INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
54th session
Agenda item 3

71FUND/EXC.54/3
27 May 1997

Original: ENGLISH

INCIDENTS INVOLVING THE 1971 FUND

SEA EMPRESS

Note by the Director

1 Introduction

1.1 This document sets out the situation as regards claims for compensation arising from the *Sea Empress* incident which occurred on 15 February 1996 in the entrance to Milford Haven in South Wales (United Kingdom). With respect to the incident, the impact of the spill, the clean-up operations and the effects on fishery and tourism, reference is made to document 71FUND/EXC.52/7.

1.2 The document also deals with the level of the 1971 Fund's payments and with one claim for compensation which the Director considers should be referred to the Executive Committee for decision.

2 Claims situation

2.1 General situation

2.1.1 As at 23 May 1997, 800 claimants had presented claims for compensation to the Claims Handling Office.

2.1.2 Claims have been approved for a total of £9 289 726. Payments have been made to 485 claimants totalling £6 786 171. Of this amount, £6 712 892 has been paid by the Skuld Club and £73 280 by the 1971 Fund. Cheques for a further £192 423 are awaiting collection by the claimants. Most of the payments correspond to 75% of the amounts approved by the Club and the Fund. However, payments of up to 100% of the approved amounts have been made by the Club in a number of cases where the amount of compensation was small or where the claimant has been able to demonstrate that a payment of more than 75% was necessary to avoid immediate financial hardship.

2.1.3 Final settlements for the periods covered by the respective claims have been concluded with 256 claimants. Some of these claimants have pending claims, however, in respect of later periods.

2.2 Claims for clean-up operations

2.2.1 There have been only limited developments as set out below in respect of claims for clean-up operations since the Executive Committee's 53rd session. For claims in this category reference is made to paragraph 2.2 of document 71FUND/EXC.53/5.

2.2.2 Devon County Council has submitted a claim for £8 979 which was assessed at £4 922. An interim payment of 75% of the assessed amount was made. This claim has been re-examined in the light of further information provided by the claimant, resulting in a revised assessment of £5 823.

2.2.3 Pembrokeshire County Council submitted an interim claim for £1 094 094 in respect of costs incurred by Preseli Pembrokeshire District Council and South Pembrokeshire District Council prior to the local authority re-organisation on 1 April 1996. On the basis of the documentation submitted so far, this claim has been assessed by the experts engaged by the Skuld Club and the 1971 Fund at £918 373 for the substantiated items, of which 75% (£677 188) was paid (document 71FUND/EXC.53/5, paragraph 2.2.2). Responses to some queries are still outstanding, and a further assessment will be made in the light of any additional information provided by the claimant. A further claim has been submitted by Pembrokeshire County Council for the period April-July 1996, amounting to £3 301 972. As regards the April 1996 part of the claim, this has been provisionally assessed at £741 875. A further assessment for April 1996 will be made in the light of any additional information to be provided by the claimant. Documentation presented in support of the claims for the period May-July 1996 is being examined by the experts of the Skuld Club and the 1971 Fund. Further claims from the Council are expected.

2.2.4 The Joint Nature Conservation Committee, a government funded body set up to ensure a co-ordinated approach by the nature conservation bodies in England, Scotland, Wales and Northern Ireland, has submitted a claim for £11 336 for the cost of advisory personnel and for the cost of a diving survey which was undertaken to establish potential damage to marine species in the vicinity of the casualty. An examination of the claim has shown that the major part relates to studies of a general or purely scientific character. According to the criteria for admissibility laid down by the Assembly and the Executive Committee, the cost of such studies are not admissible (cf Report of the 7th Intersessional Working Group, document FUND/A.17/23, paragraph 9). A further assessment of the remaining part of the claim will be made when additional information has been provided by the claimant.

2.3 Property claims

Two hundred and forty-one claims have been submitted in respect of damage to property. Claims have been approved for a total of £271 028, and most of them have been paid in full by the Skuld Club.

2.4 Fishery claims

2.4.1 Claims have been presented by 155 fishermen for loss of income as a result of the fishing bans. Some of these fishermen are involved in catching white fish, but the majority are catching whelks and crustaceans. Some of the claims include damage to nets and the loss of pots. Claims from 125 fishermen have been approved for a total of £5 572 446. Payments totalling £4 031 911 have been made in respect of these claims.

2.4.2 Claims from nine fishermen for lost fishing gear have been approved at £39 050. Payments totalling £27 940 have been made in respect of these claims.

