish Coastguard incurred costs in respect of clean-up operations totalling SEK 1.1 million (£82 000). The Rescue Service Agency, together with local authorities, incurred clean-up costs totalling SEK 4.1 million (£302 000). The aggregate amount of the claims would therefore fall well below the limitation amount applicable to the *Alambra*.
- 2.6 The Swedish authorities informed the 1992 Fund that they intended to submit their claims for compensation to the shipowner. The authorities further indicated that if they were to be unsuccessful in obtaining compensation from the shipowner, they would consider claiming against the Fund. However, in order to be able to obtain compensation from the 1992 Fund, the authorities would have to prove that the damage resulted from an incident involving a ship as defined in the 1992 Civil Liability Convention.
- 2.7 The Swedish authorities made available to the 1992 Fund the results of analyses carried out by the Swedish Forensic Laboratory of samples of oil carried on board the *Alambra* and of samples of oil found on several Swedish islands. The Fund examined the results of the analyses and concurred with the conclusion of the authorities that the pollution samples matched closely those taken from the *Alambra*.

Imposition of fine on the shipowner

- 2.8 The Swedish Coastguard imposed a water pollution fine of SEK 439 000 (£32 000) on the owner of the *Alambra* under the 1980 Act on Measures Against Pollution from Ships.
- 2.9 The shipowner appealed against this decision to the Stockholm District Court. The owner requested that the District Court should annul the Coastguard's decision on the grounds that the Swedish authorities did not have jurisdiction to impose a water fine in this case, since the alleged discharge was made by a foreign vessel and took place in the Swedish Exclusive Economic Zone (EEZ) and the fine was imposed after the *Alambra* had left that zone. The owner requested subsidiarily that the case should be dismissed since there had been no discharge of oil from the *Alambra*.
- 2.10 In a decision rendered in July 2002 the District Court considered the first ground invoked by the shipowner, namely that the case should be dismissed on the grounds that the Swedish authorities did not have jurisdiction to impose a water fine in respect of the discharge in question. The Court rejected the shipowner's request for dismissal on this ground.
- 2.11 In September 2002 the Stockholm Court of Appeal upheld the District Court's decision. The shipowner lodged an appeal against this decision and in May 2003 the Supreme Court granted the shipowner the right to bring the matter before it.

- 2.12 The Supreme Court ruled that the Swedish Coastguard had jurisdiction to impose a water pollution fine on a foreign flag vessel causing pollution in the Swedish EEZ, and that this would be the case even if the vessel in question had not been boarded or detained in the Swedish EEZ or Swedish territorial waters. The Supreme Court further ruled that the exercise of such jurisdiction was not in conflict with Sweden's international obligations.

Legal actions against the shipowner/Club and the Fund

- 2.13 In September 2003 the Swedish Government took legal action in the Stockholm District Court against the shipowner and the London Club maintaining that the oil in question originated from the *Alambra* and claiming compensation of SEK 5 260 364 (£388 000) for clean-up costs. The Government also took legal action against the 1992 Fund as a protective measure to prevent its claim against the Fund becoming time-barred. The Government invoked the liability of the 1992 Fund to compensate the Government if neither the shipowner nor the London Club were to be held liable to pay compensation.
- 2.14 The 1992 Fund submitted its response to the Court in October 2003 requesting that the action against the Fund should be suspended until the final judgement had been rendered in respect of the action against the shipowner and his insurer. The Fund informed the Court that it shared the Swedish Government's view that the *Alambra* was the most likely source of the pollution.
- 2.15 The District Court decided that the action against the Fund should be suspended until the action against the shipowner/London Club had been heard.
- 2.16 In May 2005 the shipowner and the London Club asked the Court for postponement of the proceedings to give the parties time to negotiate an out-of court settlement. The Court granted the request for postponement.
- 2.17 In June 2006 the Swedish Government, the shipowner and London Club reached an out-of-court settlement without any admission of liability by any party. As a consequence of this agreement the pending legal actions against the shipowner and the London Club were withdrawn. Also in June 2006, the Swedish Government and the 1992 Fund concluded a settlement agreement whereby the Swedish Government agreed to pay the 1992 Fund SEK 79 000 (£5 900) corresponding to all of the Fund's legal and expert costs. As a result the proceedings pending in the Court against the Fund were withdrawn.

3 Action to be taken by the Executive Committee

The Executive Committee is invited to take note of the information contained in this document.
