



INCIDENTS INVOLVING THE 1992 FUND

INCIDENT IN GERMANY

Note by the Director

Objective of document:

To inform the Committee of the latest developments regarding this incident (set out in section 5).

Summary of the incident so far:

In December 2002 the Court of first instance issued a judgement that found that the *Kuzbass* was the source of the pollution that affected the coast of Germany in 1996. The owner of the *Kuzbass* and his insurer appealed against the judgement. At a hearing in December 2004 the Appeal Court stated that on the basis of the evidence submitted, 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%. After the meeting, the shipowner/insurer offered to increase their contribution to 20%, following which the Director decided to accept this offer.

A preliminary assessment was made of the claim by the German authorities in July 2005, following which the German authorities provided additional information in February 2006 and January 2007. In June 2007 the claim was finally settled for DM2 513 055 or €1 284 905 (£954 000)^{<1>}.

At a court hearing in November 2007 a settlement agreement was concluded between the Federal Republic of Germany, the shipowner, the West of England Club and the 1992 Fund, which included interest. As a result of the settlement, in December 2007 the 1992 Fund paid a total of €1 766 903 (£1 214 151) as well as €45 293 (£32 818) in court costs incurred by the German Government.

<1>

In this document conversion of currencies has been made on the basis of the exchange rate as at 14 February 2008 (£1 = €1.34655) except in respect of payments made by the 1992 Fund where the conversion has been made at the rate on the date of payment.

Recent developments:	<ol style="list-style-type: none"> 1. In June 2007 a settlement was concluded regarding principle, interest and costs of court proceedings (paragraph 5.3). 2. In December 2007, as a result of the settlement, payments were made by the 1992 Fund and the legal actions by the Federal Republic of Germany were withdrawn (paragraphs 5.4 and 5.5). 3. This case has now been finalised.
Action to be taken:	Information to be noted.

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 oil was Libyan crude and 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 (£30.5 million)^{<2>}.

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 (£965 000).
- 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.

^{<2>} The conversion of the SDR has been made on the basis of the exchange rate as at 14 February 2008 (£1= SDR 1.24702).

- 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, after which statements of response were submitted by the German authorities and later on also by the 1992 Fund.
- 3.6 Detailed information on the considerations of the Appeal Court and the parties involved in the proceedings can be found in document 92FUND/EXC.38/4, paragraphs 3.5-3.8.
- 3.7 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 (£89 000) 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.
- 3.8 The Appeal Court ordered the continuation of the case and fixed the date of the next hearing for 6 April 2005.
- 3.9 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.
- 3.10 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 decided that a new hearing would only be held 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 Detailed information on the considerations by the Executive Committee in March 2005 can be found in document 92FUND/EXC.38/4, paragraphs 4.1-4.8.
- 4.3 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% on offer at the time.

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.
- 5.2 In July 2005 the 1992 Fund and the West of England Club, with the assistance of the International Tanker Owners Pollution Federation Limited (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 (£692 000) pending receipt of further information in respect of some claim items.
- 5.3 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 (£817 000). In January 2007 the German authorities provided further documentation and following a meeting between the authorities and the 1992 Fund in Hamburg, Germany in June 2007 the claim was settled for DM2 513 055 or €1 284 905 (£954 000).
- 5.4 During 2007 negotiations were held with the German Government in respect of the interest to be paid by the 1992 Fund and of the costs incurred by the German Government in respect of the proceedings before the District Court in Flensburg and the Schleswig-Holstein Court of Appeal. At a court hearing in November 2007 a settlement agreement was concluded between the Federal Republic of Germany, the shipowner, the West of England Club and the 1992 Fund. In compliance with this agreement, in December 2007 the 1992 Fund paid €1 766 903 (£1 214 151) in respect of the principal settlement amount plus interest, followed by a further payment of €45 293 (£32 818) in respect of the court costs incurred by the German Government. In accordance with the agreement, the West of England Club has reimbursed the Fund 20% of the amounts paid by it in respect of the payment of the principal plus interest and will reimburse shortly also 20% of the payment in respect of court costs.
- 5.5 As a result of the agreement all legal actions by the German government against the shipowner, the West of England Club and the 1992 Fund have been withdrawn.
- 5.6 The Director is pleased to report that this case has now been finalised.

6 Action to be taken by the Executive Committee

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