



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

ASSEMBLY
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Agenda item 5

71FUND/A/ES.8/7
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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, some of which the 1971 Fund considers are inadmissible, and a claim by the Ministry of Agriculture and Fisheries, all other claims have been settled and 75% of the settlement amounts have been paid. The claims by the municipality appear to have become time-barred. The 1971 Fund has taken recourse action against the owner of the tug *Falcon 1* which was towing the *Pontoon 300* when the incident occurred.

Action to be taken:

- (a) review the level of the 1971 Fund's payments;
- (b) consider the question of time bar; and
- (c) decide whether the 1971 Fund should pursue the recourse action.

1 The incident

- 1.1 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 north-westerly 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. It is estimated that some 8 000 tonnes of oil was spilled.
- 1.2 The *Pontoon 300* was registered in Saint Vincent and the Grenadines and was owned by a Liberian company. The barge was not covered by any insurance for oil pollution liability. The tug *Falcon 1* is registered in Abu Dhabi and owned by a citizen of that Emirate.
- 1.3 The *Pontoon 300* was a flat-top barge of 8 037 tons dwt. The barge was constructed with 24 buoyancy tanks in six rows of four tanks each, and a double centre bulkhead. Divers reported

signs of diesel oil having been loaded in fore and aft ballast tanks in the barge. Most of the tanks on the barge were interconnected.

- 1.4 Several unsuccessful attempts to raise the barge were made during January 1998. The barge was finally lifted on 3 February 1998 and was towed into the port of Hamriyah. After oil residues had been removed, the barge was towed out to sea and scuttled.

2 Clean-up operations

- 2.1 The spilt oil spread over 40 kilometres of coastline, affecting four Emirates. The worst affected Emirate was Umm Al Quwain.
- 2.2 The Federal Environment Agency (FEA) co-ordinated spill response activity, with support from the Frontier and Coast Guard Service and municipal authorities. Onshore clean-up operations were carried out by an oil company and a number of local contractors. Collected oily waste was transported to an inland disposal site. The work was completed in June 1998.

3 Claims for compensation

Settled claims

- 3.1 Claims totalling Dhs 7.4 million (£1.4 million) in respect of clean-up operations 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

- 3.2 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, property damage, clean-up and environmental damage as set out in paragraphs 3.3 - 3.9 below.

Fishermen and tourism

- 3.3 A claim for Dhs 10 million (£1.9 million) has been submitted in respect of losses suffered by 200 fishermen who were allegedly prevented from fishing for some 30 days due to the presence of oil at sea. No documentary evidence has been provided to support the claim. Although some disruption to fishing activities was experienced at the time of the incident, the 1971 Fund's experts have indicated that it was not on the scale alleged.
- 3.4 A claim totalling Dhs 307 000 (£59 000) has been made in respect of damage to fishing boats and fishing gear. No details have been provided, but the claim appears to be based upon estimates.
- 3.5 A claim totalling Dhs 765 000 (£150 000) has been submitted for economic losses allegedly suffered by two hotels in Umm al Quwain. No supporting documentation has been provided. The 1971 Fund's experts have indicated that other factors, such as the weather and the fact that the incident coincided with the Holy month of Ramadan, may have contributed to any alleged downturn in hotel occupancy.

Property damage

- 3.6 Claims totalling Dhs 7.0 million (£1.3 million) have been submitted in respect of damage to the properties of four private individuals. No details have been provided regarding the nature of the damage, although it is understood that the sea defence walls of the properties in question and adjacent rocky shorelines were oiled. However, a local contractor collected the oil manually, and residual stains on rocks and sea walls were rapidly removed by natural wave action.

Clean-up

- 3.7 A claim totalling Dhs 19.7 million (£3.8 million) has been made in respect of alleged clean-up operations of beaches and creeks in Umm al Quwain. The claim is based on an offer made by a contractor based in the Sultanate of Oman, and there is no evidence that the contractor was actually engaged to undertake the work. Furthermore, the clean-up was organised by the FEA, which appointed a local contractor to undertake the work, the cost of which was approved by the 1971 Fund.

