



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1971

EXECUTIVE COMMITTEE  
52nd session  
Agenda item 3

71FUND/EXC.52/5  
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## INCIDENTS INVOLVING THE 1971 FUND

### KIHNU

Note by the Director

#### **1 The incident**

1.1 The Estonian tanker *Kihnu* (949 GRT) grounded on 16 January 1993 close to the port of Tallinn (Estonia). The ship was carrying about 1 000 tonnes of heavy fuel oil and 460 tonnes of diesel oil. It is estimated that some 100 tonnes of heavy fuel oil and 40 tonnes of diesel oil were spilled as a result of the grounding.

1.2 The Estonian authorities carried out certain clean-up operations. The Finnish National Board of Waters and Environment despatched two oil combatting vessels and a helicopter to Estonia to assist in dealing with the spill.

1.3 The owner of the *Kihnu* at the time of the incident was the Tallinn Port Authority. The *Kihnu* was under bare-boat charter to an Estonian company, PKL Ltd, which had taken out P & I insurance with Ocean Marine Mutual Insurance Association Ltd.

#### **2 Claim for compensation**

2.1 In December 1995 the Finnish Government submitted a claim to the 1971 Fund for FM 713 055 (£90 000) relating to the clean-up operations carried out in Estonian territorial waters.

2.2 The 1969 Civil Liability Convention and the 1971 Fund Convention entered into force for Estonia on 1 March 1993, ie after the *Kihnu* incident. At its 49th session, the Executive Committee considered that, although the claim of the Finnish Government related to activities undertaken within the territorial waters of a non-Member State, the measures were taken to prevent or minimise pollution damage within the territory or territorial sea of Finland, a 1971 Fund Member State. The Committee decided, therefore, that the measures taken by the Finnish authorities in principle fell within the scope of application of the 1969 Civil Liability Convention and 1971 Fund Convention (document 71FUND/EXC.49/12, paragraph 3.4.6).

2.3 The Finnish Government's claim was discussed at a meeting held in Helsinki on 9 January 1997. The Government agreed to reduce the amounts claimed for certain items relating to the maintenance of Government owned vessels and to the salaries of crews, since the amounts claimed included certain elements of "fixed costs" which were not closely linked to the clean-up operations. Reductions were also agreed in respect of the rates for a helicopter and a pump, both owned by the State, since the rates claimed were significantly higher than comparable commercial rates. As a result the Government reduced its claim to FM 543 618 (£69 000), provided that an out-of-court settlement would be reached.

2.4 Subject to the decisions of the Executive Committee on the issues set out in paragraphs 4 and 5 below, the Director has accepted the reduced amount of the Finnish Government's claim of FM 543 618 as admissible.

### **3 Court action**

3.1 The State of Finland took legal action against the 1971 Fund and the P & I insurer in the Helsinki District Court in January 1996, claiming compensation for FM 713 055. The action was filed on the last day of the three-year time bar period provided in the 1969 Civil Liability Convention and the 1971 Fund Convention. Under Finnish law to prevent a claim from becoming time-barred it is sufficient that an action is filed in the court before the expiry of that period. For this reason the State's claim is not time-barred. The writ was served on the 1971 Fund in June 1996.

3.2 Following the meeting in Helsinki referred to in paragraph 2.3, the amount claimed in court was reduced to FM 701 676 (£89 000).

3.3 In November 1996, the 1971 Fund submitted its pleadings to the Court. In its submission, the Fund reserved its position as to whether the Finnish Government had fulfilled its obligation under Article 4.1 (b) of the 1971 Fund Convention (cf paragraph 5 below). In addition, the Fund maintained that the amount claimed was too high.

3.4 The P & I insurer has in its pleadings requested that the Government's action should be dismissed. The insurer has maintained that there was no right of direct action, since the insurance was not issued under Article VII.1 of the 1969 Civil Liability Convention and there was no certificate of insurance under that Convention.

3.5 The limitation amount applicable to the *Kihnu* calculated in accordance with the 1969 Civil Liability Convention is estimated at 113 000 Special Drawing Rights (FM 746 800, corresponding to £94 700).