2.4.3 A claim has been presented by one oyster farmer whose stock was contaminated as a result of the spill and who has been prevented from selling oysters due to the fishing ban. Payments totalling £83 869 have been made to this claimant corresponding to 75% of the losses resulting from the destruction of the part of the stock that would normally have been harvested and sold each month since the incident.

2.4.4 Fourteen fish and shellfish processing companies and merchants have claimed compensation for losses suffered as a result of having been deprived of raw material due to the fishing ban. Of these, two companies trade in white fish, three in whelks and five in crustaceans, whereas two trade in cockles, and two in cockles and mussels from the Burry Inlet area. So far interim payments totalling £1 064 561 have been made to ten of these companies.

2.5 Claims from the tourism industry

Claims have been received from 337 operators in the tourism industry, such as hotels, bed and breakfast businesses, caravan parks, shops and restaurants, as well as from a sailing school, a water sports centre, a diving school and angling shops. Claims in this category have been approved for a total of £938 223, and payments for a total of £647 809 have been made. The remaining claims are being examined. The majority of claims have come from small businesses providing bed and breakfast or self-catering accommodation.

3 Level of payment of claims

3.1 Decision by the Executive Committee at its 48th - 50th sessions

The Executive Committee decided at its 48th session to limit the Director's authority to make payments to 75% of the damage actually suffered by the respective claimant, since the total amount of the claims arising out of the *Sea Empress* incident might exceed the total amount of compensation available under the 1969 Civil Liability Convention and the 1971 Fund Convention. At its 49th and 50th sessions the Executive Committee decided that the 1971 Fund's payments should, for the time being, remain limited to 75% of the damage actually suffered by the claimant.

3.2 Consideration at the Executive Committee's 52nd session

3.2.1 At the Executive Committee's 52nd session, the United Kingdom delegation introduced document 71FUND/EXC.52/7/1 which contained two estimates of the total amount of the claims, a low estimate of £34 million and a high estimate of £49 million. The delegation noted that, as virtually all fishing bans had been lifted and the clean-up operations were nearly completed, there was little uncertainty as to the amount of the claims in these two sectors. With regard to tourism claims, the delegation had been advised by the Wales Tourist Board and by the claimants' advisers that the total amount of those claims was likely to be well below £9 million. The delegation noted that many claimants were concerned at the lack of progress towards payments at 100% of approved losses, especially as claims had been approved for a total of only £8.5 million. It was stated that while little use had yet been made of the special arrangement for payments at 100% of the approved claims in cases of financial hardship, it did not follow that individuals and small businesses were not suffering financial difficulties due to the reduced level of payments. It was further stated that few small businesses could afford to lose 25% of their income. The United Kingdom delegation urged the Executive Committee to increase the payment of approved claims to 100%.

3.2.2 A number of delegations considered, in view of the uncertainty as to the total amount of the claims, that an increase of the percentage payable was inappropriate at that stage.

3.2.3 The Executive Committee decided at its 52nd session that the 1971 Fund's payments should for the time being remain limited to 75% of the damage actually suffered by the respective claimants as assessed by the experts engaged by the 1971 Fund and the Skuld Club. It was further decided that this matter should be reviewed at the Committee's 53rd session. The Committee instructed the Director to obtain as much information as possible about the total amount of the claims and in particular the amount of the salvage claim (document 71FUND/EXC.52/11, paragraph 3.6.22).

3.2.4 In response to this decision the United Kingdom delegation stated that it understood the concern regarding the salvage claim and supported the view that the Director should endeavour to obtain more information on this potential claim. The delegation also urged the Director to try to quantify the total amount of the claims for the Committee's next session. It was stated that if, after such a quantification,

it appeared that there was still an apparent risk of the 1971 Fund's limit being exceeded, CRISTAL should be notified of the possible need for additional funding. The United Kingdom delegation also invited delegations to consider the consequences for claimants of fluctuations in the value of the Special Drawing Right (SDR).

