



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
47th session
Agenda item 3

FUND/EXC.47/6
19 February 1996

Original: ENGLISH

INCIDENTS INVOLVING THE IOPC FUND

SEKI

Note by the Director

1 Introduction

This document sets out the situation in respect of the *Seki* incident which occurred on 30 March 1994 off the port of Fujairah (United Arab Emirates). It describes the developments since the Executive Committee's 44th session, especially as regards fisheries claims (paragraphs 5.10-5.14), and deals with a recently presented claim for environmental damage (paragraph 9).

2 The incident

2.1 The tanker *Baynunah* (34 240 GRT), registered in the United Arab Emirates, and the Panamanian-registered tanker *Seki* (153 506 GRT) collided some nine miles off the port of Fujairah (United Arab Emirates). The *Baynunah* was in ballast at the time, whereas the *Seki* was 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.

2.2 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 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.

2.3 The spill affected various 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.

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

3 Clean-up operations

3.1 In the United Arab Emirates the response to the oil spill was organised by the Fujairah Port Authority, with advice from experts from the International Tanker Owners Pollution Federation Ltd (ITOPF), acting as technical advisers on behalf of the shipowner, the Britannia P & I Club and the IOPC Fund.

3.2 Three skimming vessels operated by a local contractor were engaged in offshore oil recovery operations. Additional clean-up resources were provided by the Abu Dhabi National Oil Company and the Government of Oman. Vacuum trucks and skimmers were used from shore to collect oil pooled against the coast.

3.3 The shoreline clean-up, initially conducted by local contractors, was suspended when it became clear that the oil had penetrated deeply into the coarse sand beaches. Trials were conducted to identify the optimum clean-up methods. Meanwhile, a considerable degree of natural cleaning took place as a result of wave and tidal action.

3.4 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. A further contract relating to additional clean-up operations was concluded with the French company which provided for payments on a daily rate basis. Some 11 000m³ of oily waste have been collected and will have to be disposed of.

3.5 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 United Arab Emirates, acting as technical advisers to the Government of Fujairah.

3.6 Throughout the clean-up operations, agreement on the completion of the cleaning of each site was 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 was not reached in respect of the last three sites where some oil was still present in the sand, and the operations were resumed in late November 1995 to clean these sites to the satisfaction of the local authorities.

4 Claims for compensation: general situation

United Arab Emirates

4.1 The Government of Fujairah has notified the Court of Fujairah of 30 claims amounting to Dhr 163 million (£28.6 million). The Government has so far, however, submitted only 19 claims to the Britannia P & I Club, totalling Dhr 98.3 million (£17.2 million), plus a claim for environmental damage for US\$15 983 610 (£10 million). These claims include one submitted by the Government of Fujairah on behalf of 743 fishermen for Dhr 36.9 million (£6.5 million). The Britannia P & I Club and the IOPC Fund have been given notice of a further 16 claims (ie 36 claims in all), although some of these claims have not yet been quantified.

4.2 The Britannia P & I Club has made payments to the Government of Fujairah totalling Dhr 35.4 million (£6.2 million), including payments of Dhr 13.7 million (£2.4 million) in respect of the fisheries claims.

Oman

4.3 The Government of Oman submitted a claim for OR100 564 (£168 000) 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 (£45 200) for fishery damage along the affected coastline of the Musandam peninsula. This claim was settled and paid by the Britannia P & I Club in November 1994 at OR92 279 (£154 400), after consultation with the Director.

5 Fisheries claims

Submission of claims and initial assessment

5.1 The fisheries claims referred to 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 the Government ministries involved, of the three municipalities within the affected area and of two fisheries co-operatives.