### **4 Regional agreements on oil spill response**

4.1 At its 49th session, the Executive Committee instructed the Director to examine the relationship between applicable regional agreements relating to co-operation in respect of oil spills and the compensation regime established by the 1969 Civil Liability Convention and the 1971 Fund Convention (document 71FUND/EXC.49/12, paragraph 3.4.7).

4.2 The Finnish Government has given the following information in this regard.

The Estonian authorities did not request assistance from the Finnish Government. When notifying the Finnish Government of the incident, the Estonian authorities stated that the Finnish Government would be welcome to assist if it so wished, but that the Estonian authorities had no possibility of paying the Finnish authorities for any assistance rendered. The Finnish Government decided nevertheless to intervene, in order to protect Finnish territorial waters and coast.

At the time of the incident there was no bilateral agreement on oil spill response between Finland and Estonia. It had been agreed, however, that an agreement which had been entered into in 1990 between Finland and the Soviet Union should be applied provisionally. Under the Agreement, the State rendering assistance was entitled to compensation only if the assistance had been requested. An agreement on oil spill response was concluded between Estonia and Finland in December 1993.

The Convention on the Protection of the Marine Environment of the Baltic Sea (Helsinki Convention), in the version in force at the time of the incident, did not contain any provisions concerning the reimbursement of costs.

4.3 In the Director's view, the Finnish Government's right of compensation from the shipowner and the 1971 Fund for the costs incurred is not dependent on whether the Government was entitled to recover its costs from the Estonian authorities. Under Article 1.7 of the 1969 Civil Liability Convention, any person carrying out preventive measures is entitled to compensation. In addition, the Estonian authorities would, in the Director's view, have been entitled to present a subrogated claim against the shipowner and the 1971 Fund, if they had reimbursed the Finnish Government for its costs.

**5 Article 4.1(b) of the 1971 Fund Convention**

5.1 Article 4.1(b) of the 1971 Fund Convention reads as follows:

1. For the purpose of fulfilling its function under Article 2, paragraph 1(a), the Fund shall pay compensation to any person suffering pollution damage if such person has been unable to obtain full and adequate compensation for the damage under the terms of the Liability Convention,

(a) -----

(b) because the owner liable for the damage under the Liability Convention is financially incapable of meeting his obligations in full and any financial security that may be provided under Article VII of that Convention does not cover or is insufficient to satisfy the claims for compensation for the damage; an owner being treated as financially incapable of meeting his obligations and a financial security being treated as insufficient if the person suffering the damage has been unable to obtain full satisfaction of the amount of compensation due under the Liability Convention after having taken all reasonable steps to pursue the legal remedies available to him;

(c) -----

5.2 At its 49th session, the Executive Committee instructed the Director to investigate whether and, if so, to what extent the Finnish authorities had taken the necessary steps to recover the costs incurred from the shipowner and his insurer or from the Estonian authorities, and to examine the reasonableness of the amounts claimed (document 71FUND/EXC.49/12, paragraph 3.4.7).

5.3 As for the issue of whether the Finnish Government had taken all reasonable steps to pursue the legal remedies available to it to recover its costs from the shipowner and his insurer, the Government has made the following points:

The owner of the *Kihnu* was at the time of the incident the Tallinn Port Authority. The vessel was under bare-boat charter to an Estonian company, PKL Ltd. The vessel was chartered with all liabilities following from its use, and PKL Ltd had taken out insurance to cover these liabilities.

The Finnish Government has not pursued a claim against the shipowner or the insurer in Estonia, since the Conventions were not in force for Estonia at the time of the incident and there was no Estonian legislation dealing with liability for oil pollution. Neither the shipowner nor the charterer was subject to Finnish law. The Finnish Government's only possibility of recovering its costs was to take action in Finland against the insurer and the 1971 Fund. In these circumstances, the Finnish Government has taken all reasonable steps to recover its costs from the shipowner and his insurer.

5.4 The Director makes the following analysis as to whether the Finnish Government has fulfilled the requirement laid down in Article 4.1(b) of the 1971 Fund Convention to take all reasonable steps to pursue the legal remedies available to it.

