



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND

EXECUTIVE COMMITTEE  
44th session  
Agenda item 3

FUND/EXC.44/7  
3 October 1995

Original: ENGLISH

## INCIDENTS INVOLVING THE IOPC FUND

### SEKI

Note by the Director

#### 1 The incident

1.1 The tanker *Baynunah* (34 240 GRT), registered in the United Arab Emirates, and the Panamanian-registered tanker *Seki* (153 506 GRT) collided on 30 March 1994 some nine miles off the port of Fujairah (United Arab Emirates). The *Baynunah* was in ballast at the time, whereas the *Seki* was fully laden with some 293 000 tonnes of Iranian light crude oil. The N°1 port wing tank of the *Seki* was ruptured, resulting in the escape of approximately 16 000 tonnes of oil.

1.2 The spilt oil drifted northwards under the influence of wind and currents and came ashore north of the port of Khorfakkan. Much of this oil was refloated by offshore winds and driven away from the coast, where much of it dispersed by natural processes. However, some of the oil drifted further north along the coast, affecting the Emirates of Fujairah and Sharjah and polluting some 30 kilometres of shoreline between Khorfakkan in Sharjah and Dibba Hassan in Fujairah. The coast of the Musandam peninsula in Oman was also polluted south of Limah.

1.3 The spill affected artisanal fisheries. Fishermen along the east coast of the United Arab Emirates were instructed by the authorities to suspend fishing activities. Amenity beaches used by tourists for swimming and diving were also affected. The main tourist season runs, however, through the cooler winter months, from late September onwards. A desalination plant immediately south of Khorfakkan was temporarily shut down at night as a precautionary measure.

1.4 The *Seki* is entered in the Britannia's Steam Ship Insurance Association Limited (the Britannia P & I Club).

## **2 Clean-up Operations**

2.1 Details of the clean-up operations were given in a document submitted by the Director to the Executive Committee at its 42nd session (document FUND/EXC.42/6).

2.2 Clean-up operations were stopped in early April 1995 on ITOPF advice that the work had reached a point where the shorelines were as clean as could reasonably be expected and that the techniques being used could not be expected to improve the situation further. The ITOPF experts considered that additional cleaning using these or more aggressive techniques was likely to delay the natural recovery of the shorelines identified as particularly biologically important by the Federal Environmental Agency of the UAE, acting as technical advisers to the Government of Fujairah.

2.3 Throughout the clean-up operations, agreement on the completion of the cleaning of each site has been reached by a joint inspection team which comprised representatives of the Government of Fujairah, the Federal Environmental Agency and surveyors acting on behalf of the Britannia P & I Club in liaison with ITOPF. However, agreement has not been reached on the last three sites.

2.4 The IOPC Fund is not aware of any further clean-up operations carried out since the Executive Committee's 43rd session. However, surveyors appointed by the Britannia P & I Club have reported that in the intervening period there has been a significant redistribution of shore-line sediments as a consequence of wave action. They have not observed any polluted sediments following this redistribution.

## **3 Claims for compensation; general situation**

### United Arab Emirates

3.1 The Government of Fujairah has notified the Court of Fujairah of 30 claims amounting to Dhs 162 967 248 (£28 million). The Government has so far, however, submitted only 19 claims to the Britannia P & I Club, totalling Dhs 98 261 000 (£16.8 million). These claims include one submitted by the Government of Fujairah on behalf of 743 fishermen for Dhs 36.9 million (£6.3 million). Notice of a further 17 claims (ie 36 claims in all) has been given to the IOPC Fund, although some of these claims have not yet been quantified.

3.2 The Britannia P & I Club has made payments to the Government of Fujairah totalling Dhs 27 375 901 (£4.7 million), including payments of Dhs 6 572 707 (£1 123 500) in respect of the fisheries claims.

3.3 Since the Executive Committee's 43rd session, there has been a significant development in respect of fisheries claims, whereas there has been little development in respect of any other claims. An additional advance payment of Dhs 655 561 (£112 500) has been made by the Britannia P&I Club in respect of claims for the costs incurred by the Abu Dhabi National Oil Company (ADNOC) for assistance in the initial stages of the clean-up. The Britannia P & I Club has also made a further advance payment of Dhs 732 443 (£125 400) in respect of Government personnel involved in the clean-up operations.

