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COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
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Agenda item 3

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INCIDENTS INVOLVING THE 1971 FUND

SEA EMPRESS

Note by the Director

Summary:	There have been only a few developments in respect of the claims situation. A number of claims have been submitted which relate to losses allegedly suffered as a result of the closure or disruption of the normal operation of the Port of Milford Haven. Criminal prosecutions were brought against the Milford Haven Port Authority and the Harbour Master in Milford Haven. A full trial was not held, as a result of pleas by the defendants being accepted by the prosecutor. The Port Authority was sentenced to pay a fine of £4 million. The 1971 Fund's experts are continuing their consideration of the various issues relating to the possibility of the Fund's taking recourse action against third parties.
Action to be taken:	Decide in respect of the claims relating to losses allegedly suffered as a result of the closure of the port or the disruption of the port operations.

1 Introduction

1.1 This document sets out the developments as regards claims for compensation arising from the *Sea Empress* incident which occurred on 15 February 1996 in the entrance to Milford Haven in South Wales (United Kingdom). The document also addresses the cause of the incident and related issues.

1.2 With respect to the incident, the impact of the spill, the clean-up operations and the effects on fishery and tourism, reference is made to documents 71FUND/EXC.52/7, 71FUND/EXC.55/7, 71FUND/EXC.57/6, 71FUND/EXC.58/6 and 71FUND/EXC.59/8.

2 Claims situation

2.1 General situation

As at 31 December 1998, 1007 claimants had presented claims for compensation for a total of £44 027 655. Claims have been approved for a total of £15 445 610. Payments have been made to 728 claimants totalling £15 217 866, of which £6 866 809 has been paid by the Skuld Club and £8 351 057 by the 1971 Fund. Cheques for a further £227 744 are available to claimants.

2.2 Recent developments

2.2.1 There have been only limited developments in respect of the claims situation since the Executive Committee's 59th session.

2.2.2 The major development relates to a claim by the French Government for FFr1 491 337 (£158 520) for costs incurred in providing two vessels to assist the United Kingdom Government with operations to recover oil from the sea. This claim was settled at FFr1 239 583 (£131 960) and was paid (plus interest) on 31 December 1998. The claimed amount was not accepted in full since the Director considered that the rate claimed for one of the vessels was too high.

2.2.3 In May 1998 the Maritime and Coastguard Agency of the United Kingdom Department of the Environment, Transport and the Regions submitted a preliminary claim for £11 356 443 relating to the costs incurred by the Marine Pollution Control Unit (MPCU) and contractors engaged by MPCU as a result of the clean-up operations incurred following the *Sea Empress* incident. This claim is being assessed by the experts engaged by the Skuld Club and the 1971 Fund. Meetings will be arranged between representatives of the Maritime and Coastguard Agency and the 1971 Fund's experts to discuss this claim.

2.2.4 Final settlements have been reached in respect of the majority of the claims presented. It has not been possible to conclude settlements with all claimants and therefore some claimants may pursue their claims in court.

2.3 Claims for fees

2.3.1 One hundred and twenty-three claims for fees have been received in respect of work carried out by a firm of loss assessors which represents a large number of claimants. These claims, totalling £553 690, are being reviewed by experts ("costs draftsmen") engaged by the Skuld Club and the 1971 Fund. Further claims for fees are expected.

2.3.2 It will be recalled that the 1971 Fund's policy in respect of fees for work carried out by claimants' advisers was laid down by the Executive Committee at its 37th session. The Committee decided that reasonable fees for work done would be considered, but that fees would not be paid on a contingency or percentage basis. The Committee took the view that the question of whether and to what extent fees were payable should be assessed in connection with the examination of a particular claim, taking into account the necessity for the claimant to use expert advice, the usefulness of the work carried out by the expert, the quality of that work, the time needed and the normal rate for work of that kind (document FUND/EXC.37/3, paragraph 4.2.21).

2.4 Time-bar

It should be noted that further claims against the 1971 Fund will become time-barred on or shortly after 15 February 1999.

3 Claims relating to costs allegedly incurred or losses allegedly suffered as a result of salvage operations, port closure or vessel traffic restrictions

3.1 Background

3.1.1 At its 53rd session the Executive Committee noted that a claim had been presented by a county fire brigade for expenses incurred in providing fire fighting and emergency stand-by cover during the salvage operations. The Committee decided that the admissibility of this claim should not be considered until the details of any salvage claim were known (document 71FUND/EXC.53/12, paragraph 3.5.35). As nearly three years have passed since the incident and no salvage claim has been presented, the Committee is invited to reconsider this claim.

