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ANY OTHER BUSINESS

EMERGENCY PAYMENTS IN CASES OF FINANCIAL HARDSHIP

Note by the United Kingdom delegation

Introduction

1 The United Kingdom has become increasingly concerned about the lack of emergency payments to those suffering immediate financial hardship following an oil pollution incident. This paper discusses this problem and proposes a solution.

The problem

2 Large businesses can often survive a period of reduced or zero income, either through their existing funds or through insurance for disruption of business. However, the United Kingdom's experience in both the *Braer* and the *Sea Empress* has shown that these options may not be open to small businesses, who can suffer genuine and acute financial hardship if their income is curtailed for a short period of time. In addition to the suffering caused, in extreme cases this could lead to foreclosure of loans and bankruptcy. This could in turn give rise to greater costs to the IOPC Fund, or to additional costs for the social services of the coastal state.

3 The problem for the shipowner and the IOPC Fund is that the Civil Liability and Fund Conventions require payments to be pro-rated if there is a possibility that the financial limit per incident may be exceeded. There may be insufficient information immediately following an incident for a decision to be taken on the appropriate level of the pro-rata.

Proposal

4 The United Kingdom cannot support any proposal which would be contrary to the Civil Liability or Fund Conventions. Equally, it is unacceptable that the Member States are forced to take action to remedy deficiencies in the current compensation regime, such as the United Kingdom has done in respect of *Sea Empress* claims, and France has done for claims arising out of the *Haven* incident.

5 The United Kingdom proposes that the IOPC Fund and the International Group of P & I Clubs should explore the possibility of making provisional payments in certain circumstances, to alleviate genuine financial hardship.

6 Such provisional payments were clearly anticipated by the authors of the 1971 Fund Convention. Article 18.7 provides that one of the functions of the Assembly shall be:

"(7) to approve settlements of claims against the Fund, to take decisions in respect of distribution among claimants of the available amount of compensation in accordance with Article 4, paragraph 5, and to determine the terms and conditions according to which provisional payments in respect of claims shall be made with a view to ensuring that victims of pollution damage are compensated as promptly as possible."

7 This Article specifies that one duty of the Assembly is to compensate victims as promptly as possible. It also makes clear that provisional payments are separate from pro-rated payments made under Article 4, paragraph 5. It should be noted that the Article does not say that provisional payments may be made; it says that they shall be made.

Provisional payments

8 It is anticipated that following features would be desirable for a system of provisional payments:

- (a) the claimant must have a claim for compensation which is eligible in principle for damage which has already occurred;
- (b) the claimant must demonstrate that he or she is suffering actual financial hardship. Hardship could be defined as an inability to meet normal outgoings;
- (c) there is a reasonable expectation that the IOPC Fund will be able to recover some or all of the provisional payments if a pro-rata is decided at a lower level;
- (d) the claimant signs a declaration that he or she accepts the terms of the provisional payment and undertakes to repay some or all of the payment if later required. Such a declaration would also include acceptance that future payments may be reduced if necessary.

9 Provisional payments might be made in two circumstances:

- (a) in the immediate aftermath of an incident, when it is too soon for the IOPC to determine the correct pro-rata to be applied to claims;

- (b) when a pro-rata has been determined, but payment at this level is insufficient in a particular case.

Recovery of provisional payments

10 If a successful regime for provisional payments is to be developed, it will be important to reduce the risk that any overpayments may not be recoverable.

11 The United Kingdom therefore believes that the granting of provisional payments should be at the discretion of the Director, who will be able to decline to make a payment if he considers that there is a significant risk that overpayments could not be recovered. It seems likely that the majority of cases of financial hardship will be from claimants suffering ongoing losses, such as fishermen who are prevented from fishing by fishing bans. In such cases, any overpayments could be recovered by reducing subsequent compensation payments. Organisations representing claimants, such as trade organisations or professional agents, may also be prepared to underwrite the repayment of provisional payments.

Conclusions

12 The United Kingdom considers that the IOPC Assembly will have failed in its remit if it does not develop a regime to make provisional payments, as envisaged by the authors of the 1971 Fund Convention and repeated in the 1992 Fund Convention.

13 A regime of provisional payments would enable the IOPC Fund to meet its obligations for prompt compensation payments, whilst being consistent with the Fund Convention's requirement for pro-rata payments. It would be targeted at the most vulnerable claimants and would take effect in the period when media interest in the incident was most intense. The United Kingdom does not anticipate that provisional payments would be needed often.

14 The United Kingdom recommends that the Assembly should ask the Director to develop proposals to implement a provisional payment regime, as described in this paper and consistent with Article 18.7 of the 1971 and 1992 Fund Conventions, and for the Director to report his findings to the 20th session of the Assembly in October 1997.
