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COMPENSATION
FUND 1971

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Agenda item 15

71FUND/AC.12/13/6
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INCIDENTS INVOLVING THE 1971 FUND

PONTOON 300

Note by the Director

Summary:

Apart from a number of claims submitted by a municipality and a claim by the Ministry of Agriculture and Fisheries, all of which are the subject of legal proceedings, all other claims have been settled and 75% of the settlement amounts have been paid. The 1971 Fund has maintained that the claims by the municipality have become time-barred and that some of the claims are inadmissible. The Court appointed three experts to examine these claims. The experts have submitted their report to the Court. The 1971 Fund is pursuing a recourse action against the owner of the tug *Falcon 1* which was towing the *Pontoon 300* when the incident occurred. The criminal action against the master of the tug is still pending.

Action to be taken: Information to be noted.

1 Introduction

- 1.1 An estimated 8 000 tonnes of intermediate fuel oil was spilled from the barge *Pontoon 300* (4 233 GRT), which was being towed by the tug *Falcon 1* off Hamriyah in Sharjah, United Arab Emirates. The barge had reportedly become swamped during high seas and strong winds on 7 January 1998 and had taken on water whilst losing oil. During the course of the night of 8 January, the barge sank and settled on the seabed at a depth of 21 metres, six nautical miles off Hamriyah.
- 1.2 The spilt oil spread over 40 kilometres of coastline, affecting four Emirates. The worst affected Emirate was Umm Al Quwain.
- 1.3 This document focuses on developments in respect of the *Pontoon 300* incident that have taken place since the 9th session of the Administrative Council in October 2002.

2 Claims for compensation

Level of payments

- 2.1 The Administrative Council decided at its 1st and 2nd sessions that in view of the magnitude of the pending claims the level of payment of settled claims should be maintained at 75% of the established loss (documents 71FUND/AC.1/EXC.63/11, paragraph 3.7.4 and 71FUND/AC.2/A.23/22, paragraph 17.11.5).

Settled claims

- 2.2 Claims totalling Dhs 7.4 million (£1.4 million) in respect of clean-up operations and preventive measures have been settled for a total of Dhs 6.3 million (£1.2 million). The 1971 Fund has paid a total of Dhs 4.8 million (£900 000), corresponding to 75% of the settlement amounts.

Pending claims

- 2.3 In May 2000 the Municipality of Umm al Quwain presented claims against the 1971 Fund totalling Dhs 199 million (£39 million) on behalf of fishermen, tourist hotel owners, private property owners, a marine research centre and the municipality itself. These claims are in respect of economic losses in the fishery and tourism sectors, property damage and clean-up costs and environmental damage as set out in the table in paragraph 3.6 below.

3 Legal actions

- 3.1 In September 2000, well before the expiry of the three-year time bar period, the Umm Al Quwain Municipality brought legal action in the Umm Al Quwain Court in respect of its claims against the tug owner and the owner of the cargo on board the *Pontoon 300* in respect of its claims. The 1971 Fund was not joined as a defendant in the proceedings, nor was it formally notified of the proceedings. However, the plaintiffs requested the Court to notify the 1971 Fund through diplomatic channels in accordance with Article 7.6 of the 1971 Fund Convention and through the Ministry of Justice in accordance with United Arab Emirates law of Civil Procedure.
- 3.2 In June 2001 the Administrative Council considered the question of whether the claims by the Umm Al Quwain Municipality had become time-barred. Under Article 6 of the 1971 Fund Convention, rights to compensation from the 1971 Fund are extinguished unless an action is brought under the Convention against the Fund, or notification has been made to the Fund under Article 7.6 of the Convention of an action against the shipowner or his insurer under the 1969 Civil Liability Convention, within three years of the date when the damage occurred. However, notification under Article 7.6 can be made only in respect of actions against the shipowner liable under the 1969 Civil Liability Convention or his insurer. Actions against other parties would fall outside that Convention. Since none of the defendants listed in the Municipality's writ was the owner of the *Pontoon 300* or his insurer, the 1971 Fund considered that the action could not be based on the 1969 Civil Liability Convention and that Article 7.6 of the Fund Convention was not applicable.
- 3.3 Claims against the 1971 Fund became time-barred on or around 8 January 2001 at which point the Umm Al Quwain Municipality had not taken the measures laid down in the 1971 Fund Convention to prevent the claims becoming time-barred. However, the 1971 Fund's UAE lawyers drew attention to the fact that under the procedural law of the UAE there was no legal distinction between an actual defendant and a notified party and that the Court might identify and confirm the 1971 Fund as a defendant rather than as a notified party to get around the problem. Furthermore, since the Municipality's writ was filed in court before the end of the three-year time bar period, the Fund's lawyers believed that it might be considered sufficient by the Court to prevent the Municipality's claim becoming time-barred.