Estonia was not Party to the 1969 Civil Liability Convention and the 1971 Fund Convention, nor did it have any domestic law governing liability for oil pollution. It appears very unlikely, therefore, that the Finnish Government would have been able to recover its costs for preventive measures from the shipowner, the bare-boat charterer or the insurer by taking legal action in Estonia. In any event, a judgement rendered by an Estonian court would not have been rendered under the 1969 Civil Liability Convention.

The Finnish Government could have taken action in Finland against the registered owner (Tallinn Port Authority) under the Finnish legislation implementing the 1969 Civil Liability Convention. However, Finland does not have any agreement with Estonia in respect of enforcement of judgements, and Estonia is not Party to any treaty relating to recognition and enforcement of judgements which would be applicable in this case. It is unlikely, therefore, that a judgement rendered by a Finnish Court against the shipowner could have been enforced in Estonia. It would have been theoretically possible to enforce such a judgement against the shipowner's assets in any State Party to the 1969 Civil Liability Convention. However, it is almost certain that the Tallinn Port Authority would not have assets outside Estonia.

The Finnish Act implementing the 1969 Civil Liability Convention provides for a channelling of liability which goes further than the channelling provided in Article III.4 of the Convention. The channelling in this Act is similar to that contained in Article III.4 of the 1992 Civil Liability Convention. Claims for compensation for pollution damage falling within the scope of the Act may not be brought against, *inter alia*, any person who in the place of the registered owner operates the ship. For this reason, it would not have been possible for the Government to bring legal action against the bare-boat charterer under this Act, nor under any other legal provisions.

The insurer has opposed the action against it in Finland on the ground that there was no right of direct action, since the insurance was not issued under Article VII.1 of the 1969 Civil Liability Convention. As mentioned above, the insurance had been taken out by the bare-boat charterer and not by the registered owner. It is unlikely, therefore, that the Finnish Court will accept a direct action against the P & I insurer, since Finnish law does not allow direct action against insurers except in cases specifically provided by statute. It is improbable that a direct action against the insurer in the Turks & Caicos Islands (a United Kingdom dependency), where the insurer has its registered office, would be successful, again because the insurance was not issued under Article VII.1 and United Kingdom law does not allow direct action against an insurer, except in cases specifically provided by statute.

5.5 For the reasons set out above, the Director takes the view that the Finnish Government has taken all reasonable steps to pursue the legal remedies available to it to recover its costs from parties other than the 1971 Fund.

5.6 Should the Executive Committee agree with the Director that the Finnish Government has taken all reasonable steps to recover its costs from the shipowner, the bare-boat charterer and the insurer, the question arises as to whether the 1971 Fund should await the outcome of the legal proceedings in respect of the Finnish Government's action against the insurer before paying compensation, or whether the Fund should immediately compensate the Government for the amount agreed. If the Finnish Government's action against the shipowner were successful for the reduced amount claimed in court (FM 701 676), the compensation would be fully covered by the shipowner's limitation amount (FM 746 800). In that case, the Fund would not be called upon to make any payments. However, for the reasons set out above, the Director believes that it is unlikely that the Finnish Government's direct action against the P & I insurer will succeed. The Director is therefore not in favour of waiting for the outcome of these proceedings. In his view, the 1971 Fund should pay compensation in the amount agreed to the Finnish Government without waiting for the Court's decision in respect of the Government's action against the insurer. It would then have to be decided whether the 1971 Fund should pursue the action against the insurer in order to recover the amount paid to the Finnish Government. Since it is unlikely, in the Director's view, that such an action would succeed, the Director does not favour pursuing such an action.

**6 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 consider whether the Finnish Government's right to compensation from the 1971 Fund depends on whether or not the Government was entitled to compensation from the Estonian authorities;
  - (c) to decide whether the Finnish Government has taken all reasonable measures to pursue the legal remedies available to recover its costs from the shipowner, the bare-boat charterer and the insurer; and
  - (d) if the question raised under (c) above is answered in the affirmative, to decide whether the 1971 Fund should pay compensation to the Finnish Government without waiting for the outcome of the Government's action against the insurer and, if so, whether the Fund should pursue the action against the insurer on the basis of subrogation.
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