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Agenda item 3

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INCIDENTS INVOLVING THE IOPC FUND

RIO ORINOCO

Note by the Director

1 Introduction

Since the issue of document FUND/EXC.28/4 there have been important developments in respect of this incident, as set out below.

2 The Vessel

The RIO ORINOCO is at anchor in the port of Quebec, where the remaining asphalt cargo (about 6 000 tonnes) is being removed by the new owner, Groupe Desgagnés. The owner has taken out an insurance covering, inter alia, the risk of pollution during the discharge.

3 Canadian Government's Claim

3.1 As mentioned in paragraph 6.1 of document FUND/EXC.28/4, in August 1991 the Canadian Government submitted a claim for a total amount of Can$6 864 996 (£3 720 000) in respect of the operations carried out by or on behalf of the Canadian Coast Guard up to 31 January 1991 in connection with attempts to remove the ship from its grounded position. After internal verification by the Canadian authorities, the amount claimed was increased to Can$7 261 546 (£3 930 000).

3.2 On 19 September 1991, the Canadian Government presented a claim relating to the operations carried out by Groupe Desgagnés under contract with the Coast Guard to remove the RIO ORINOCO from her grounded position and take her to a place of safety. This claim amounted to Can$3 497 667 (£1 894 000).

3.3 The claims were examined by the IOPC Fund Secretariat with the assistance of the experts from International Tanker Owners Pollution Federation Limited (ITOPF) and Murray Fenton & Associates who had been following the various operations on behalf of the IOPC Fund.

3.4 On 25 and 26 September 1991 negotiations were held in Quebec (Canada) between the Canadian Government and the IOPC Fund concerning the two claims referred to above.

3.5 The claim in respect of the period up to 31 January 1991 relates to the operations carried out by various private companies under contract with the Coast Guard, eg inspection of the vessel by divers, inspection and repair of the ship's boilers, services of a naval architect and a salvage master, hire of two barges, services connected with the attempts to remove the ship, supervision of the ship during the winter, the Coast Guard's monitoring of these operations (eg in respect of personnel, equipment, ships and aircraft) and the Coast Guard's pollution response at sea.

3.6 The main elements of this claim were as follows: cost of operations carried out by various contractors (68%), cost of Coast Guard personnel (12%) and cost of Coast Guard vessels and aircraft (13%).

3.7 This claim gave rise to important questions, in particular the reasonableness of certain operations, the relationship between salvage and preventive measures, the rates charged for certain vessels and aircraft owned by the public authorities and used during the operations, and the costs claimed for Government employees.

3.8 The operations undertaken up to 31 January 1991 to remove the RIO ORINOCO from her grounded position and to remove her bunker oil and cargo are summarised in paragraphs 4.3 - 4.6 of document FUND/EXC.28/4. In respect of these operations, the question arose as to whether they should be considered as falling within the definitions of "pollution damage" and "preventive measures" (Articles I.6 and I.7 of the Civil Liability Convention). As these operations were taken for the purpose of removing the vessel and her cargo, they could be considered as salvage operations or "wreck removal".

3.9 In the PATMOS case (Italy, 1985), the IOPC Fund examined the question of whether and to what extent salvage operations fell within the definition of "pollution damage" laid down in the Civil Liability Convention, ie whether such operations could be considered as "preventive measures" as defined in that Convention. The Executive Committee took the position that operations could be considered as falling within the definition of "preventive measures" only if the primary purpose was to prevent pollution damage; if the operations primarily had another purpose, such as rescuing hull or cargo, the operations would not be covered by this definition (document FUND/EXC.16/8, paragraph 3.3.2). The position taken by the Executive Committee was endorsed by the Italian Court of first instance which was seized with that case. The plaintiffs whose claims had been rejected by the Court on these grounds lodged appeals against the judgement, but the appeals were later withdrawn.

3.10 On the basis of the advice given by the IOPC Fund's experts and his own discussions with the Canadian authorities, the Director made the following assessment of the situation in his submission to the Executive Committee at its 26th session. In view of her location, wedged between two rock shelves, there was a serious risk that the RIO ORINOCO would break if left over the winter. Although the asphalt cargo had turned solid after the ship's boilers had ceased functioning, the solid but brittle asphalt would break into pieces if it were to enter the water. These pieces could cause contamination to the shoreline the following spring and summer, when the sun would make the asphalt soft and sticky. As already mentioned, Anticosti Island is a nature reserve of great environmental interest. In addition, pieces of asphalt could enter the cooling water system of passing ships, damaging their machinery, and lumps of asphalt could enter the cooling water system of industrial installations located on the shores of the Gulf of St Lawrence. It should also be noted that the RIO ORINOCO had been declared a constructive total loss and that the shipowner had stated that he was financially incapable of removing the vessel and her cargo. For these reasons, the Director expressed the view that the measures taken by the Coast Guard to remove the vessel and her cargo had the prevention of pollution as their primary purpose and that these measures therefore fell in principle within the definition of "preventive measures", as interpreted by the Executive Committee in the PATMOS case. In addition, the Director considered that the various operations carried out for this purpose up to 21 December 1990 were generally reasonable in the circumstances, particularly in view of the approaching winter, although the operations were not ultimately successful. Likewise, he was of the opinion that it was reasonable to keep a small crew on board the RIO ORINOCO up to 31 January 1991 (document FUND/EXC.26/2, paragraph 2.17).