### Oman

3.4 The Government of Oman submitted a claim for OR100 564 (£164 000) for costs of surveillance activities, costs incurred in placing dispersant-spraying aircraft on standby and in the provision of offshore recovery equipment to the Government of Fujairah. The claim included an item for OR27 000 (£44 000) for fishery damage along the affected coastline of the Musandam peninsula. This claim was settled and paid by the P & I Club in November 1994 at OR92 279 (£150 500), after consultation with the Director.

## 4 Fisheries claims

### Preparation of claims and initial assessment

4.1 The fisheries claims referred to in paragraph 3.1 above had been assessed by a sub-committee established by a Higher Committee set up by the Ruler of Fujairah. The sub-committee was composed of representatives of various Government ministries, of three municipalities and of two fisheries cooperatives.

4.2 The IOPC Fund has been informed that each fisherman filled in a form prepared by the sub-committee setting out, *inter alia*, a list of his equipment, the number of crew members and their wages. The sub-committee established maximum admissible levels for daily income by boat type, maximum number of crew per boat and maximum number of damaged nets and other fishing gear which would be accepted in a claim, together with unit costs for crew and damaged or lost equipment. The maximum number of lost fishing days was set by the sub-committee equivalent to 10 days for fishermen based south of Badiyah, the point where the oil came ashore, and equivalent to 22 days for those based in Badiyah and the villages north thereof.

4.3 The fisheries sub-committee is understood to have reviewed each claim individually and to have assessed the claims on the basis of the information contained in the respective claims forms, the known fishing practise followed by individual claimants and information provided by representatives of fishery co-operatives who were said to have interviewed individual fishermen.

4.4 The Government of Fujairah submitted the claim for damage to fisheries to the Britannia P & I Club's local correspondent on 16 August 1994. Experts appointed by the Britannia P & I Club and the IOPC Fund began to investigate this claim in late August 1994 and made a preliminary assessment of the losses suffered by fishermen. Since very little information had been presented by claimants, the assessment was made on the basis of a survey of the fishing industry conducted in September 1994, supported by published summaries of fishery statistics, the daily fish sale records of the Khorfakkan Fishermen's Society (a major fishery co-operative) and other relevant records. These data were used to derive a model of the economic impact of the incident. The experts estimated a total loss of Dhs 5.2 million (£890 000). In January 1995, the Britannia P & I Club paid this amount as an advance to the Government, after consultation with the Director. After clarification had been provided by the Government of Fujairah in January 1995 on one point, the assessment was adjusted to Dhs 6 572 707 (£1 123 500). The balance of Dhs 1 372 707 (£240 000) was paid to the Government by the Club in February 1995, again after consultation with the Director.

4.5 The wide disparity between the assessment of the experts engaged by the Britannia P & I Club and the IOPC Fund and that of the fisheries sub-committee derives mainly from the following three sources.

4.5.1 Claims were included for fishermen from areas which were not contaminated by oil. It has been maintained that also these fishermen did not fish during a period of some days after the incident, due to the uncertainty of the situation. It has also been maintained that the market for locally caught fish was interrupted as a result of the incident. However, the information obtained by the experts from interviews with fishermen and from the fish sales records of the Khorfakkan Fishermen's Society supported the experts' conclusion that only the fishermen who operated in contaminated areas had suffered loss of income. Similarly, the experts took the view that only fishermen operating in contaminated areas had suffered loss of or damage to fishing gear.

4.5.2 The amount claimed for loss of or damage to nets and other fishing gear represents 61% of the fisheries claim. The level of damage to or loss of fishing gear was considered by the experts to be unrealistically high. From a survey of a sample of the fishing fleet made by the P & I Club's surveyors, it appeared that every fisherman in the survey area who owned a kingfish, tuna or drift net had presented a claim for damage or loss. This is inconsistent with the pattern of fishing activity understood from the interviews

mentioned in paragraph 4.5.1. Furthermore, more fish traps were alleged to have been lost than the experts estimated to be in use. Amounts claimed relating to two categories of fishing gear (beach seines and fish traps) were discounted by the experts, because no plausible explanation was offered as to how such gear came to be damaged or lost and no evidence was offered to show that such items were in fact lost or damaged beyond repair. It appears that no survey, other than the alleged interviews conducted by fishery co-operatives, was carried out of the damaged equipment and that no systematic documentation or photographic record was kept of the damaged property, or of the subsequent destruction of such property.

