



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

ADMINISTRATIVE COUNCIL
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Agenda item 2

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INCIDENTS INVOLVING THE 1971 FUND

ALAMBRA

Note by the Director

Summary:

The Maltese tanker *Alambra* spilled oil in the Port of Muuga, Tallinn (Estonia) in September 2000. Claims totalling £2.1 million in respect of the costs of clean-up operations and economic losses have been presented to the shipowner as well as a claim by the Estonian State for £1.8 million, which has the character of a fine or charge. A number of claimants have commenced legal actions against the shipowner and his insurer, two of whom have notified the 1971 Fund of the proceedings in accordance with Article 7.6 of the 1971 Fund Convention. The question has arisen as to whether the 1969 Civil Liability Convention and the 1971 Fund Convention have been correctly implemented into Estonian law.

In the proceedings, the shipowner's insurer has alleged that the shipowner had deliberately failed to maintain the *Alambra* properly and that, therefore, the insurer is not liable for the pollution damage resulting from the incident.

Action to be taken:

To give the Director such instructions in respect of the court actions as it may deem appropriate.

1 The incident

- 1.1 The tanker *Alambra* (75 366 GRT), registered in Malta, was loading a cargo of heavy fuel oil in the port of Muuga, Tallinn (Estonia), when an alleged 300 tonnes of cargo escaped from one of the vessel's cargo tanks as a result of corrosion of the bottom plating.
- 1.2 The *Alambra* was detained by the Estonian authorities pending a decision by the Tallinn Port Authority to allow the remaining 80 000 tonnes of cargo on board to be removed. The cargo transfer was eventually undertaken in February 2001, and in May 2001 the vessel finally left Estonia for scrapping.

- 1.3 The *Alambra* was entered in the London Steam-Ship Owners' Mutual Insurance Association Ltd (London Club).

2 Limitation of liability

- 2.1 Estonia is Party to the 1969 Civil Liability Convention and the 1971 Fund Convention.
- 2.2 The limitation amount applicable to the *Alambra* under the 1969 Civil Liability Convention is estimated at 7.6 million SDR (£6.4 million).

3 Claims for compensation

- 3.1 Claims for clean-up costs were submitted to the shipowner and the London Club by the Tallinn Port Authority for EEK 6.5 million (£270 800) and by the Estonian State (Ministry of Environment) for EEK 4 million (£166 700).
- 3.2 A claim for EEK 45.1 million (£1.9 million) is being pursued against the shipowner by the Estonian State (Environment Inspectorate). This claim, which appears to have the character of a fine or charge, appears to have been calculated on the basis of the estimated quantity of oil spilled and cannot therefore be considered a claim for compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention.
- 3.3 A claim for US\$100 000 (£63 000) is being pursued against the shipowner and the London Club by a charterer of a vessel said to have been delayed whilst clean-up operations were being undertaken.
- 3.4 The owner of the berth in the Port of Muuga from which the *Alambra* was loading cargo at the time of the incident, and a company contracted by the owner of the berth to carry out oil loading activities on its behalf, have submitted claims to the shipowner and the London Club for EEK 29.1 million (£1.2 million) and EEK 9.7 million (£404 000) respectively for loss of income due to the unavailability of the berth whilst clean-up operations were undertaken.

4 Legal actions

- 4.1 In November 2000 the owner of the berth in the Port of Muuga and the company it had contracted to carry out oil loading operations took legal actions against the shipowner and the London Club and requested the Court to notify the 1971 Fund of the proceedings in accordance with Article 7.6 of the 1971 Fund Convention. Having been notified of the actions in February 2002, the 1971 Fund intervened in the proceedings. In the context of these legal actions, the question has arisen as to whether the 1969 Civil Liability Convention and the 1971 Fund Convention have been correctly implemented into Estonian national law.
- 4.2 On 1 December 1992 Estonia deposited its instruments of ratification of the 1969 Civil Liability Convention and the 1971 Fund Convention with the Secretary-General of the International Maritime Organization (IMO). As a result, the Conventions entered into force for Estonia on 1 March 1993. The lawyers acting for the shipowner and the London Club, as well as the Estonian lawyers acting for the 1971 Fund have, however, drawn their clients' attention to the fact that, in their view, under the Estonian Constitution, ratification of the Conventions should not have taken place before the Estonian Parliament had given its approval and adopted the necessary amendments to the national legislation. The Conventions were not submitted to Parliament and the necessary amendments to national law were not made. The Conventions have not been published in the Official Gazette. For these reasons the 1969 Civil Liability Convention did not, in the view of these lawyers, form part of national law and could not be applied by the Estonian courts.
- 4.3 In a Bill submitted to the Estonian Parliament in 2002, containing a proposal for a new Maritime Act, the Government deals with the constitutional issue referred to above. It is stated in the Bill that the 1969 Civil Liability Convention is a treaty which needs parliamentary approval, since it

