INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
9th session
Agenda item 6

92FUND/EXC.9/12
27 October 2000
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RECORD OF DECISIONS OF THE NINTH SESSION OF THE EXECUTIVE COMMITTEE

(held from 23 to 27 October 2000)

Chairman:	Professor L S Chai (Republic of Korea)
Vice-Chairman:	Mr J Wren (United Kingdom)

Opening of the session

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 92FUND/EXC.9/1.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

Canada	Latvia	Singapore
Denmark	Liberia	Spain
France	Marshall Islands	Tunisia
Germany	Mexico	United Kingdom
Greece	Republic of Korea	Venezuela

The Executive Committee took note of the information given by the Director that all the above-mentioned members of the Committee had submitted credentials which were in order.

2.2 The following Member States were represented as observers:

Algeria	Cyprus	Norway
Australia	Finland	Panama
Bahamas	Grenada	Sweden
Belgium	Ireland	United Arab Emirates
China (Hong Kong Special Administrative Region)	Italy	Uruguay
	Japan	Vanuatu
Croatia	Netherlands	

2.3 The following non-Member States were represented as observers:

States which have deposited instruments of ratification, acceptance, approval or accession to the 1992 Fund Convention:

Antigua and Barbuda	India	Russian Federation
Argentina	Malta	Slovenia
Fiji	Morocco	Tonga
Georgia	Poland	Trinidad & Tobago

Other States

Brazil	Estonia	Peru
Cameroon	Ghana	Saudi Arabia
Chile	Malaysia	Turkey
Colombia	Nigeria	United States
Ecuador		

2.4 The following intergovernmental organisations and international non-governmental organisations were represented as observers:

Intergovernmental organisations:
International Oil Pollution Compensation Fund 1971 (1971 Fund)
International Maritime Organization (IMO)
European Commission (EC)

International non-governmental organisations:
Comité Maritime International (CMI)
European Chemical Industry Council (CEFIC)
International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)
International Group of P & I Clubs
International Tanker Owners Pollution Federation Limited (ITOPF)
International Union for the Conservation of Nature and Natural Resources (IUCN)
Oil Companies International Marine Forum (OCIMF)

3 Incidents involving the 1992 Fund

3.1 Overview

The Executive Committee took note of document 92FUND/EXC.9/2 which contained a summary of the situation in respect of all eight incidents dealt with by the 1992 Fund since the Committee's 4th session.

3.2 Incident in Germany

3.2.1 It was recalled that on 20 June 1996 crude oil was found to have polluted a number of German islands close to the border with Denmark in the North Sea and that the German authorities had undertaken clean-up operations at sea and on shore. It was also recalled that investigations by the German authorities had revealed that the Russian tanker *Kuzbass* had discharged Libyan crude in the port of Wilhelmshaven on 11 June 1996. It was noted that according to the German authorities, analysis of oil samples taken from the ship matched the results of the analysis of samples taken from the polluted coastline.

3.2.2 It was noted that in July 1998 the German authorities had brought legal action in the Court of first instance in Flensburg against the owner of the *Kuzbass* and his P & I insurer, claiming compensation for the cost of the operations for an amount of DM2 610 226 (£815 000). It was further noted that the 1992 Fund had been notified of the legal actions and had intervened in the proceedings in order to protect its interests.

3.2.3 The Executive Committee took note of developments in respect of this incident contained in document 92FUND/EXC.9/3 and in particular of the pleadings submitted to the Court by the owner of the *Kuzbass* and his P & I insurer in which they had stated that analyses carried out on their behalf showed that, although the oil carried by the *Kuzbass* and the oil found ashore had both originated from Libya, the oil carried by the *Kuzbass* was Brega crude and the polluting oil was not. The Committee noted that the shipowner and the insurer had stated that since the *Kuzbass* was proceeding to the Mediterranean to load a cargo of crude oil, there had been no need to clean the tanks, and that in any event the route followed by the *Kuzbass* was far from the areas where the oil which caused the pollution was alleged to have been discharged into the sea. It was also noted that the German authorities had maintained that there was *prima facie* evidence that the pollution could only have been caused by the *Kuzbass*. It was further noted that according to the German authorities it was impossible to establish that the two oils were not identical on the basis of current scientific standards. It was further noted that the German authorities no longer maintained that the oil pollution was caused by tank cleaning but by the discharge of slops, since there had been a leak between a slop tank and a cargo tank.