4.5.3 The unit costs applied by the sub-committee in respect of damaged or lost fishing gear were considered by the experts to be unreasonably high for most categories of gear when compared to prices quoted by local suppliers.

4.6 After further discussions in February 1995 between the experts engaged by the Club and the IOPC Fund and the members of the fisheries sub-committee, the experts reconsidered their assessment of the losses suffered by the fishermen but they were unable to make a reliable reassessment of the quantum of the damage suffered. The experts accepted in principle damage to two categories of fishing gear previously rejected, following new explanations of the causes of loss made by members of the sub-committee. However, despite these explanations, the experts were unable to quantify these losses. It was also accepted that some disruption to the fishing industry was likely in areas which were not contaminated by oil, but again the experts were unable to quantify any losses which may have been incurred as a result.

#### Consideration by the Executive Committee at its 42nd session

4.7 At its 42nd session, the Executive Committee considered the fisheries claims on the basis of a document presented by the Director (document FUND/EXC.42/6). The Government of the United Arab Emirates had also submitted a document (document FUND/EXC.42/6/1).

4.8 The Committee noted that the individual fishermen concerned did not have accounts or tax returns to support their claims. The Committee also accepted that the published fishery statistics were not entirely accurate and that the sales records available did not give a correct picture of the normal income of the fishermen in the area. It was noted that the experts employed by the Britannia P & I Club and the IOPC Fund had nevertheless expressed the opinion that the amount assessed by the sub-committee was not supported by the facts, neither as regards the catches nor as regards the affected area, and that the experts had taken the view that the sub-committee's assessment of the alleged damage to fishing gear was unrealistically high.

4.9 In the discussion, a number of delegations expressed their sympathy for the victims of the *Seki* incident. Many delegations stated that the IOPC Fund should maintain its policy of compensating victims of oil pollution damage for the loss or damage actually suffered as promptly as possible. A number of delegations emphasised that compensation was only payable under the Civil Liability Convention and the Fund Convention in respect of damage or loss actually suffered by the individual claimant and that the claimant had an obligation to prove the quantum of his loss or damage. It was stated that it was also necessary that the IOPC Fund took a flexible approach in its application of the requirement that the claimant would have to substantiate his loss and that account should be taken of the local situation and the possibilities for the claimant to produce evidence. It was emphasised, however, that the loss or damage had to be proven. One delegation stated that the requirement for accepting claims should be "no evidence, no pay".

4.10 In conclusion, the Executive Committee reiterated the IOPC Fund's position that a claim was admissible only to the extent that the quantum of the loss actually suffered was demonstrated. The Committee accepted, however, that a certain flexibility would have to be exercised as regards the application of the requirement of proof to be submitted by a claimant in order to demonstrate the quantum of his loss, taking into account the particular situation of the country concerned and in accordance with the conclusions of the 7th Intersessional Working Group. In the view of the Committee, it was necessary

to investigate all possible elements of proof available, which would not be limited to accounts or taxation documents. The Committee took the view that the findings of a government committee or similar body could not be considered as proof in itself, but was an element which should be taken into consideration for the assessment of the loss suffered. The Committee stated that other elements should be taken into account, including statistics relating to the level of catches in previous years and to the income of fishermen during previous years in the area under consideration. It was emphasised that it was necessary that the IOPC Fund's experts were given the possibility of forming an independent opinion of the quantum of the losses actually suffered.

4.11 The Executive Committee took the view that the same considerations as those set out in paragraph 4.10 should be applied in respect of damage to or loss of property, and that the losses suffered should be established taking into account elements of proof other than the findings of the government sub-committee.