requires amendments to Estonian national law. The point is made that accession to the Convention was made in contradiction with the Constitution. It is mentioned, however, that on the international level, Estonia is deemed to be a party to the 1969 Civil Liability Convention. It is stated in the Bill that the same problem arises in respect of the 1971 Fund Convention which requires ratification by Parliament although it does not require amendments to national law.

- 4.4 The shipowner and the London Club have raised this issue in their pleadings in the court, as did the 1971 Fund in its submission to the court in order to protect its position, pending the Administrative Council's consideration of this matter. The Director discussed the situation with the Estonian Ministries concerned on the occasion of a visit to Estonia in April 2002.
- 4.5 At the July 2002 session of the Administrative Council the Director expressed the view that it appeared that the procedure for ratification of international treaties laid down in the Estonian Constitution, which entered into force on 3 July 1992, had not been observed. He stated that it was possible, therefore, that the 1969 and 1971 Conventions would be considered by the Estonian courts as not forming part of Estonian law. He mentioned that it could not be ruled out, however, that the courts might find that the Conventions were nevertheless applicable. The Director also expressed the view that, since the purpose of the 1971 Fund was to compensate victims of oil pollution damage, the Fund should normally not take a formalistic approach in dealing with claims for compensation. For this reason he considered that, if the claims in the *Alambra* case were settled out of court, the issue of the non-applicability of the Conventions should not be raised by the Fund. However, in this case this issue had been raised by the shipowner and the London Club and by the 1971 Fund in the legal proceedings. If the courts were to hold that the claims against the shipowner and the Club could not be pursued under the Conventions but only under other provisions in Estonian national law, the question would arise as to the basis of the 1971 Fund's obligation to pay compensation. The Director mentioned that he was pursuing discussions with the London Club for the purpose of reaching out-of-court settlements in respect of those claims that fell within the scope of application of the Conventions.
- 4.6 In his pleadings to the Court, the shipowner has maintained, *inter alia*, that although the Estonian Merchant Shipping Act provides that the shipowner is liable for pollution damage, the Act's definition of pollution damage does not provide for civil liability for further loss or damage caused by preventive measures. The shipowner has also argued that the Estonian Constitution requires that in order for international agreements to be applicable under national law, such agreements must be passed by parliament. The shipowner has further maintained that the relevant provisions in the Act are in conflict with the provisions of the 1969 Civil Liability Convention.
- 4.7 The claimants have, in their pleadings, argued that a provision in the Merchant Shipping Act stipulates that if both an international agreement to which Estonia is a party and the Act apply different legal standards, the standard of the international agreement should be applied. In the claimants' view, the Estonian courts would therefore apply the Convention rather than the Act and the courts should not take into account the restrictions placed by the Constitution as regards the ratification of treaties.
- 4.8 The claims for compensation filed in court fall well below the limitation amount applicable to the *Alambra* under the 1969 Civil Liability Convention and also below the amount at which the 1971 Fund may be called upon to pay indemnification to the shipowner. For this reason, the Director took the view that it was very unlikely that the 1971 Fund would be called upon to pay compensation or indemnification, that the constitutional issue referred to above was mainly of academic interest and that the Fund did not need to take an active part in the ongoing proceedings.
- 4.9 However, in September 2002 the London Club filed pleadings in court maintaining that the shipowner had deliberately failed to make the necessary repairs to the *Alambra* resulting in the ship becoming unseaworthy and that therefore under the insurance contract as well as under the Merchant Shipping Act, the Club was not liable to pay compensation for the damage resulting from the incident.