3.3 Consideration at the Executive Committee's 53rd session

3.3.1 At the Executive Committee's 53rd session, the Director presented the following estimate of the total amount of the claims arising from this incident:

> The cost of the clean-up operations was estimated at £23 million. Fishery claims had been approved for £5.2 million and pending and rejected fishery claims amounted to £7 million. It had been suggested that some fishermen might submit claims for damage to fish stocks, that four claims totalling £53 974 had been presented for the alleged reduction in catches of squid and whitefish in the Bristol Channel and that a few further claims in the latter category were expected for relatively small amounts. The fishery claims might total £15 million. With regard to the tourism sector, claims had been approved for £750 000 and claims for £627 000 were being examined. The Claims Handling Office had sent letters to 580 potential claimants in the tourism sector who had requested claims forms but had not yet submitted claims, 244 of the potential claimants had replied, out of whom 130 had stated that they intended to present a claim and 114 had stated that they did not[1]. It was not known whether a claim for costs relating to the salvage of the *Sea Empress* and her cargo would be presented, and if so, in what amount. In a document presented by the United Kingdom delegation to the Executive Committee's 52nd session an amount of £7 million had been included for such a claim. There might be certain payments in respect of interest and in respect of fees of advisers and experts engaged by the claimants, but it was not possible to give an estimate of the total amounts of such payments.

3.3.2 Maintaining its view that the 1971 Fund's 60 million SDR limit would not be breached, the United Kingdom delegation stated that it had no grounds for believing that the admissible fishery claims would reach the Director's estimate of up to £15 million. The delegation restated its view from the previous Executive Committee's session that its estimate of the total amount of all fishery claims was between £8 million and £10 million, and indicated that the total value of annual landings in the squid fishery in the Bristol Channel was approximately £110 000 per year. This delegation referred to the fact that the United Kingdom Ministry of Agriculture, Fisheries and Food was not undertaking any special monitoring of the fish stocks and did not expect any long term damage to these stocks as a result of this incident. The United Kingdom delegation stressed the importance, as in previous incidents, of seeking advice via specialised agencies or experts. The United Kingdom delegation indicated that it had previously estimated the claims in the tourism sector to be between £3 million and £9 million, but expressed satisfaction that the Director now estimated that claims in this sector were unlikely to be more than £4 million. The delegation mentioned that it had been informed by one firm of solicitors which represented 24 claimants in the tourism sector that their clients' claims amounted to approximately £250 000 and by another firm of solicitors representing six claimants that details of their clients' claims were already known to the 1971 Fund. The United Kingdom delegation also stated that £7 million was the highest possible estimate for the salvage claim, as included in its submission to the Executive Committee's 52nd session, but now believed that this was unrealistically high, since the value of ship and cargo salved was substantial.

3.3.3 Although more information was available than at the time of the Executive Committee's 52nd session, the Committee considered that there was still a degree of uncertainty as to the total amount of the claims. The Committee therefore decided that the 1971 Fund's payments should for the time being remain limited to 75% of the damage actually suffered by the respective claimants as assessed by the experts engaged by the 1971 Fund and the Skuld Club. It was further decided that this matter should be reviewed at the Committee's 54th session.

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[1] As at 23 May 1997, 288 potential claimants had replied, out of whom 155 had stated that they intended to present a claim and 133 had stated that they did not.

3.3.4 The United Kingdom delegation stated that, since the cargo carried by the *Sea Empress* was owned by a party to CRISTAL (Contract Regarding a Supplement to Tanker Liability for Oil Pollution), there was approximately £20 million available from Cristal Ltd to provide compensation to claimants who had not received full compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention. This delegation took the view that the 1971 Fund should formally notify Cristal Ltd that the amounts available for compensation under the 1969 Civil Liability Convention and 1971 Fund Convention might not be sufficient to compensate all claimants in full.

3.3.5 The Executive Committee decided that the 1971 Fund, after consultation with the Skuld Club, should notify Cristal Ltd that the amounts available for compensation under the 1969 Civil Liability Convention and 1971 Fund Convention might not be sufficient to meet in full the claims arising from the *Sea Empress* incident.

3.4 Information provided by Cristal Ltd

Cristal Ltd has provided the following information as to the possibilities for victims of the *Sea Empress* incident to obtain compensation under the Contract Regarding a Supplement to Tanker Liability for Oil Pollution (CRISTAL Contract).

Parties to the CRISTAL Contract are mainly various oil companies. The compensation system under the Contract is administered by Cristal Ltd.

The cargo on board the *Sea Empress* was owned by a party to the CRISTAL Contract. As a result, Cristal could be called upon to pay compensation to victims of oil pollution damage resulting from the incident who have not been fully compensated from other sources.

The total amount available under the CRISTAL Contract in respect of the *Sea Empress* incident is 79 176 122 SDR (£67 million). From this amount is deducted the amount due under the Supplement to the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution (TOVALOP Supplement), in the *Sea Empress* case 33 389 520 SDR (£28 million), which includes the amount payable by the shipowner under the 1969 Civil Liability Convention. The limitation amount applicable to the ship under the 1969 Civil Liability Convention, 8 825 686 SDR (£7.5 million), is paid by the shipowner to the claimants. The balance between that amount and the amount due under the TOVALOP Supplement, 33 389 420 SDR (£28 million), is paid by the shipowner to Cristal Ltd to repay (in part) the contributions which parties to the CRISTAL Contract have paid to the 1971 Fund.

