



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
49th session
Agenda item 3

71FUND/EXC.49/6
10 June 1996

Original: ENGLISH

INCIDENTS INVOLVING THE IOPC FUND

SEKI

Note by the Director

1 Introduction

1.1 At its 47th session, the Executive Committee had been presented with a document by the Director giving a general outline of the situation in respect of the claims arising out of the *Seki* incident which occurred on 30 March 1994 off the Port of Fujairah (United Emirates). The document (document FUND/EXC.47/6) dealt with, *inter alia*, a claim for environmental damage submitted by the Government of Fujairah. 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).

1.2 In view of certain developments the Director nevertheless submitted certain aspects of this incident to the Executive Committee for consideration at its session in April 1996 (48th session), namely certain questions relating to the claim by the Government of Fujairah for environmental damage.

1.3 The present document sets out the situation in respect of this incident, with particular emphasis on the claim for environmental damage.

2 Claims for compensation: general situation

2.1 United Arab Emirates

2.1.1 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 totalling Dhr 98.3 million (£17.2 million) to the shipowner's P & I insurer, the Britannia Steam Ship Insurance Association Ltd (the Britannia P & I Club), 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.

2.1.2 The Britannia P & I Club has made payments to the Government of Fujairah totalling Dhr 36.4 million (£6.5 million), including payments of Dhr 13.7 million (£2.4 million) in respect of the fishery claims.

2.2 Oman

The Government of Oman submitted a claim for OR100 564 (£168 000) for the cost of surveillance activities, and for 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.

3 Fishery claims

Submission of claims and initial assessment

3.1 The fishery 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 fishery co-operatives.

3.2 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

3.3 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).

3.4 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

3.5 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 fishery 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.

3.6 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.

3.7 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

3.8 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).

3.9 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 concerning evidence to support claims (document FUND/EXC.44/17, paragraph 3.6.16).

Response by the Government of Fujairah

3.10 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.

3.11 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 the movement of the oil spill and the 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 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.

3.12 New information on fishing gear replacement costs has 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).

3.13 The Government of Fujairah contested the low rate of *lansh* daily incomes used by the experts in the revised assessment. The experts had considered that the available data demonstrated that the *lansh* fishery had collapsed prior to the oil spill and that this was the reason why the daily income was low. 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.

3.14 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).

4 Claims in respect of clean-up operations

4.1 As regards the clean-up operations, since the Executive Committee's 47th session progress has been made in cleaning the last three sites where it had previously not been possible to reach agreement with the local authorities. After further work to remove oil present in the sand had been carried out and following an inspection on 21 April 1996, the local authorities confirmed that the sites had been cleaned to their satisfaction.

4.2 A French and a Saudi Arabian clean-up contractor 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 5.1 million (£909 100) 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.

4.3 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.

4.4 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 the 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). This claim is still under consideration.

4.5 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).

5 Claim in respect of legal fees

5.1 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.

5.2 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 on 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.

6 Other claims not relating to environmental damage

6.1 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 explanations have been received.

6.2 Claims of which the Court has been notified but 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 claimed by a hotel owner in Fujairah, fish transporters, fish traders and ice producers).

7 Claim for environmental damage

7.1 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.

7.2 The Britannia P & I Club 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.

7.3 The claim is based on a study made by Cooperative Insurance Consultancy Co Ltd, a company 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>}.

<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.

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

7.5 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^{<2>} 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:

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

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)

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

<2> Natural resource damage assessment.

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.

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

8.1 Reference is made 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".

8.2 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).

8.3 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^{<3>}, 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.

8.4 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.

<3>

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.

9 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.

10 Special deposit made by the shipowner

10.1 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 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 or 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.

10.2 Having been informed of the on-going discussions concerning the conclusion of such a Memorandum, the Director informed the shipowner of the IOPC Fund's concern, since the Memorandum 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.

10.3 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*.

10.4 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 7.1 above).

10.5 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.

11 Consideration by the Executive Committee at its 48th session

11.1 Although the Executive Committee had decided at its 47th session, at the request of the Government of the United Arab Emirates, to postpone its further consideration of the *Seki* incident to its 49th session, the developments in respect of the deposit made by World-Wide Shipping Agency Ltd were brought to the attention of the Committee at its 48th session.

11.2 The Executive Committee referred to the IOPC Fund Resolution N°3 and to the policy of the IOPC Fund 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.

11.3 The Executive Committee endorsed the Director's view that the claim for environmental damage presented by the Government of Fujairah to the Britannia P & I Club was not admissible under the Civil Liability Convention and the Fund Convention since it was calculated on the basis of a theoretical model.

11.4 The Executive Committee noted that it was expected that the shipowner would 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. The Committee instructed the Director that, if such an action were brought, he should oppose the action on behalf of the IOPC Fund (document FUND/EXC.48/6, paragraph 4.2.9).

12 Developments since the Executive Committee's 48th session

12.1 So far, the IOPC Fund has not been informed of any legal action against the Britannia P & I Club and the Fund by World-Wide Shipping Agency Ltd to recover the amount paid from the deposit referred to in paragraph 10.4 above.

12.2 The IOPC Fund's lawyer in the United Arab Emirates has examined whether a claim relating to environmental damage of the type presented by the Government of Fujairah would be admissible under the law of the United Arab Emirates. He has expressed the view that the courts in the United Arab Emirates require that the claimant proves that he has actually suffered an economic loss and in addition provides evidence of the quantum of his loss. In his opinion, claims based on a theoretical formula of the type used for the calculation of the claimed amount in this case would not be admissible.

13 Action to be taken by the Executive Committee

The Executive Committee is invited:

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