- 3.4 In December 2000 the UAE Ministry of Agriculture and Fisheries joined the Umm Al Quwain Municipality's action as a co-plaintiff, claiming Dhs 6.4 million (£1.2 million), which corresponded to the claim by the marine resource research centre included in the Municipality's claim. However, the Ministry also joined the 1971 Fund as a co-defendant in its action. Although the action had not been served on the 1971 Fund, the Administrative Council decided that this claim was not time-barred, since the Fund had been brought in as a defendant in the action before the expiry of the three-year time bar period (document 71FUND/AC.5/A/ES.8/10, paragraph 5.5.12).
- 3.5 In the proceedings, the 1971 Fund maintained that the claims submitted by the Municipality were time-barred. In December 2001 the Umm Al Quwain Court issued a preliminary judgement in which it decided to refer the matter to a panel of experts experienced in oil pollution and the environment, to be appointed by the UAE Ministry of Justice. The Court further decided to combine all the pleadings relating to issues of jurisdiction and time bar and to review these after the experts had submitted their report
- 3.6 The experts submitted their report to the Umm Al Quwain Court of First Instance in February 2003. The pending claims and the court experts' assessment of the claims are summarised in the table below:

Claim	Claimed amount Dhs	Assessed amount Dhs
Fishing		
- Loss of income	10 008 840	1 137 048
- Property damage	306 593	123 429
Tourism	765 389	122 570
Property damage	7 000 000	0
Marine Research Centre	6 352 660	335 000
Environmental damage		
- Marine organisms	130 294 415	0
- Mangroves	24 280 000	1 500 000
Clean-up	19 744 600	0
Total	Dhs198 752 497 £32.8 million	Dhs3 218 047 £0.5 million

- 3.7 The 1971 Fund submitted its comments to the court on the experts' report. The comments can be summarised as follows:

Notwithstanding the Fund's position that the claims by the Municipality are time-barred, the assessment of the claims by the panel of experts was generally in line with the 1971 Fund's policy as regards the admissibility of claims for compensation. As regards the claim for loss of income from fishing and damage to their fishing gear, the Fund agreed with the experts' assessment.

The experts assessed the losses by the Umm Al Quwain Beach Hotel on the basis of the hotel accounts for January 1997. The Fund would have assessed this claim based on the accounts for two or three years preceding the year of the damage. The assessment would have been more accurate if the experts had also compared the hotel's accounts for the year subsequent to the spill.

The experts rejected the claim for property damage due to lack of supporting evidence that show the actual cost of cleaning the damaged property. The Fund agreed with this assessment.

The Marine Research Centre's activities were affected by the pollution. However, the experts pointed out that some items of its claim were based on expenses incurred up to three years before the incident. The experts provisionally assessed the claim for a total of Dhs 335 000 subject to the claimants providing further supporting documents. The Fund agreed with the experts' recommendations and their provisional assessment.