4.12 In the light of the discussions, the Executive Committee decided to instruct the IOPC Fund's experts to search, in co-operation with the authorities of Fujairah, for all evidence and elements of proof available, whether statistics, regional studies or declarations of various kinds made in previous years. It was emphasised that it was particularly important to establish by all possible means the existence and duration of any interruption of fishing, as well as the reaction of the market for locally caught fish following the incident. The experts were also instructed to establish whether, in the light of these elements, it would be possible to make an individual evaluation of the damage actually suffered by individual claimants other than on the basis of a simple declaration made by the claimants or by other organisations; if such an individual assessment was not possible, the experts should examine whether or not it would be possible to make an assessment of the losses suffered by groups of fishermen.

#### Consideration by the Executive Committee at its 43rd session

4.13 At its 43rd session, the discussion was based on documents submitted by the Director and the Government of the United Arab Emirates (documents FUND/EXC.43/3 and FUND/EXC.43/3/1).

4.14 The Executive Committee took note of the development in respect of the fishery claims. It noted with satisfaction the progress made in this case. The Committee considered, nevertheless, that it was not yet possible to approve the fisheries claim, either wholly or partially, nor was it possible at this stage to authorise payments of compensation. The Director was instructed to continue working in close co-operation with the authorities in the United Arab Emirates, and to report the developments to the Committee at its 44th session.

#### Developments since the Executive Committee's 43rd session

4.15 As suggested by the Director at the Executive Committee's 42nd session, the fishery assessment team was strengthened to include an Arabic speaking fisheries expert, Mr A White, who has wide experience in the region, spent five years in the United Arab Emirates and was involved in the development of the Fisheries Ministry of the Emirates.

4.16 Fisheries experts engaged by the Britannia P & I Club and the IOPC Fund visited Fujairah from 26 May to 5 June 1995. The purpose of their visit to Fujairah was to meet with the Government fisheries sub-committee, collect further information, meet with the individuals who physically filled in the assessment forms in respect of the individual claims, and search for any further evidence and elements of proof in support of the fisheries claims, in accordance with the instructions given by the Director following the decision of the Executive Committee at its 42nd session (cf document FUND/EXC.42/11, paragraph 3.5.14).

4.17 All information and documentation requested by the Director had been provided by the Government of Fujairah to the IOPC Fund's experts by the end of June 1995, to the extent that such information and documentation were available to the authorities.

4.18 The most important new documentation consisted of records pertaining to fish landings and fish market sales from 1993 and onwards. Unfortunately, no records had been found for the period before November 1993, and for this reason it was not possible for the experts to reconstruct the pre-spill variability of landings and sales. Nevertheless, the data provided permitted a more detailed analysis of the coastal fisheries in the affected region than had been possible previously. A reassessment of the claims could therefore be made on the basis of this data together with information collected earlier. As a result, the initial assessment was increased significantly by the experts.

4.19 As mentioned above, the Executive Committee instructed the experts to establish whether it would be possible to make an individual evaluation of the damage actually suffered by the individual claimants other than on the basis of a simple declaration made by the claimants or by other organisations; if such an individual assessment was not possible, the experts should examine whether or not it would be possible to make an assessment of the losses suffered by groups of fishermen (document FUND/EXC.42/11, paragraph 3.5.14). The experts have considered that it would not be possible, on the basis of the elements of proof available, to evaluate the damage suffered by individual claimants and they have therefore made an assessment of the losses suffered by groups of fishermen.

4.20 The most significant change in the assessment concerned the claims for loss of income from fishermen in areas which were not contaminated by oil. New evidence, both documentary and verbal, was made available regarding the interruption of fishing and the operation of fish markets before and after the spill. This evidence confirmed that economic losses related to a decline in the volume of sales had been experienced by fishermen from all parts of the east coast of the United Arab Emirates, and supported the assessment by the fisheries sub-committee. The experts have thus accepted that losses equivalent to an interruption period of ten fishing days has been sustained by fishermen to the south of Al Badiyah, while losses equivalent to an interruption period of 22 fishing days had been sustained by fishermen in Al Badiyah and to the north.