- 4.10 At a court hearing held on 17 September 2002, the 1971 Fund and the claimants requested the postponement of the proceedings to enable them to consider the position taken by the London Club as regards the alleged unseaworthiness of the *Alambra* and the legal consequences thereof.
- 4.11 The Director has examined the pleadings submitted by the London Club. The Club has stated that the *Alambra* had a history of corrosion problems both prior and subsequent to its purchase by its owner at the time of the incident in Estonia. It is further stated that in June 2000 the master of the *Alambra* reported a corrosion hole in the bottom plating of a cargo tank, in spite of which, and in contravention of the classification society's rules, the shipowner allowed the vessel to load a full cargo. It is also stated that during the laden voyage the vessel made a deviation to Kalamata (Greece) for repairs by divers, although this was not recorded in the vessel's engine or deck log books. It is mentioned that when the vessel arrived at Mohammedia (Morocco), its discharge port, there was a leakage of cargo from one of the cargo tanks, and that the vessel sailed to Algeciras (Spain) for further underwater repairs (which was not reported in the deck log book) before returning to Mohammedia to continue its cargo discharge. The London Club has maintained that the shipowner must have been aware of the condition of the vessel, and that in failing to report the holes in the cargo tanks to the classification society and allowing the vessel to continue trading in such a condition, the pollution in Estonia was a result of the shipowner's intentional wrongful act and that the Club therefore had no liability for the pollution damage.
- 4.12 The case was considered by the Administrative Council at its 9th session in October 2002. The Council recalled that the lawyers acting for the shipowner and the London Club, as well as the lawyers acting for the 1971 Fund, had drawn attention to the fact that, under the Estonian Constitution, ratification of the Conventions should not have taken place before the Estonian Parliament had given its approval and adopted the necessary amendments to the national legislation, that the Conventions had not been submitted to Parliament and that the necessary amendments to national law had not been made. The Council further recalled that for these reasons the 1969 Civil Liability Convention and the 1971 Fund Convention did not, in the view of these lawyers, form part of national law and could not be applied by the Estonian courts and that the shipowner and the London Club had raised this issue in their pleadings in the court. It was also recalled that the 1971 Fund had also raised this issue in its submission to the court in order to protect its position, pending the Council's consideration of this matter.
- 4.13 During the Council's consideration one delegation stated that it was premature to make any decision on the legal issues until the Estonian courts had considered the matter. However, in that delegation's view, the 1971 Fund should advise all the claimants of the need to pursue their claims against the shipowner and his insurer.
- 4.14 In response to a question as to whether the *Alambra* carried insurance in respect of the 1969 Civil Liability Convention, the Director stated that although this had not been confirmed he had no reason to doubt that the vessel was insured. The Director further stated that, because the insurer had maintained that the 1969 Civil Liability Convention did not apply to the incident, the insurer had not invoked the defence of wilful misconduct on the part of the shipowner, which the 1969 Civil Liability Convention entitled him to do, and had therefore argued that it was on the basis of the insurance contract and the Estonian Merchant Shipping Act that the insurer was not liable to pay compensation.
- 4.15 The Administrative Council did not give the Director any instructions as regards the court proceedings.
- 4.16 The Director has examined, together with the 1971 Fund's Estonian lawyers, the documentation submitted by the Club. The Director has also considered the legal aspects of the Club's position. As a result of this analysis, the 1971 Fund has filed further pleadings arguing that under Estonian law the concept of wilful misconduct is to be interpreted as an intentional act, not only in respect of the incident but also in respect of the effects thereof, ie that the shipowner deliberately caused pollution damage. The Fund has in its pleadings maintained that the evidence presented regarding the condition of the *Alambra* does not establish that the shipowner was guilty of wilful misconduct and that the insurer is therefore not exonerated from its liability for pollution damage.

4.17 Further court hearings will be held in January, February and April 2003.

5 Action to be taken by the Administrative Council

The Administrative Council is invited:

- (a) to take note of the information contained in this document; and
- (b) to give the Director such instructions in respect of the court actions as it may deem appropriate.
