



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
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Agenda item 4

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INFORMATION ON OTHER INCIDENTS

SEKI

Note by the Director

1 Introduction

Since the Executive Committee's 47th session there have been certain developments as regards a claim for environmental damage presented by the Government of Fujairah to the P & I insurer, Britannia Steam Ship Insurance Association Limited (the Britannia P & I Club), in connection with the *Seki* incident which occurred on 30 March 1994 off the port of Fujairah (United Arab Emirates). Although the Committee decided at that session to postpone further consideration of the *Seki* incident to its 49th session in June 1996, the Director has felt that the Committee should be informed of these developments already at the 48th session.

2 Claim for environmental damage

2.1 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.

2.2 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 relates only to quantifiable elements of damage.

2.3 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 1969 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>}.

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

2.5 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:

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

^{<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.

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)

2.6 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.

3 Consideration at the Executive Committee's 47th session

At the Executive Committee's 47th session, the Director presented a document which dealt with, inter alia, the claim for environmental damage (document FUND/EXC.47/6). At the request of the Government of the United Arab Emirates, the Committee decided to postpone its further consideration of the *Seki* incident to its session in June 1996 (document FUND/EXC.47/14, paragraph 3.5).

4 IOPC Fund's position in respect of claims for environmental damage

4.1 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".

4.2 At its 44th session, the Executive Committee was informed that the Government of Fujairah had notified the court of a claim for alleged damage to the environment. 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 also 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 4.3 below.

4.3 The IOPC Fund's position in respect of the admissibility of claims relating to damage to the marine environment can be summarised 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.

<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.

- (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.

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

5 Limitation proceedings

The limitation amount applicable to the *Seki* is 14 million SDR (approximately £13.3 million). The Britannia P & I Club has established a limitation fund in the Court of Fujairah by means of a letter of undertaking.

6 Special deposit made by the shipowner

6.1 Through its agent (World-Wide Shipping Agency Limited), the owner of the *Seki* entered into a Memorandum of Agreement with the Government of Fujairah on 20 June 1994. Pursuant to this Memorandum, the owner has deposited US\$19.6 million (£12.6 million) with a bank in the United Arab Emirates. Claims presented by the Government can be paid from this deposit even if they have 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 could take legal action in respect of that claim against the Club and the IOPC Fund in the competent court in the United Arab Emirates. Under the Memorandum, the Government of Fujairah is obliged to refund to the shipowner the amount received towards any part of a claim not upheld by the court.

6.2 Having been informed of the on-going discussions concerning the conclusion of such a Memorandum, the Director expressed to the shipowner the IOPC Fund's concern, since it would create a system of payments at variance with the Civil Liability Convention and the Fund Convention and would in fact result in the establishment of two limitation funds. He also pointed out that under Article III.4 of the Civil Liability Convention no claims for compensation should be made against the shipowner otherwise than in accordance with the Convention, and that the intention of the international legislator had been to channel all claims against the shipowner within the Convention.

6.3 In a letter dated 24 June 1994, the Director made it clear to the authorities of the United Arab Emirates that this Memorandum constituted a private arrangement and would not affect the legal position of the IOPC Fund. He also stated in that letter that the IOPC Fund was not bound by any agreement in respect of a claim unless that claim had been approved explicitly by the Fund or had 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. A copy of this letter was forwarded to the owner of the *Seki*.

6.4 The Director was informed on 25 March 1996 that the Government of Fujairah had drawn upon the deposit made by World-Wide Shipping Agency Ltd in respect of the claim relating to environmental damage for a total of US\$15 983 610 (£10 million), which corresponds to the amount claimed (cf paragraph 2.1 above).

6.5 In view of this development, the Director reminded the Government of Fujairah on 27 March 1996 of the IOPC Fund's position in respect of claims for environmental damage.

6.6 It is expected that the shipowner will take legal action against the Britannia P & I Club and the IOPC Fund to recover the amount paid from the above-mentioned deposit to the Government of Fujairah

in respect of the environmental damage claim. If such action were brought, and subject to any instructions which the Executive Committee may give him, the Director intends to oppose the action on behalf of the IOPC Fund.

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

The Executive Committee is invited to take note of the information contained in this document.