5.2 Experts appointed by the Britannia P & I Club and the IOPC Fund made a preliminary assessment of the losses suffered by fishermen. Since very little information had been presented by claimants, this 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. The experts estimated a total loss of Dhr 5.2 million (£911 900). In January 1995, the Britannia P & I Club paid this amount as an advance to the Government, after consultation with the Director. After clarification relating to the licensing of fishing vessels had been provided by the Government of Fujairah in January 1995, the assessment was adjusted to Dhr 6.6 million (£1.2 million). The balance of Dhr 1.4 million (£240 700) was paid to the Government by the Club in February 1995, again after consultation with the Director.

Consideration by the Executive Committee at its 42nd session

5.3 At its 42nd session, in April 1995, 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. 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 (document FUND/EXC.42/11, paragraph 3.5.11).

5.4 In the light of the discussions, the Executive Committee instructed 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 (document FUND/EXC.42/11, paragraph 3.5.14).

Revised assessment

5.5 Fishery experts engaged by the Britannia P & I Club and the IOPC Fund visited Fujairah from 26 May to 5 June 1995 to meet with the fisheries sub-committee of the Government of Fujairah, collect further information, meet with the individuals who actually 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 fishery claims. All information and documentation requested was provided by the Government of Fujairah to the experts by the end of June 1995, to the extent that such information and documentation were available to the authorities. The most important new documentation consisted of records pertaining to fish landings and fish market sales from 1993 and onwards.

5.6 On the basis of this data and information collected earlier, the experts carried out a more detailed analysis of the coastal fisheries in the affected region. On this basis their best assessment of the total losses in respect of the fishery claims amounted to Dhr 13.7 million (£2.4 million), compared with Dhr 5.2 million (£911 900) initially assessed and the adjusted assessment of Dhr 6.6 million (£1.2 million) made in January 1995.

5.7 After consultation with the Director, the Britannia P & I Club paid the difference between the experts' January 1995 assessment and their revised assessment, viz Dhr 7.0 million (£1.2 million).

Consideration by the Executive Committee at its 44th session

5.8 At the Executive Committee's 44th session held in October 1995, a number of delegations emphasised that the IOPC Fund acted within the framework of a mutual system and that it was necessary, therefore, that there were rules on the admissibility of claims which were respected by all Member States. These delegations also expressed their support for the policy as regards the need for evidence to substantiate the claims, as laid down by the Executive Committee in April 1995 (document FUND/EXC.44/17, paragraph 3.6.14).

5.9 At that session the Executive Committee reiterated its position that the IOPC Fund could pay compensation only to the extent that a claimant had demonstrated an actual loss supported by evidence which would enable the Fund's experts to form an independent opinion of the damage sustained. The Committee expressed the hope that further co-operation between the Government of Fujairah and the experts engaged by the IOPC Fund and the Britannia P & I Club would make it possible to arrive at a settlement of all claims, respecting the requirement laid down by the Committee in respect of evidence to support claims (document FUND/EXC.44/17, paragraph 3.6.16).

Response by the Government of Fujairah

5.10 In December 1995, the Government of Fujairah submitted a technical response to the revised assessment of the fishery claim made by the experts employed by the Britannia P & I Club and the IOPC Fund. The response disputed this assessment in several key areas, particularly in relation to the extent of fishing gear losses, the unit replacement values of various fishing gears, and the levels of income in the *lansh* fishery. This document has been considered in depth by these fishery experts.

5.11 The Government of Fujairah had challenged in several ways the analyses made by the fishery experts in the assessment of claims for fishing gear losses. Where the areas in dispute were subject to some degree of objective verification (for example movement of oil spill and periods of physical interruption of fishing), the experts were unable to modify their previous assessment as regards fishing gear losses. However, the Government of Fujairah had presented what appears to be new data

concerning the pre-spill distribution of fishing nets by area. The significance of these new data cannot be assessed by the experts until information is given on the source and date of these data. For this reason, further explanation of these data has been requested.