After deduction of the amount payable by the shipowner under the TOVALOP Supplement (33 389 420 SDR or £28 million), there remains an amount of 45 786 592 SDR (£39 million). This amount is available for distribution on an equal basis to those claimants who have not been fully compensated under the 1969 Civil Liability Convention and the 1971 Fund Convention and to the parties to the CRISTAL Contract as a reimbursement of their contributions to the 1971 Fund. If the amount available is insufficient to meet the claims of these two groups in full, the claims in both groups are reduced pro rata.

Cristal Ltd is a payer of last resort. All claimants must therefore pursue their claims against other persons who are under an obligation to pay compensation, ie against the shipowner/Skuld Club and the 1971 Fund. Cristal Ltd will make payments only after the 1971 Fund has informed Cristal Ltd that final settlements have been concluded in respect of all claims arising out of the *Sea Empress* incident or after final judgements have been rendered by the competent courts. The reason for this requirement is that Cristal Ltd must know firstly how much has been paid by the parties to the CRISTAL Contract as contributions to the 1971 Fund, and secondly the total amount of the unpaid claims.

Under the CRISTAL Contract, Cristal Ltd is the sole judge of the validity of any claim for compensation, on the basis of the terms and conditions of the Contract.

The 1971 Fund would be entitled to present subrogated claims to Cristal Ltd in respect of claims which it had paid, provided that notification was made within two years of the incident (see para 3.5 below).

3.5 Procedures for notification of claims to Cristal Ltd

The Director is discussing with Cristal Ltd the appropriate procedures for notification of claims.

3.6 Director's considerations

3.6.1 The Director has not been able to obtain any more accurate figures as to the total amount of the claims than those set out in paragraph 3.3.1 above.

3.6.2 The Director takes the view that there is still a degree of uncertainty as to the total amount of the claims. This uncertainty relates, in the Director's view, to potential claims from the fisheries and tourism sectors, and in respect of the potential salvage claim. Subject to the observations made in paragraphs 3.6.3–3.6.6 below, the Director considers, therefore, in view of the Committee's position at previous sessions as to the need to exercise caution, that the 1971 Fund's payments should for the time being remain limited to 75% of the damage actually suffered by the respective claimant as assessed by the experts engaged by the 1971 Fund and the Skuld Club.

3.6.3 As set out in the information provided by Cristal Ltd, there would be available an amount of 45 786 592 SDR (£39 million) for distribution to those claimants who might not be fully compensated under the 1969 Civil Liability Convention and the 1971 Fund Convention, and to the parties to the CRISTAL Contract as a reimbursement of their contributions to the 1971 Fund. After discussion with Cristal Ltd, and assuming that all contributors to CRISTAL were also paying contributions to the 1971 Fund in respect of the *Sea Empress* Major Claims Fund, the Director estimates that the maximum amount to be received by those parties would be £20 million. On this assumption, if the amounts available under the 1969 Civil Liability Convention and the 1971 Fund Convention were insufficient, there would therefore be available approximately £19 million for distribution amongst claimants whose admissible claims might not be paid in full under the Conventions.

3.6.4 As set out above, the 1971 Fund would be entitled to make subrogated claims against Cristal Ltd for reimbursement in respect of payments made by the Fund in excess of the total amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention (60 million SDR), provided that proper notification was made by the Fund to Cristal Ltd within two years of the date of the incident. Although it appears that Cristal Ltd is prepared to accept a generally worded notification, it cannot be ruled out that new claims might be submitted after the expiry of the two year period which in Cristal Ltd's view would not be covered by such a notification. It should also be noted that Cristal Ltd could reject a subrogated claim on the ground that it is not admissible under the CRISTAL Contract.

3.6.5 It should be noted, however, that no payments will be made by Cristal Ltd until final settlements have been reached or final judgements have been rendered in respect of all claims. This means that, should some claims be subject to court proceedings, it could take many years before Cristal Ltd would make any payments. It should be noted that under the Rules of the CRISTAL Contract, the payment of interest is at the discretion of CRISTAL.