The environmental damage claim by the Municipality of Umm Al Quwain, pertaining to loss of marine life and fish stocks lacked supporting evidence to substantiate the damage allegedly suffered and therefore was rejected by the experts. The experts proposed that the claim in respect of alleged damage to mangroves should be assessed on the basis of reinstatement measures, in particular the costs of replanting 20 hectares of mangrove saplings. The experts estimated that the costs of replanting mangrove saplings at an average density of 5 000 plants per hectare would be in the range Dhs1.0–1.5 million (£165 000 - £247 000). The experts recommended that the cost of re-planting would only be admissible if the claimants submitted evidence confirming that replanting activities have actually been undertaken during the years subsequent to the pollution incident. The 1971 Fund agreed with the experts' recommendation and their assessment of the costs of reinstatement measures.

- 3.8 In April 2003, the Umm Al Quwain Municipality submitted pleadings stating that the experts had not performed their duty as required by the Court, especially in relation to investigating the losses claimed. The Municipality requested that the Court should refer the matter back to the experts with the instruction to re-assess the claims in light of its comments.
- 3.9 In May 2003, the Ministry of Agriculture and Fisheries submitted pleadings stating that the amount assessed by the experts in respect of the claim by the Marine Research Centre was not acceptable. The Ministry stated that in relation to the Centre's claim the experts did not take into account the additional cost it had incurred in maintaining the various species of seafood. The Ministry requested the Court to refer the matter back to the experts with instruction to re-assess the claim.
- 3.10 The owner of the tug *Falcon 1* submitted pleadings maintaining that the experts had failed to assess the claims in an objective manner. He stated that the report was issued contrary to local law and jurisprudence and contained contradictions as regards facts and conclusions. He also stated that the report was faulty and incomplete and requested the Court to set aside the entire report.
- 3.11 At a hearing held in May 2003 the Municipality applied to the Court that the owner of the *Pontoon 300* should be joined in the proceedings. The 1971 Fund submitted pleadings requesting the Court to reject the joining of the shipowner in the proceedings. In any case, the Fund's lawyers are of the opinion that the fact that the shipowner has been joined in the proceedings does not change the legal situation as regards these claims. The Court has not made a decision regarding this application.
- 3.12 It is not known when the Court will reach its decision regarding the experts' report and the question of time bar.

4 Criminal proceedings

- 4.1 In November 1999 a Criminal Court of first instance found the master of the tug *Falcon 1*, the tug owner and the alleged cargo owner and their respective general managers guilty of misuse of the barge *Pontoon 300* which was not in a seaworthy condition and thus in violation of United Arab Emirates law, and causing harm to the people and the environment by use of the unseaworthy

barge. The master of the tug *Falcon 1*, the tug owner and his general manager appealed against the judgement, but the alleged cargo owner and his general manager did not.

- 4.2 In February 2000 the Criminal Court of Appeal found the tug owner and his general manager not guilty. The Court of Appeal confirmed the guilty verdict against the master of the *Falcon 1*, the alleged cargo owner and his general manager.
- 4.3 The master of the tug *Falcon 1* lodged an appeal in the Federal Court of Cassation, which sent the case back to the Court of Appeal to consider the issues of seaworthiness of the *Pontoon 300* and the master's defence of 'force majeure'. In October 2001 the Criminal Court of Appeal issued a preliminary judgement in which it appointed three experts from the UAE Ministry of Justice to provide a report to the Court of Appeal on the cause of the incident. In June 2002 the experts submitted their report to the Ajman Criminal Court of Appeal. The 1971 Fund has not been allowed access to that report since it is not a party to these proceedings.
- 4.4 In November 2002 the Court of Appeal referred the matter back to the experts instructing them to examine whether the incident was caused by the negligence of the master or the weather. The Court also instructed the experts to give their opinion on a report by an independent expert engaged by the master of the tug *Falcon 1*.
- 4.5 The case has been adjourned several times in the Court of Appeal. The experts have been requested by the Court to submit their report by 30 November 2003.