5.12 New information on fishing gear replacement costs had also been made available by the Government of Fujairah. As regards the cost of fishing nets the new information was consistent with the information used by the Britannia P & I Club and the IOPC Fund's experts in both previous assessments, although there remains a divergence of views regarding the rate by which the cost of new nets should be discounted to obtain their replacement value. With respect to the unit replacement cost for *gargurs* (fish traps) the new information led to the experts reassessing this item, with the recommendation that the unit replacement value for *gargurs* be raised from Dhs 95 to Dhs 110. This change increased the experts' assessment by Dhr 63 133 (£10 800).

5.13 The Government of Fujairah contested the low rate of *lansh* daily incomes used by the experts in the revised assessment, dependent on their demonstration that the *lansh* fishery had collapsed prior to the oil spill. The Government argued that the experts' conclusions were incorrect, since they had overlooked the impact of Ramadan in reducing the effectiveness of fishing effort, had not properly understood the origin of landings data and had underestimated the unit values of landings. Each of these points was investigated in detail by the experts, but they did not find anything which affected the validity of their revised assessment on this point.

5.14 For the reasons set out above, the experts engaged by the IOPC Fund and the Britannia P & I Club increased their assessment of the fishery claims by Dhr 63 133 (£10 800).

6 Claims in respect of clean-up operations

6.1 The French and Saudi Arabian clean-up contractors each submitted claims for Dhr 4.65 million (£815 500). After consultation with the Director, the Britannia P & I Club paid Dhr 4.2 million (£744 800) and Dhr 4.65 million (£815 500) to these contractors, respectively through the Government of Fujairah. Payments totalling Dhr 4.1 million (£714 300) were made by the Club to the Government in respect of the work carried out by the French company under the daily rate contract for additional work.

6.2 The local contractor responsible for offshore recovery operations during the initial stages of the incident submitted a claim for US\$6.0 million (£3.9 million). The Britannia P & I Club made an advance payment of US\$1 million (£644 000) to this contractor through the Government of Fujairah. 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.

6.3 The Abu Dhabi National Oil Company (ADNOC) also assisted in the initial stages of the clean-up operations and submitted a claim for Dhr 1.6 million (£287 000) in respect of work carried out and provision of specialised equipment. The Britannia P & I Club made an advance payment of Dhr 655 561 (£115 000) to the Government of Fujairah in respect of this claim. As a result of queries raised by the experts appointed by the Club and the Fund, ADNOC reduced the claimed amount to Dhr 1.4 million (£244 000). Experts appointed by the Club and the Fund are currently examining the additional information provided by ADNOC.

6.4 The advance payments made by the Britannia P & I Club to the Government of Fujairah in respect of the Government's own claims and those of other clean-up contractors total Dhr 20.8 million (£3.6 million).

7 Claim in respect of legal fees

7.1 The Government of Fujairah submitted a claim in respect of fees for legal advice following the incident in the amount Dhr 1.4 million (£239 100). The IOPC Fund requested further information as to the nature of the work carried out by the lawyers involved. This claim is still under consideration.

7.2 The Britannia P & I Club also paid Dhr 86 423 (£14 700) for the cost of advice to the Government of Fujairah on the 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.

8 Other claims not relating to environmental damage

8.1 Three claims totalling Dhr 17.6 million (£3.1 million) were presented for losses allegedly suffered in respect of, *inter alia*, loss of value of a house, interruption of beach sand extraction and lost income for a beach-side hotel. Questions relating to these claims were forwarded to the Government of Fujairah, but no further explanations have been received.

8.2 Claims notified to the Court which have not yet been submitted to the Britannia P & I Club include claims - totalling some Dhr 2.5 million (£438 400) - 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).

9 Claim for environmental damage

9.1 On 8 February 1996 a claim for compensation for environmental damage was presented to the Britannia P & I Club, for an amount of US\$15 983 610 (£10 million). The claim has not been formally submitted to the IOPC Fund.

9.2 The Britannia P & I Club has rejected the claim as not admissible under the Civil Liability Convention, since in the Club's view the assessment of compensation is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models. The Club has stated that the Convention only relates to quantifiable elements of damage.