Marine resource research centre

- 3.8 A claim for Dhs 6.4 million (£1.2 million) has been submitted by a local marine resources research centre in respect of clean-up costs, disruption to its activities in fish culture, fish larvae and shrimp production and damage to the bushes of an experimental mangrove project. The amounts claimed in respect of all these items appear to be based upon estimates, and again no supporting documents have been provided to explain the nature of the alleged losses and the basis of the claimed amounts. According to the 1971 Fund's experts, although some of the experimental mangroves were oiled as a result of the incident, they were cleaned naturally after six months without the loss of any bushes or the need to replant seedlings.

Environmental damage

- 3.9 The Umm al Quwain Municipality has claimed Dhs 192 million (£37 million), the major part of which, some Dhs 161 million (£31 million), relates to alleged losses of fish stocks and other marine resources, including mangroves. These losses are reportedly based on studies, surveys, experiments and estimates of the economic value of the affected resources. The estimation of the damage appears to be based upon theoretical models.
- 3.10 In a letter to the Umm al Quwain Municipality the Director drew attention to the fact that claims in respect of property damage and economic losses actually sustained are admissible in principle, but that before the 1971 Fund can assess these items of the claim, considerable supporting documentation will be required. The Director also pointed out that claims for environmental damage are not admissible.

4 Legal actions

- 4.1 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 a 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.
- 4.2 Article 7.6 reads:

Without prejudice to the provisions of paragraph 4, where an action under the Liability Convention for compensation for pollution damage has been brought against an owner or his guarantor before a competent court in a Contracting State, each party to the proceedings shall be entitled under the national law of that State to notify the Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the court seized and in such time and in such a manner that the Fund has in fact been in a position effectively to intervene as a party to the proceedings, any judgement rendered by the court in such proceedings shall, after it has become final and enforceable in the State where the judgement was given, become binding upon the Fund in the sense that the facts and findings in that judgement may not be

disputed by the Fund even if the Fund has not actually intervened in the proceedings.

- 4.3 In September 2000, ie well before the expiry of the three-year time bar period, the Umm al Quwain Municipality brought legal action against the tug owner and the cargo owner in the Umm al Quwain Court. The total amount claimed in the legal action is Dhs 199 million (£39 million), and the claims correspond with those referred to in paragraphs 3.3 – 3.9. The 1971 Fund has not been joined as a defendant in the proceedings nor has been formally notified of the proceedings. The plaintiffs have 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 Undersecretary of the Ministry of Justice according to Article 9, paragraph 7 of the UAE law of Civil Procedure. 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 any other parties would fall outside that Convention. Since none of the defendants listed in the Municipality's writ is the shipowner or his insurer, the action cannot in the Director's view be based on the 1969 Civil Liability Convention and Article 7.6 of the 1971 Fund Convention is not applicable.
- 4.4 In December 2000 the Ministry of Agriculture and Fisheries joined in the Umm al Quwain Municipality's action as a co-plaintiff claiming Dhs 6.4 million (£1.2 million), which corresponds to the claim by the marine resources research centre referred to in paragraph 3.8 above. The Ministry of Agriculture and Fisheries has joined the 1971 Fund as a co-defendant in its action.
- 4.5 Claims against the 1971 Fund became time-barred on or around 8 January 2001. The question has arisen as to whether the claims that are the subject of the legal action by the Umm al Quwain Municipality are time-barred. For the reasons set out in paragraph 4.3 it appears that the Umm al Quwain Municipality has not taken the measures laid down in the 1971 Fund Convention to prevent the claims becoming time-barred; the action which the Municipality has taken is not against the registered owner of the *Pontoon 300* or his insurer and the Municipality has not taken legal action against the 1971 Fund. The Director is therefore of the view that the Municipality's claims are time-barred.
- 4.6 However, the 1971 Fund's UAE lawyers have drawn attention to the fact that in the procedural law of the UAE there is no legal distinction between an actual defendant and a notified party and that the Court may identify and confirm the 1971 Fund as a defendant rather than a notified party to get around the problem. Furthermore, since the writ was filed in court before the expiry of the three-year time bar period, the Fund's lawyers believe that it may be considered by the courts as sufficient for preventing the Municipality's claims becoming time-barred.
- 4.7 Although the action by the Ministry of Agriculture and Fisheries referred to in paragraph 4.4 has not yet been served on the 1971 Fund, the Director takes the view that this claim is not time-barred since the 1971 Fund has been brought in as defendant in this action before the expiry of the three-year time bar period.
- 4.8 However, the question has also arisen as to the Ministry of Agriculture and Fisheries' and Umm al Quwain Municipality's standing to sue in respect of the alleged damages covered by the claims, since neither of them has any right to claim against the 1971 Fund or anyone else on behalf of any other parties unless a power of attorney or other legal authority is provided by the individual or entity who suffered the alleged loss.
- 4.9 Pending any instructions by the Assembly, the Director has instructed the 1971 Fund's lawyers to prepare defences on the grounds that the claims by the Umm al Quwain Municipality are time-barred and that neither the Municipality nor the Ministry of Agriculture and Fisheries has title to sue, unless they show that they have legal authority to act for the individuals or entities who suffered the alleged losses.