4.21 Following further examination of fisheries statistics provided by the Ministry of Agriculture and Fisheries of the United Arab Emirates, and after detailed discussions with the staff responsible for processing statistical data, the experts came to agree with the sub-committee in respect of both the period of interruption and the quantum of daily losses for one type of vessel (*tarads*) which makes up the major part of the fishing fleet. With respect to another type of fishing vessel ("lanshes"), the experts agree with the fisheries sub-committee concerning the period of interruption but do not agree with the sub-committee's assessment of the daily loss. In fact, the information provided has resulted in the experts revising downwards the estimated daily losses of these vessels due to the collapse of the lansh fishery, probably as a result of overfishing, prior to the *Seki* incident. Part of the claimed amount relating to the interruption of fishing is for wages paid by the owners of the fishing vessels to their crews during the period of interruption. Claims in respect of such wages have been rejected since these are included in the amounts claimed for loss of catches.

4.22 A major part of the amount assessed by the sub-committee (some 61% of the amount claimed) related to loss of or damage to nets and other fishing gear. In this regard also, the initial assessment has been revised upwards. Of the increase in the assessment (Dhs 635 737 or about £109 000), approximately two thirds relates to claims for losses of fish traps (*gargur*), which had been rejected in the initial assessment but for which there was a strong support through statements by a number of interviewed fishermen. Most of the remaining increase relates to claims for irreparable damage to fishing gears owned by fishermen whose homes lay outside of the area of contamination but who were fishing at the time of the incident off the affected coastline. There still remains a wide difference between the assessment of the IOPC Fund's experts and that of the fisheries sub-committee with regard to fishing gear losses. Less than 0.1% of fishing gear claims were substantiated by evidence of any type. In preparing their revised assessment of the property damage, the IOPC Fund's experts have therefore relied heavily on verbal evidence, including evidence provided by fishermen who had not themselves suffered losses, evaluated in the context of local fishing practices and the known movement of the spilled oil. The basis of the revised assessment is an analysis of the most probable losses which, due to the nature of the losses and local business practice, can not be verified in an objective way. There is also a great difference in the assessment of the unit costs in respect of which the experts maintain the view that the claimed amounts are highly exaggerated. The unit costs applied by the experts are based on

investigations into market prices in the area, supported by some material provided by the fisheries sub-committee.

4.23 In their reassessment, the experts engaged by the IOPC Fund and the Britannia P & I Club have used the information at their disposal and analytical models based on this information. On this basis, their best assessment of the total losses in respect of the fisheries claims amounts to Dhs 13 665 797 (£2.3 million), compared with Dhs 5.2 million (£890 000) initially assessed, revised to Dhs 6 572 707 (£1 123 500) in January 1995. Of the total amount assessed, Dhs 10 236 352 relates to loss of catches and sales due to interruption of fishing and Dhs 3 429 445 to loss of or damage to nets and other fishing gear.

4.24 After the consultation with the Director, the Britannia P & I Club has offered to pay the balance between the experts' previous assessment and their revised assessment, viz Dhs 7 093 090 (£1 214 600).

4.25 The Report of the fishery experts was communicated to the Government of Fujairah on 15 September 1995.

## **5 Claims in respect of clean-up operations**

5.1 After formal tendering procedures had been completed, two companies, one French and one Saudi Arabian, were engaged to remove oil remaining trapped in the sand and pebble sediments along the coast, the work being divided between them. Their contracts provided for payment on a lump sum basis. The operations began during the last week of August, and both contracts were completed by the second week of October 1994. It became evident, however, that the extent of oiling was greater than had been estimated when the contracts were concluded. For this reason, a further contract relating to additional clean-up operations was concluded with the French company which provided for payment on a daily rate basis. These operations are expected to be completed at the end of March 1995.

5.2 The French and Saudi Arabian clean-up contractors each submitted claims for Dhs 4.65 million (£795 000). After consultation with the Director, the Britannia P & I Club paid Dhs 4 247 000 (£726 000) and Dhs 4.65 million (£795 000) to these contractors, respectively. The reason for the payment to the French company being for less than the amount claimed is that some of the work which should have been carried out under the original lump sum contract was not completed but was transferred to the new daily rate contract. Payments totalling Dhs 4 073 180 (£889 300) have been made by the Club to the Government in respect of this daily rate contract for additional work.

5.3 The local contractor responsible for offshore recovery operations during the initial stages of the incident has submitted a claim for US\$6.0 million (£3.8 million). The Britannia P & I Club has made an advance payment of US\$1 million (£628 000) to this contractor. An examination of the claim carried out by the experts appointed by the Club and the IOPC Fund showed that, in their view, the amount claimed was excessive due to the calculation being based on inflated hire charges and because vessels and equipment were kept on hire longer than was considered reasonable.