9.3 The claim is based on a study made by Cooperative Insurance Consultancy Co Ltd, which has its head office in Jeddah (Saudi Arabia). The study refers to the Civil Liability Convention and the 1971 Fund Convention and the 1992 Protocols thereto and states: "It is generally accepted that, although no specific reference is made in either the Convention or the subsequent Protocols, costs incurred in conducting a Natural Resource Damage Assessment and remedial costs are determined as necessary by such a study are for consideration both under the CLC and the Fund. Thus is the concept of Environmental Damage recognised by both". The study also refers to the decision by the Court of Appeal in Messina in the *Patmos* case (Italy), in which the Court awarded compensation for environmental damage under the Civil Liability Convention, assessed on an equitable basis^{<1>}.

9.4 It is mentioned in the study that the economic losses suffered by individuals and Government agencies have been claimed separately.

9.5 The claim has been calculated on the basis of the so-called Jeddah method which is described in the study. The relevant part of the study relating to the application of the formula reads as follows:

<1>

It should be recalled that the total amount of compensation payable in the *Patmos* case fell below the limitation amount applicable to the ship. Since the IOPC Fund was not called upon to pay any compensation, it was not entitled to appeal against the Court of Appeal's judgement.

We have deliberately avoided bibliographic references in the preparation of this claim statement. Those concerned with such matters are all too familiar with the likely long term effects of a crude oil spill of this magnitude and there is not value in attempting to support necessary assumptions with historical data calibrated neither to the type of spill nor the affected environment.

Although costs incurred in a N.R.D.A and subsequent remedial costs form a valid basis of claim under the CLC and Fund it is felt that the uncertainty of total costs potential and the time factor involved make this an unattractive approach to settlement of this claim. There is too the concern that although survey driven the N.R.D.A is dependent on assumptions when determining remedial measures necessary and the likelihood of their success.

We have seen earlier that the "Jeddah Method" can produce a result approximating to that of an ecovalue assessment. This approach offers the advantages of simplicity and ease of application as well as probably being less costly in overall terms than an N.R.D.A coupled with the cost of subsequent remedial measures.

The cost formula of the Jeddah method is:

$$C = \frac{(F1 + F2 + F3)}{3} \times [(Rm) (V) + (Rpl) (V)]$$

where:

C = Total natural resource cost in US\$

F1 = Toxicity factor = $\frac{0.75 \times \text{API gravity}}{30}$ or

the value from table 1 if API gravity is not known

F2 = Degradability factor = $0.50 \times \frac{30}{\text{API gravity}}$ or

the value from table 1 if API gravity is not known

F3 = Dispersability factor, taken from table 1

Rm = Base rate for damaged marine resources according to degree of sensitivity shown in tables 2 and 3

Rpl = Base rate for damaged public lands according to the sensitivity of the land use categories as identified in tables 2 and 3

V = Volume of oil spilled (in gallons)

9.6 It is stated in the report that the following base data have been used and the following assumptions have been made.

Total oil spilled (for purposes of calculation)

A) Transient Oil

A quantity of oil passed into Omani and Iranian waters. The quantity cannot be determined. Oily sediment will have been deposited to lasting effect on the passage northwards, there was direct impact on offshore fishing grounds and there was transient pollution from this oil.

We allow a 10% credit of total oil spilled against this item.

B) Total Oil Spilled

16000 M.T = 117856 Bbls (from Bill of Lading figures)
 1 Bbl = 42 US gallons
 16000 M.T = 4,949,952 US gallons

C) Oil and Water Recovered

10235 bbls = 429,870 US gallons

We assume that of this 50% will have been water. We therefore take the net oil quantity recovered as 214,935 gallons.