3.11 At its 26th session, the Executive Committee considered whether the attempts made in November and December 1990 to remove the RIO ORINOCO and her cargo fell in principle within the definitions of "pollution damage" and "preventive measures" laid down in Article I.6 and I.7 of the Civil Liability Convention. Basing its considerations on the interpretation which the Committee had given to the definition of "preventive measures" in the PATMOS case, the Committee considered that the primary purpose of the operations to remove the ship and cargo carried out up to 31 January 1991 in the RIO ORINOCO case had been to prevent pollution. The Executive Committee therefore decided that these operations fell, in principle, within the definition of "preventive measures" (document FUND/EXC.26/6, paragraph 3.4).

3.12 In his examination of this claim the Director based his approach on the decision of principle taken by the Executive Committee. However, the operations during certain periods had a dual purpose, viz both to prevent and minimize pollution and to salve the vessel and the cargo. The Director therefore had to consider how the costs for these operations should be distributed between salvage and pollution prevention. In presenting its claim, the Canadian Government had already made such a distribution. The rationale of this distribution and the various percentages applied in respect of the different operations were discussed in detail between the IOPC Fund's experts and the technical experts representing the Canadian Government. On the basis of the advice of the IOPC Fund's experts, the Director accepted that the distribution made by the Canadian Government was in general reasonable.

3.13 After discussions of the various issues at the above-mentioned meeting in Quebec, agreement was reached between the Canadian Government and the Director to settle the claim relating to the operations undertaken by or on behalf of the Coast Guard up to 31 January 1991 at an aggregate amount of Can$6 950 000 (£3 763 880). The Director made his agreement to this settlement subject to the approval of the Executive Committee.

3.14 As set out in paragraphs 4.6 - 4.9 of document FUND/EXC.28/4, the RIO ORINOCO was removed from its grounded position in August 1991 and brought to a place of safety. These operations were carried out by Groupe Desgagnés under contract with the Canadian Coast Guard. The contract provided payment of a lump sum on a "no cure, no pay" formula. The amount paid by the Canadian Government to the contractor, Can$3 497 667 (£1 894 000), was in accordance with the provisions of the contract.

3.15 The Director is of the opinion that the primary purpose of the operations carried out under the above-mentioned contract was to prevent and minimise pollution. In this regard he refers to the reasons for the Executive Committee's decision in respect of the operations carried out during the period up to 31 January 1991. The Director therefore considers that the operations during the summer also fell within the definition of "preventive measures". He also considers that the terms of the contract are reasonable as is the contract amount.

3.16 The Canadian Government's claim included an amount of Can$228 819 (£123 920) which related to a so-called "goods and services tax". The Director did not consider this amount admissible, since the Canadian Coast Guard's payment of this amount was received by the Canadian Government in the form of tax. The Canadian Government accepted the Director's argument and withdrew this element of the claim, which was thus reduced from Can$3 497 667 to Can$3 268 848 (£1 770 300).

3.17 Agreement was reached between the Canadian Government and the Director to settle this claim at the reduced amount of Can$3 268 848, subject to approval by the Executive Committee.

3.18 For the reasons given above, the Director proposes that the Executive Committee approves the two claims presented by the Canadian Government for Can$6 950 000 (£3 763 880) and Can$3 268 848 (£1 770 300), respectively.

3.19 It should be noted that further claims will be presented in respect of the operations carried out by the Coast Guard after 31 January 1991. The cost of these operations has been provisionally indicated at around Can$2 million (£1 083 130). In addition, there are two contracts entered into by the Coast Guard with private companies, totalling approximately Can$230 000 (£124 560), which are

not included in the settlement, since there is a dispute between the Canadian Government and the companies concerned in respect of these contracts. Further claims will also be presented by the Canadian Government relating to certain operations carried out by the Ministry of Environment and the Ministry of Fisheries and Oceans; it is estimated that these claims will not exceed Can$500 000 (£270 780). The total amount of the claims to be submitted by the Canadian Government would thus be Can$2.5 - 3 million (£1.4 - 1.6 million).

4 Claims by the Swedish Club

4.1 On 30 September 1991, the Swedish Club submitted a claim for Can$470 404 (£254 750) in subrogation in respect of the clean-up operations carried out during the summer of 1991 and the disposal of waste collected during these operations (cf document FUND/EXC.28/4, paragraphs 2.2 and 2.3).

4.2 Although the IOPC Fund Secretariat has not been able to complete its examination of this claim, the Director is of the opinion that the operations were generally carried out efficiently and that the amount claimed is in general reasonable. For this reason, the Executive Committee may wish to consider to authorise the Director to settle this claim, pursuant to Internal Regulation 8.4.2.

4.3 As mentioned in paragraph 5.6 of document FUND/EXC.28/4, the Director had settled two claims presented by the Swedish Club but that, due to certain difficulties in obtaining formal approval of the settlement by the shipowner, the claim had not been paid. This formal approval having been received, the settlement agreement was signed by the parties, and on 20 September 1991 the IOPC Fund paid to the Swedish Club an amount of Can$458 417 (£232 817), representing the total amount of the claims minus the shipowner's limitation amount.

4.4 The Swedish Club will submit a further claim in respect of the disposal of the oily waste collected on the beaches during the autumn of 1990. This claim is estimated at Can$350 000 (£190 000).

5 Action to be Taken by the Executive Committee

The Executive Committee is invited to:

(a) take note of the information contained in this document;

(b) consider the Director's proposal to approve:

(i) the Canadian Government's claim in respect of the operations carried out by or on behalf of the Coast Guard up to 31 January 1991 for an amount of Can$6 950 000 (paragraph 3.13 above); and

(ii) the Canadian Government's claim in respect of the operations covered by the contract with Groupe Desgagnés for Can$3 268 848 (paragraph 3.17 above); and

(c) consider whether to authorise the Director to settle the claim presented by the Swedish Club in respect of the clean-up operations during the summer of 1991 (paragraph 4.1 above).