5 Level of the 1971 Fund's payments

- 5.1 In view of the uncertainty as to whether the total amount of the claims might exceed the total amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention (60 million SDR, corresponding to approximately £52.5 million), the Executive Committee decided at its 57th session to limit the 1971 Fund's payments to 50% of the loss or damage actually suffered by each claimant as assessed by the 1971 Fund's experts at the time the payment was made (document 71FUND/EXC.57/15, paragraph 3.11.9). At its 58th session, the Committee increased the level of payments to 75% (document 71FUND/EXC.58/15, paragraph 3.9.5). The Administrative Council decided at its 1st and 2nd sessions to maintain the payment level at 75% (documents 71FUND/AC.1/EXC.63/11, paragraph 3.7.4 and 71FUND/AC.2/A.23/22, paragraph 17.11.5).
- 5.2 The total amount claimed against the 1971 Fund in the court proceedings as at 31 May 2001 was Dhs 206 million (£40 million), although Dhs 6.4 million (£1.2 million) is claimed both by the Municipality and the Ministry for the same alleged damage. As indicated in paragraph 4.5, the Director has taken the view that the claims by the Umm al Quwain municipality, which represent Dhs 195 million (£39 million), are time-barred. However, as also mentioned above, the 1971 Funds' UAE lawyers have drawn attention to the fact that the UAE courts might not agree with the Director on this point. Furthermore, the Fund's lawyers have indicated that UAE law is unclear on the question of whether or not claimants can increase the amount of their claims in court. In any event if the claimants were to be successful in pursuing their claims, they would be entitled to interest at 9% per annum on the amounts awarded, either from the date of the filing of the respective claim in court or from the date of the judgement. There remains a risk, therefore, that the total amount of the admissible claims will exceed the maximum amount available for compensation. The Director therefore takes the view that it would be appropriate to maintain the level of the 1971 Fund's payments at 75% of the total loss or damage suffered by each claimant.

6 Investigation into the cause of the incident

The 1971 Fund's legal advisers in the UAE who investigated the cause of the incident have reported that the failure of the Sharjah and Ajman police to collect evidence from the master and crew at the time of the incident and the absence of any direct right of the 1971 Fund to collect evidence have resulted in only very limited evidence on the cause of the incident being available to the 1971 Fund. However, the presumption of the cause of the incident was unseaworthiness of the tow *Pontoon 300* and that pursuant to the principles of towage, there was a failure on the part of the owner and the master of the tug *Falcon 1* to check the seaworthiness of the tow and preserve the same.