5.4 The Government of Fujairah has submitted various claims in relation to clean-up operations and Government personnel costs, amounting to Dhs 10.8 million (£1.8 million). After consultation with the Director, the Britannia P & I Club effected advance payments totalling Dhs 4.74 million (£811 000).

5.5 Three claims totalling Dhs 17 640 334 (£3 million) have been presented for losses allegedly suffered in respect of, *inter alia*, loss of value of a domestic dwelling, interruption of beach sand extraction and lost income for a beach-side hotel. Questions relating to these claims have been forwarded to the Government of Fujairah, but as yet no further explanations have been received.

5.6 The advance payments made to the Government of Fujairah by the Britannia P & I Club in respect of the claims in respect of clean-up operations total Dhs 20 803 194 (£3.6 million).

5.7 The Britannia P & I Club has also paid Dhs 86 423 (£14 700) for the cost of advice to the Government of Fujairah on ship-to-ship transfer of the oil remaining in the *Seki* and other matters relating to the condition of the ship and the cause of the incident. In the Director's view these costs fall outside the concepts of "pollution damage" and "preventive measures" laid down in the Civil Liability Convention and the Fund Convention.

5.8 A claim has been submitted by Gulf Agency Company (GAC), as the local agent of the owner of *Seki*, for Dhs 753 745 (£129 000), in respect of the first phase of the clean-up operations. A payment of the same amount has been made by the Britannia P & I Club.

## **6 Claim in respect of legal fees**

6.1 At its 42nd Session the Executive Committee was informed that the Government of Fujairah had submitted a claim in respect of fees for legal advice following the incident in the amount Dhs 1 363 386 (£233 000). In accordance with the position taken by the Executive Committee (document FUND/EXC.42/11, paragraph 3.5.13), the Director has requested further information as to the nature of the work carried out by the lawyer involved.

6.2 Following further discussions with the Government of Fujairah, this claim is still under consideration.

## **7 Other claims**

Claims notified to the Court which have not yet been submitted to the Britannia P & I Club include claims, totalling some Dhs 2.5 million (£427 000), for additional losses to sectors of the economy other than fishing (such as losses by a hotel owner in Fujairah, fish transporters, fish traders and ice producers), and a claim for alleged damage to the environment in the amount of Dhs 59 million (£10.1 million).

## **8 Limitation proceedings and related issues**

8.1 The limitation amount applicable to the *Seki* is 14 million SDR (approximately £13.6 million). The Britannia P & I Club has established a limitation fund for the limitation amount in the Court of Fujairah by means of a letter of guarantee.

8.2 Through its agent (World-Wide Shipping Agency Limited), the owner of the *Seki* entered into a Memorandum of Agreement with the Government of Fujairah. Pursuant to this Memorandum, the owner has deposited US\$19.6 million (£12.3 million) with a bank in the United Arab Emirates. A claim presented by the Government can be paid out of this deposit even if it has been rejected by the Britannia P & I Club and the IOPC Fund. If such a payment were to be made for a rejected claim, the shipowner may take legal action in respect of that claim against the Club and the IOPC Fund in the competent court in the United Arab Emirates. The Government is obliged to refund to the shipowner the amount received towards any part of a claim not upheld by the court. So far, no claims have been paid under this procedure.

8.3 The Director has made it clear to the shipowner and to the authorities of the United Arab Emirates that the IOPC Fund is not bound by any agreement in respect of a claim unless that claim has been approved explicitly by the Fund or has been established by a final judgement rendered by a competent court in legal proceedings brought under Article IX of the Civil Liability Convention or Article 7.1 of the Fund Convention.

**9 Investigations into the cause of the incident**

The authorities of the United Arab Emirates have investigated the cause of the incident. The Director is studying the report of this investigation.

**10 Action to be taken by the Executive Committee**

The Executive Committee is invited to:

- (a) take note of the information contained in this document; and
  - (b) give the Director such instructions as it may deem appropriate concerning the handling of the claims arising out of this incident.
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