3.6.6 The 1971 Fund would be entitled to obtain reimbursement from Cristal Ltd at some future date of payments made in excess of 60 million SDR in respect of claims covered by a notification to Cristal Ltd within two years of the incident and which are accepted as admissible by CRISTAL. The question is whether the Executive Committee considers that this would constitute a sufficient security against overpayment by the Fund. If this question were answered in the affirmative, the Committee might wish to authorise the Director to pay claims in full for the approved amounts.

4 Claim submitted to the Executive Committee for consideration

4.1 1971 Fund policy in respect of claims for pure economic loss

By endorsing the Report of the 7th Intersessional Working Group, the Assembly laid down certain criteria for the admissibility of claims for pure economic loss (document FUND/A.17/35, paragraph 26.8). These criteria 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.

4.2 Claim by a civil engineering contractor

4.2.1 A claim for £64 527 has been presented by a civil engineering contractor, Salvex Ltd, relating to losses resulting from contracts allegedly lost due to the *Sea Empress* incident. The claimant has provided the following information:

Salvex Ltd is a civil engineering contractor based in Pembrokeshire, approved by the Welsh Office to undertake works valued up to £1 million. The company's land civil engineering division concentrates on new works and repairs to structures above or below ground, and the diving and marine civil engineering division supports the company's main operations to provide a complete package for the construction industry.

The company started trading in 1994. Prior to the *Sea Empress* incident, there was a rapid growth in sales. The turnover for the twelve month period ending 31 May 1996 was £183 448, compared to £56 803 for the previous twelve month period. The profit before tax for these two periods was £13 843 and £4 656, respectively.

During the first year of operation, Salvex Ltd did not undertake much local authority work but concentrated on establishing the company's credentials. The work for the local authority increased significantly in August 1995. The average monthly income for the period August 1995 - January 1996 was £24 971. This would correspond to an annual turnover of £225 024 and a loss of turnover for the period affected by the oil spill of £138 138.

4.2.2 The claimant has made the following points in support of the claim:

(a) Degree of proximity: Salvex Ltd's losses were caused indirectly by the contamination but were, nevertheless, a foreseeable consequence of a major oil spill in the area.

(b) Degree of economic dependency: Salvex Ltd is highly dependent on local authority work. Without such work Salvex Ltd would not have a viable operation.

(c) Integral part of the area's economic activity: The company is based in and carries out its operations in Pembrokeshire. It has contracts with Pembrokeshire-based suppliers and employs local labour. The local economy has suffered as a direct result of the company's loss of local authority work. Salvex Ltd has therefore not been able to inject money into the local economy.

(d) Alternative sources of supply or business opportunities: The company has undertaken a costly re-marketing strategy to try to obtain other work. The campaign has not been successful so far. It takes time to establish new clients and demonstrate Salvex Ltd's capabilities. This leads to the problem that, if potential new clients examine Salvex Ltd's performance next year, the company's trading will show poor results as a result of the pollution. This will have a very damaging effect on new client confidence, as the financial stability of Salvex Ltd will look bad. The company has explored all possible avenues to mitigate losses.

(e) Cancellation of contracts: There were no contracts awarded that were postponed or cancelled. Invitations to tender are usually 1-2 weeks prior to the tender period.

When the incident occurred, the local authority concentrated its efforts on the clean-up, which took a number of months. During the clean-up campaign and afterwards, no enquiries had been sent out by the local authority.

Salvex Ltd approached the local authority on the matter and was verbally informed that there would be no orders placed with any contractor due to lack of funds.

(f) Tender success rate: Salvex Ltd's success rate in tendering for work is 79%. In the past the company has tendered for 19 contracts in Pembrokeshire, of which 15 have been awarded. Where Salvex Ltd has not won contracts, it has been second or third in each case.

4.2.3 The Director makes the following assessment of the admissibility of this claim. The claimant's loss was only indirectly caused by contamination. The alleged loss was suffered as a result of the local authority's decision based on its financial constraints and not as a result of the contamination itself. The loss was therefore allegedly caused by lack of funds on the part of the claimant's main source of work. In the light of these circumstances, the Director takes the view that there is not a sufficient degree of proximity between the claimant's loss and the contamination resulting from the *Sea Empress* incident. The Director proposes, therefore, that the claim should be rejected.

5 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 give the Director such instructions as it may deem appropriate in respect of the handling of the claims arising out of this incident;

(c) to take a decision on the level of the 1971 Fund's payment (paragraph 3 above);

(d) to give the Director such instructions as it may deem appropriate in respect of the admissibility of the claim by the civil engineering contractor referred to in paragraph 4.2 above; and

(e) to give the Director such instructions in relation to other aspects of this incident as it may deem appropriate.