3.1.2 Several pure economic loss claims have been submitted relating to the closure of the port of Milford Haven. The Executive Committee is invited to examine also these claims.

3.1.3 The sequence of events of the incident can be summarised as follows:

> The *Sea Empress* ran aground in the entrance to Milford Haven on 15 February 1996. It was established immediately after the grounding that four cargo tanks and several ballast tanks had been ruptured and an initial loss of around 6 000 tonnes of crude oil was reported. Although quickly refloated, the tanker listed badly and was anchored to await another tanker into which oil could be transferred. During strong winds in the night of 16 February, the *Sea Empress* grounded again with a further leakage of oil. The ship was refloated at high tide on 17 February but went aground that evening off St Ann's Head, causing a fresh release of oil. In continuing strong winds, the tanker went aground again in the morning of 18 February, but with no reported loss of oil at that time. Oil was lost at each subsequent low tide, however, with the largest releases occurring probably around midday and midnight on 19 February (the latter being estimated at 30 000 tonnes). By the afternoon of 19 February it was believed that only three tanks remained intact. The *Sea Empress* was finally refloated on the high tide in the evening of 21 February and moved to a jetty in Milford Haven. The greatest release of heavy fuel oil occurred that evening while the tanker was alongside the jetty. Steps were taken to remove fuel oil from ruptured tanks, and 500 tonnes of bunkers were transferred to another vessel at the jetty. Between 24 February and 3 March the remaining cargo, some 58 000 tonnes, was discharged and delivered to the Texaco refinery. The *Sea Empress* was towed out of Milford Haven on 27 March.

3.1.4 The policy adopted by the 1971 Fund as regards the admissibility of claims for the cost of salvage operations can be summarised as follows:

> Salvage operations may in some cases include an element of preventive measures. Such operations can be considered as *preventive measures* only if the primary purpose is to prevent *pollution damage*. If the operations have another purpose, such as salving hull and cargo, the costs incurred are not admissible under the Conventions. If the activities are undertaken for the purpose of both preventing pollution and salving the ship and cargo, but it is not possible to establish with any certainty the primary purpose of the operations, the costs are apportioned between pollution prevention and other activities. The assessment of compensation for activities which are considered to be *preventive measures* is not made on the basis of the criteria applied for assessing salvage awards; the compensation is limited to costs, including a reasonable element of profit.

3.2 Claim by county fire brigade

3.2.1 A claim for £150 000 has been presented by a county fire brigade for expenses incurred in providing fire fighting cover during the salvage operations. The claim includes costs for labour and the use of vehicles. The fire brigade has given the following information in support of its claim:

The fire brigade's intervention had two distinct phases, one whilst the *Sea Empress* was at the entrance of Milford Haven Port and the second whilst she was alongside the jetty inside the port of Milford Haven. Throughout the first phase, the fire brigade staff manned fire-fighting tugs in the vicinity of the *Sea Empress* to provide fire fighting cover for the tugs which were holding the tanker which was continuously leaking crude oil into the sea, and the operations to salve the tanker and her cargo, and to react in the event of fire or explosion. When the tanker was alongside the jetty it was found that the ship was severely damaged and the operation to tranship the remaining crude oil to other tankers alongside the *Sea Empress* was technically difficult and potentially hazardous. During the second phase, at the request of the Milford Haven Port Authority, the fire brigade provided 24 hour emergency standby cover for this operation.

The fire brigade also provided safety cover for helicopters engaged in the salvage operations, transport for helicopter crews, water supply to the jetty, lighting units to beach cleaning parties and advice on safe working practices and decontamination.