7 Criminal proceedings

- 7.1 In November 1999, the Ajman Criminal Court 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 UAE law, and causing harm to the people and the environment by use of the unseaworthy barge. The master of the *Falcon 1*, the tug owner and his general manager appealed against the judgement, but the alleged cargo owner and his general manager did not.
- 7.2 In February 2000, the Ajman 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, on the grounds of their being liable for misuse of the *Pontoon 300*, which was not in a seaworthy condition, and for causing damage to people and the environment by the use of an unseaworthy barge.
- 7.3 The master of the tug *Falcon 1* lodged an appeal in the Federal Court of Cassation, which has sent the case back to the Ajman Criminal Court of Appeal to consider the issues of seaworthiness of

the *Pontoon 300* and the master's defence that the incident was due to 'force majeure'. The Fund's lawyers are monitoring these proceedings.

8 Recourse action by the 1971 Fund

- 8.1 The 1971 Fund took legal action against the individual who owned the tug *Falcon 1* maintaining that, since the sinking of the *Pontoon 300* occurred due to its unseaworthiness and the negligence of the master and owner of the *Falcon 1* during the towage, the tug owner is liable for the ensuing damage. The Fund claimed Dhs 4.5 million (£840 000), corresponding to the major part of the compensation it has paid for clean-up operations and preventive measures (cf paragraph 3.1).
- 8.2 The owner of the tug initially expressed a willingness to enter into discussions with the 1971 Fund. For this reason, the parties requested that the Dubai Court should grant an adjournment of the proceedings. This was done formally by the 1971 Fund's lawyers, but informally by the lawyers acting for the tug owner. The owner of the tug subsequently decided not to hold any discussions, and in May 2000 he filed pleadings opposing the Fund's action, making the following points:
- The Dubai Courts have no jurisdiction, in this case.
 - The 1971 Fund has no title to pursue a claim against the tug owner, and in any event the 1971 Fund has filed its claim prematurely.
 - Since the Court of Appeal had found the tug owner and the general manager not guilty, they have no liability in civil law for the damage resulting from the incident.
 - The incident resulted from storms that were more than Force 11 and was therefore caused by 'force majeure' and the owner of the tug is not liable.
 - There was negligence on the part of the local authorities in attempting to salvage the *Pontoon 300*.
- 8.3 The 1971 Fund's lawyers have advised the Director that the Dubai court has jurisdiction since one of the defendants has a place of business in Dubai. They have also advised that the 1971 Fund has 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 release, receipt and subrogation document signed by the claimants who have received payments from the 1971 Fund would in their view give the Fund the right to pursue actions in respect of these payments under that Article. The Fund's lawyers have 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 the law on towage. The lawyers have stated that under Articles 315 – 317 of 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.
- 8.4 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*, who had allegedly chartered the tug *Falcon 1*, to pay the Fund Dhs 4.5 million (£840 000).
- 8.5 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 has appealed against this judgement, contesting the validity of the charter party, and maintaining that in any event the charter party is only binding upon the parties thereto and not on the Fund. However, an application has been made to stay the appeal proceedings pending the decision in the hearing at the Ajman Criminal Court of Appeal referred to in paragraph 7.3 above.

8.6 The 1971 Fund's lawyers have mentioned that the tug owner might be entitled to limit his liability under the Maritime Code unless the incident was a result of the personal fault of the owner. It appears that the *Falcon 1* is of 254 GRT. Under the law of the Emirates the tonnage limitation figure would be some Dhs 75 000 (£20 436).

9 Action to be taken by the Assembly

The Assembly is invited:

- (a) to take note of the information contained in this document;
 - (b) to consider the issue of time bar in respect of the claims by the Umm al Quwain municipality;
 - (c) to review the level of the 1971 Fund's payments;
 - (d) to give the Director instructions regarding the recourse action against the owner of the *Falcon 1*; and
 - (e) to give the Director such other instructions in respect of this incident as it may deem appropriate.
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