5 Recourse action by the 1971 Fund

- 5.1 In January 2000 the 1971 Fund took legal action against the owner of the tug *Falcon 1* maintaining that, since the sinking of the *Pontoon 300* had occurred due to its unseaworthiness and the negligence of the master and owner of the *Falcon 1* during the towage, the tug owner was liable for the ensuing damage. The Fund claimed Dhs 4.5 million (£840 000), corresponding to the major part of the compensation it had paid for clean-up operations and preventive measures.
- 5.2 The owner of the tug *Falcon 1* opposed the 1971 Fund's action stating that the Dubai Court had no jurisdiction and that the 1971 Fund had no title to pursue a claim against him. The tug owner further maintained that since the Court of Appeal had found the tug owner and the general manager not guilty, they had no liability in civil law for pollution damage resulting from the incident. The tug owner also pleaded 'force majeure' on the grounds that the incident resulted from severe (Force 11) storms and argued negligence on the part of the local authorities in attempting salvage of the *Pontoon 300*.
- 5.3 The 1971 Fund's lawyers advised the Fund that the Dubai Court had jurisdiction since one of the defendants has a place of business in Dubai and that the Fund had the right to take recourse action based on Article 9 of the 1971 Fund Convention which forms part of the law of the United Arab Emirates. The Fund's lawyers maintained that the tug *Falcon 1* was in control of the *Pontoon 300* and therefore legally responsible for the *Pontoon 300* in accordance with the principles of law on towage. They stated that under the Maritime Code of the Emirates the towing vessel and the vessel being towed were jointly liable for any loss suffered by third parties arising out of the towage operation.
- 5.4 In December 2000, the Dubai Court rendered a judgement in which it rejected the 1971 Fund's claim against the owner of the tug *Falcon 1*, but ordered the owner of the cargo on board the *Pontoon 300* to pay the Fund Dhs 4.5 million (£760 000).
- 5.5 The basis of the rejection of the claims against the owner of the *Falcon 1* was that under the terms of the charter party the master of the tug was under the control of the charterer. The 1971 Fund appealed against the judgement, contesting the validity of the charter party, and maintaining that in any event the charter party was only binding upon the parties thereto and not upon the Fund.

At a hearing in November 2001 the Fund amended the claimed amount to Dhs 4.7 million (£800 000) to reflect the amounts actually paid by the Fund.

- 5.6 In February 2002 the Dubai Court of Appeal upheld the judgement of the Court of First Instance against the same parties but amended the judgement to the effect that the amount payable by the Owner of the cargo onboard the *Pontoon 300* was increased to Dhs 4.7 million (£800 000) on the basis of the Fund's revised claim.
- 5.7 The 1971 Fund appealed to the Dubai Court of Cassation against the Court of Appeal's judgement on the ground that under UAE maritime law, even if the cargo owner had chartered the tug, the management of the tug would remain under the control of the tug owner unless the charter party specified otherwise. The Fund also argued that a photocopy of the charterparty submitted by the tug owner was not sufficient evidence to support an alleged charter arrangement between the owner of the tug and the cargo owner.
- 5.8 In his pleadings to the Court of Cassation, the tug owner maintained that the original charter party was submitted in the criminal proceedings and that he could therefore only submit a photocopy thereof in connection with the recourse action. The tug owner further maintained that since the Criminal Court had accepted the validity of the original charter party, it should be deemed valid for the purpose of the recourse action.
- 5.9 In October 2002 the Court of Cassation allowed the Fund's appeal and referred the matter back to the Court of Appeal for it to reconsider the matter. Both parties submitted further pleadings in December 2002.
- 5.10 In January 2003 the Court of Appeal issued a preliminary judgement appointing a local marine expert to review all documents of this case in order to determine if the tug was in fact on charter to the cargo owner. The expert was also instructed to establish the terms of the charter party, its commencement date and duration and the identity of the tug owner. He was further instructed to verify the extent of the pollution damage suffered by the victims who had been paid compensation by the Fund. The tug owner submitted pleadings objecting to the appointment of the marine expert but did not provide any explanation for his objection.
- 5.11 At the expert's request the Fund has provided copies of the assessments of all the claims settled by the Fund.
- 5.12 At a hearing held on 14 September 2003, the Court of Appeal adjourned the case to 20 October 2003 to allow the expert to complete his report.

6 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 this incident as it may deem appropriate.
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