For the purpose of calculation, therefore, we have a total volume of oil at;

"Gross" oil spilled	4,949,952 US gallons
Less 10% transient oil	<u>494,995</u>
	4,454,957
Less oil recovered	<u>214,935</u>
	4,240,022 US gallons

Characteristics of the Oil

API gravity 33.84 (from Bill of Lading)

F1 Toxicity factor = $\frac{0.75 \times \text{API gravity}}{30} = \frac{0.75 \times 33.84}{30} = 0.846$

F2 Degradability factor = $0.50 \times \frac{30}{\text{API gravity}} = 0.50 \times \frac{30}{33.84} = 0.443$

F3 Dispersability factor (from table 1) = 0.50

Sensitivity

We take 50% of affected marine environments as being of critical sensitivity with a base rate of \$5.75.

The other 50% we take as "sensitive" with a base rate of \$4.60.

All affected land environments we take as "sensitive" with a base rate of \$1.15.

9.7 As regards this claim, attention should be drawn to the Resolution adopted by the IOPC Fund Assembly in 1980 (Resolution N°3) which stated that "the assessment of compensation to be paid by the International Oil Pollution Compensation Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models".

9.8 At its 47th session, the Executive Committee was informed that the Government of Fujairah had notified to the court a claim for alleged damage to the environment (document FUND/EXC.42.6, paragraph 3.22). The Committee referred to the IOPC Fund's policy which had been laid down by the Assembly, namely that damage to the environment per se was not admissible whereas reasonable costs for reinstatement actually incurred or to be incurred qualified for compensation. The Committee referred to the summary of the IOPC Fund's policy as set out in paragraphs 3.22 and 3.23 of document FUND/EXC.42/6 (document FUND/EXC.44/17, paragraph 3.6.17); this summary is reproduced in paragraph 9.9 below.

9.9 The IOPC Fund's position in respect of the admissibility of claims relating to damage to the marine environment can be summarized as follows (documents FUND/WGR.7/4, paragraph 7.1 and FUND/A.17/23, paragraphs 7.3.5 and 7.3.6).

- (a) The IOPC Fund accepts claims which, in accordance with the terminology used in document FUND/WGR.7/4^{<2>}, relate to "quantifiable elements" of damage to the marine environment, for example:
 - (i) reasonable costs of reinstatement of the damaged environment; and
 - (ii) loss of profit (income, revenue) resulting from damage to the marine environment suffered by persons who depend directly on earnings from coastal or sea-related activities, eg loss of earnings suffered by fishermen or by hoteliers and restaurateurs at seaside resorts.
- (b)
 - (i) The IOPC Fund has consistently taken the position that claims relating to unquantifiable elements of damage to the marine environment cannot be admitted.
 - (ii) The Assembly has rejected claims for compensation for damage to the marine environment calculated on the basis of theoretical models.
 - (iii) Compensation can be granted only if a claimant has suffered quantifiable economic loss.
- (c)
 - (i) Damages of a punitive character, calculated on the basis of the degree of the fault of the wrong-doer and/or the profit earned by the wrong-doer, are not admissible.
 - (ii) Criminal and civil penalties for oil pollution from ships do not constitute compensation and do not therefore fall within the scope of the Civil Liability Convention and the Fund Convention.

9.10 In view of the foregoing, the Director takes the view that the claim for environmental damage presented by the Government of Fujairah is not admissible under the Civil Liability Convention and the Fund Convention since it is calculated on the basis of a theoretical model.

10 Limitation proceedings and related issues

The limitation amount applicable to the *Seki* is 14 million SDR (approximately £13.4 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.

11 Investigation 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.

^{<2>} For the purpose of that document, the expression "quantifiable elements" was taken to mean damage to the environment in respect of which the value of the damage can be assessed in terms of market prices; the expression "non-quantifiable elements" was taken to mean damage in respect of which the quantum of the damage cannot be assessed according to market prices.

12 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) give the Director such instructions as it may deem appropriate concerning the handling of the claims arising out of this incident; and
 - (c) consider the claim for environmental damage presented by the Government of Fujairah (paragraph 9 above).
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