Throughout the clean-up operations the fire brigade was a member of the safety group within the Joint Response Centre (JRC) and maintained a continuous presence of at least two fire brigade officers, although on occasions this presence increased to six officers. One of the duties of the safety group was to identify potential hazards and to react physically or to prepare comprehensive contingency plans to deal with the potential emergencies. On at least two occasions these plans were implemented when it was considered that, due to the severe weather conditions in the area, there was a real possibility that the ship would break up. On these occasions measures were taken to position men and equipment near village communities that might have to be evacuated. The fire brigade officers at the JRC also provided advice on the method for the transhipment of the cargo and were amongst those who authorised the transhipment of the cargo from the *Sea Empress.*

3.2.2 In the Director's view the major part of the operations carried out by the fire brigade was directed towards providing a fire fighting capability during the salvage operation, supporting the salvage and search and rescue operation and the precautionary evacuation of the local population from St Ann's Head. He considers therefore that, with the exception of the cost of providing lighting units to beach cleaning parties, which represents only a minimal amount of the claim, the fire brigade's activities related mainly to operations which had as their primary purpose the salvage of the *Sea Empress* and her cargo or which were aimed at protecting the population in the event of fire and explosion. The Director proposes, therefore, that this claim should be rejected, except for the item relating to the cost of providing lighting units to the beach cleaning parties, which in his view is admissible in principle.

3.3 Claims for demurrage<1> and losses arising out of delay

3.3.1 Five claims have been received for losses amounting to £31 900 allegedly suffered as a result of delay due to closure of the port or restrictions on ship movements. These include claims by voyage charterers for demurrage paid to shipowners, by a shipowner who has only been able to recover demurrage from his charterer at one half of the normal rate and by a time charterer for recovery of hire paid for time lost due to delayed departure of the vessel on charter to him.

3.3.2 It will be recalled that at its 36th session the Executive Committee considered the following claims as admissible in principle in connection with the *Aegean Sea* incident (Spain, 1992) (document 71FUND/EXC.36/10, paragraph 3.3.10):

<1> Demurrage: Compensation payable at an agreed rate by a voyage charterer to a shipowner when a vessel fails to load and discharge cargo within the time stipulated in the charterparty.

(a) a claim by the time charterer of a vessel for the recovery of hire payments made to the shipowner, for three days, since the vessel had been detained in La Coruña while the port had been closed by the authorities and therefore could not be used;

(b) a claim by a shipowner relating to six days' loss of hire, due to the fact that the closure of the port of La Coruña prevented his ship, which was to be launched from a repair slip, from sailing;

(c) a claim by an operator of a passenger ferry relating to losses suffered whilst the ferry service had to be suspended as a result of the incident and losses resulting from a reduction in the number of passengers carried during the period thereafter.

3.3.3 In the case of the *Shinryu Maru N°8* incident (Japan, 1995), the charterer of a bulk carrier presented a claim for the damage caused by the delay in returning the ship to its owner while the hull of the vessel was cleaned. The owner of the bulk carrier presented a claim for this cleaning operation. The charterer of the *Shinryu Maru N°8* paid this claim in full and presented a subrogated claim in an amount of $3 103 (£1 900). This claim was settled at the amount claimed (document 71FUND/EXC.55/12, paragraph 5.3).

3.3.4 It should be noted that in the *Aegean Sea* case the port was closed because there were large quantities of oil in the port area. It was logical therefore to consider the losses covered by the claims referred to in paragraph 3.3.2 above as losses caused by contamination. As for the *Shinryu Maru N°8* case, the vessel in question had been contaminated and the delay was a consequence of damage to property.

3.3.5 The Milford Haven Port Authority has confirmed that the port was closed "as a result of the port emergency in connection with the *Sea Empress* salvage" as follows:

15 February 1996	2018	Port closed
16 February 1996	0856	Port opened - east channel only
	1700	Port closed
17 February 1996	0700	Port opened - east channel only
	1814	Port closed
18 February 1996	0700	Port opened - east channel only
	0830	Port closed
	1717	Port opened - east channel only
20 February 1996	1740	Port closed
	1950	Port opened - east channel only
21 February 1996	1615	Port closed
22 February 1996	0050	Port opened

3.3.6 In the Director's view, the fact that the Milford Haven Port Authority used the expression "salvage" is not decisive, since it is used in a general sense.

3.3.7 The deep water channel (west channel) leading to the port of Milford Haven was closed until the *Sea Empress* was removed, since the ship obstructed the traffic. The shallower east channel was closed initially at night and later during critical periods. In the *Sea Empress* case the closure of the port of Milford Haven and the traffic restrictions were not necessitated by clean-up operations or preventive measures undertaken in the port area.

