



INCIDENTS INVOLVING THE 1992 FUND

INCIDENT IN GERMANY

Note by the Director

Summary:

The owner of the *Kuzbass* and his insurer have appealed against the Court of first instance judgement which 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 has subsequently offered to increase their contribution to 20%. A preliminary assessment has been made of the claim by the German authorities.

Action to be taken:

Take note of the information contained in the document.

1 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.

2 The 1992 Fund's involvement

- 2.1 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.
- 2.2 The limitation amount applicable to the *Kuzbass* under the 1992 Civil Liability Convention is estimated at approximately 38 million SDR (£30.7 million).

3 Legal actions

- 3.1 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 (£890 000).
- 3.2 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.
- 3.3 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.
- 3.4 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.
- 3.5 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.
- 3.6 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.
- 3.7 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.
- 3.8 In January 2004 the Fund also submitted a statement of response, which was largely along the same lines as that of the German authorities.
- 3.9 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 (£85 000) 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.

- 3.10 The Appeal Court ordered the continuation of the case and fixed the date of the next hearing for 6 April 2005.
- 3.11 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.
- 3.12 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.

4 Consideration by the Executive Committee in March 2005

- 4.1 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.
- 4.2 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.
- 4.3 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.
- 4.4 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.
- 4.5 The Committee noted that the 1992 Fund had recently received documentation in support of the claim by the German Government and that the Fund's experts were currently 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.
- 4.6 A number of delegations expressed their disappointment in respect of recent 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.
- 4.7 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.

- 4.8 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.

5 Developments subsequent to the March 2005 session

- 5.1 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.

- 5.1 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 €32 000 (£637 000) pending receipt of further information in respect of some claim items. It is expected that once further details are provided the assessed amount will increase considerably.

6 Action to be taken by the Executive Committee

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