3.3.8 In the Director's view, the losses allegedly suffered by these claimants in the *Sea Empress* case were not caused by contamination, nor can these losses be considered as damage caused by

preventive measures, since they were a result of a decision by the Port Authority which was not directly linked to the contamination or to preventive measures but taken for reasons of safety of navigation. For this reason the Director considers that there is not a reasonable degree of proximity between the contamination resulting from the incident and the losses covered by these claims and that these claims should be rejected.

3.4 Claim by Elf UK Oil Ltd

3.4.1 Elf UK Oil Ltd ("Elf") has presented a claim for £119 666 plus US$618 138 (£375 000). This claim is composed of various elements.

3.4.2 Elf has stated that it has received six claims for demurrage, totalling £21 309 plus US$28 804, and that it expects to receive a further five claims for demurrage, totalling £25 279. The basis for the claim by Elf is that the ships in question were allegedly delayed as a result of the vessel traffic restrictions in the port of Milford Haven.

3.4.3 In addition, Elf has maintained that, as a result of the depth restrictions due to the closure of one of the entrances to Milford Haven, Elf was unable to utilise the VLCC *Olympic Flame* which it had chartered for a voyage to Milford Haven and was therefore obliged to sub-charter the vessel to another charterer, thereby incurring a loss of US$56 132. Elf has further stated that it had to charter two smaller replacement vessels at a cost of US$222 105, which allegedly incurred costs over and above those which would have been incurred for the charter of the *Olympic Flame*.

3.4.4 Elf has alleged that a delivery of Brent crude required for blending with Oxberg crude, a more expensive feedstock, was delayed by seven days as a result of disruption due to the closure of the port and traffic restrictions. Elf has estimated that the cost differential of using only Oxberg crude rather than blending it with Brent crude and the subsequent purchase of further supplies of Oxberg when Brent became available was US$262 582 (£159 000).

3.4.5 Elf has further alleged that, as a result of a restricted supply of planned crudes, the refinery's throughput was reduced. Elf has submitted a graph allegedly showing that there was a reduction of throughput of 3% during the period 20 - 24 February 1996, which according to Elf is equivalent to a loss of US$29 802 (£18 000).

3.4.6 For the reasons set out in paragraph 3.3.8, the Director takes the view that the items dealt with in paragraphs 3.4.2 - 3.4.5 should be rejected.

3.4.7 Elf has claimed compensation of US$18 528 for the additional cost of the charter of a double-hulled vessel at a premium rate. It has been stated that this premium rate was paid as a result of a combination of a decision to charter a double-hulled vessel and the shipowner's reluctance "at the time to take on voyages to Milford Haven due to the circumstances". Elf has also stated that the double-hulled vessel was chartered "as a safeguard against possible risks, considering that the highest standards would be prudent in the circumstances". In the Director's view these costs cannot be considered as falling within the definition of "pollution damage" and that this part of the claim should be rejected.

3.4.8 Elf has reserved the right to submit further claims in respect of potential liabilities towards various customers for late deliveries of cargoes. So far no such claims have been received. In any event, the Director takes the view that claims for such losses are not admissible for compensation.

3.4.9 Elf has claimed £2 000 for the extra costs incurred as a result of emergency lightering of its vessel the *Star Bergen*. According to Elf, the *Star Bergen* was being loaded in Milford Haven when she was identified as a suitable vessel to take part in the transfer of oil from the *Sea Empress*. The claimed amount relates to the estimated costs of part loading and subsequent discharging of this cargo. It is understood that the *Star Bergen* was mobilised with a crew to lighter the *Sea Empress* while she was aground off St Ann's Head. The lightering operation, however, was conducted once the *Sea Empress*

was alongside a jetty. It appears to the Director that this item relates to operations with a dual purpose and that, therefore, part of the costs (say 50%) would be admissible.

3.4.10 Elf has also claimed compensation for £70 599 for certain expenses allegedly incurred in connection with its participation in the oil combatting operations. Elf has been invited to provide further information concerning these items, which appear to be admissible in principle.

4 Investigations into the cause of the incident and related issues

4.1 An investigation into the *Sea Empress* incident was carried out by the Marine Accident Investigation Branch (MAIB) of the United Kingdom Department of Transport. The report of the Chief Inspector of Marine Accidents into the grounding and subsequent salvage of the *Sea Empress* was published in March 1997. The purpose of the investigation was to determine the circumstances and causes of the accident, with the aim of improving the safety of life at sea and avoiding accidents in the future. The report did not attempt to apportion liability, nor to apportion blame, except in so far as was necessary to achieve the fundamental purpose. A summary of the MAIB report was set out in paragraphs 3.1.2 and 3.1.3 of document 71FUND/EXC.58/6.

4.2 The Commissioner of Maritime Affairs of the Republic of Liberia published a report of its investigation into the grounding of the *Sea Empress*. The report was summarised in paragraph 3.2 of document 71FUND/EXC.58/6.

4.3 Further information provided by the shipowner concerning the incident is contained in document 71FUND/EXC.58/6/Add.1 which was considered by the Executive Committee at its 58th session. The Committee's discussion was summarised in the Record of Decisions (document 71FUND/EXC.58/15, paragraphs 3.6.5 - 3.6.24).

4.4 At its 58th session, the Executive Committee endorsed the Director's opinion that, in the light of the substantial documentation provided by the shipowner and the advice received from the 1971 Fund's legal and technical advisers, there were no grounds upon which the 1971 Fund could challenge the shipowner's right to limit his liability. The Committee decided, therefore, that the 1971 Fund should not challenge that right. The Committee further decided that there were no grounds on which the 1971 Fund could oppose the shipowner's right of indemnification under Article 5.1 of the 1971 Fund Convention (document 71FUND/EXC.58/15, paragraph 3.6.25).

4.5 The shipowner has commenced limitation proceedings and taken legal action against the 1971 Fund to prevent his claim for indemnification under Article 5.1 of the 1971 Fund Convention becoming time-barred.

4.6 Following the incident criminal prosecutions were commenced by the United Kingdom Environment Agency against two defendants, namely the Milford Haven Port Authority (MHPA) and the Harbour Master in Milford Haven at the time of the incident. Both defendants faced a charge that they caused polluting matter, namely crude oil and bunkers, to enter controlled waters, contrary to Section 85(1) of the Water Resources Act 1991, and that the discharge of crude oil and bunkers amounted to public nuisance. More particularly, the prosecution alleged that MHPA failed in its duties under the Milford Haven Conservancy Act 1983 properly to regulate navigation in the Haven and properly to prevent or reduce the risk of discharge of oil, by inadequately regulating or managing the navigation and/or pilotage of large deep-draughted oil tankers. It was also alleged that, under the Pilotage Act 1987, MHPA failed to provide proper pilotage services for the Haven in that it caused an insufficiently trained and qualified pilot to perform an act of pilotage, alone, on the *Sea Empress*, thereby endangering the marine and coastal environment and posing a danger to public safety. The Harbour Master was accused of failing in his duty safely to control and regulate shipping at the entrance to and within the port.

4.7 The criminal trial began at Cardiff Crown Court on 12 January 1999 and was originally expected to last for a number of weeks. The Director and the 1971 Fund's legal advisers intended to monitor closely the criminal proceedings.

4.8 At the opening of the criminal trial on 12 January 1999, the Harbour Master pleaded not guilty, and the plea was accepted by the Environment Agency. The Milford Haven Port Authority pleaded guilty to the charge under the Water Resources Act 1991 of causing or permitting polluting matter, namely oil and bunkers, to enter controlled waters, the penalty for which is imprisonment for a term not exceeding two years, or a fine, or both. The Port Authority pleaded not guilty to all other charges. The pleas were accepted by the Environment Agency. As a result, the full trial did not take place. On 15 January 1999, sentence was passed: the Milford Haven Port Authority was ordered to pay a fine of £4 million and to pay £825 000 towards the prosecution costs. The Port Authority may make an application to the Court of Appeal for leave to appeal against sentence.

4.9 As instructed by the Executive Committee at its 58th session, the Director is continuing to consider, with the assistance of the 1971 Fund's legal and technical advisers, whether the 1971 Fund should take recourse action against third parties in order to recover the amounts paid by it in compensation (document 71FUND/EXC.58/15, paragraph 3.6.27).

4.10 The 1971 Fund's solicitors and its legal counsel have advised the Director that the Fund's right of recourse is subject to a time-bar period of six years from the date of the incident.

5 Action to be taken by the Executive Committee

The Executive Committee is invited:

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

(b) to decide as to the admissibility of the claims dealt with in section 3; and

(c) to give the Director such instructions in relation to this incident as it may deem appropriate.