3.2.4 The Executive Committee instructed the Director to follow closely the legal proceedings and to take such steps as might be required to protect the 1992 Fund's interests.

3.3 *Nakhodka*

3.3.1 The Executive Committee took note of developments in respect of this incident contained in document 92FUND/EXC.9/4 (cf document 71FUND/A.23/14/7).

Claims for compensation

3.3.2 The Executive Committee noted that as at 16 October 2000 the total payments made to claimants amounted to ¥13 804 million (£72 million), including the payments made by the shipowner and his P & I insurer totalling ¥66 million (£400 000) plus US$4.6 million (£3 million).

Level of payments

3.3.3 The Executive Committee recalled that in view of the uncertainty as to the level of the total amount of the claims, the Executive Committee of the 1971 Fund and the Assembly of the 1992 Fund had decided in April 1997 that the payments to be made by the two Organisations should, for the time being, be limited to 60% of the amount of the damage actually suffered by the respective claimants as assessed by the experts engaged by the Funds and the shipowner/UK Club at the time when the payment was made.

3.3.4 The Executive Committee also recalled that claims against the IOPC Funds had become time-barred on or shortly after 2 January 2000.

3.3.5 The Committee recalled that the Director had informed the governing bodies of the 1992 and 1971 Funds at their April 2000 sessions that he estimated the total exposure of the Funds at some ¥30 500 million (£202 million). The Committee further recalled that the governing bodies had decided to increase the level of the IOPC Funds' payments from 60% to 70% of the amount of the damage actually suffered by the respective claimants (documents 92FUND/EXC.7/5, paragraph 3.1.12 and 71FUND/AC.1/EXC.63/11, paragraph 3.6.12).

3.3.6 The Committee noted that as a result of developments since the April 2000 sessions of the governing bodies the total exposure of the Funds could be estimated at some ¥28 468 million (£189 million) and that the total amount available for compensation under the 1992 Fund Convention was ¥23 164 515 000 (£154 million). The Committee also noted that payments at 80% of the estimated total exposure would give ¥22 774 million (£151 million), which would be slightly below the total amount payable under the 1992 Conventions.

3.3.7 The Director informed the Committee that in the light of the foregoing he considered that an increase of the IOPC Funds' payments from 70% to 80% would be appropriate when further claims had been settled or withdrawn so as to reduce the total exposure of the Funds below ¥27 800 million (£184 million). He mentioned that payments of 80% of this amount would give ¥22 240 million (£148 million), which in his view would give the IOPC Funds a certain margin against overpayment.

3.3.8 In the light of the foregoing and in order to enable the IOPC Funds to make additional payments to claimants as soon as possible the Executive Committee decided to authorise the Director to increase the level of payments to 80% of the amount of the damage actually suffered by the individual claimants when the total amount of the settled and pending claims fell below ¥27 800 million.

3.3.9 The Executive Committee noted that the Administrative Council of the 1971 Fund had at its 2nd session taken the corresponding decision as regards the level of payments (document 71FUND/AC.2/A.23/22, paragraph 17.8.9).

3.4 *Mary Anne*

3.4.1 The Executive Committee took note of developments in respect of the *Mary Anne* incident contained in document 92FUND/EXC.9/5.

3.4.2 The Committee recalled that the Philippines-registered sea-going, self-propelled barge *Mary Anne* (465 GRT) had become swamped during strong winds and heavy seas and had sunk in approximately 60 metres of water off the port of Mariveles at the entrance to Manila Bay (Philippines). It was noted that the barge was reportedly carrying a cargo of 711 tonnes of intermediate fuel oil as well as some 2.5 tonnes of gas oil bunkers. It was also noted that the wreck had leaked oil continuously over several days, and that although much of the surfacing oil dispersed naturally, some oil apparently from the *Mary Anne* had stranded on shorelines.

3.4.3 The Committee noted that the *Mary Anne* was insured by the Terra Nova Insurance Company Limited (Terra Nova) which was not a Protection and Indemnity Association (P & I Club) but a conventional insurance company which covered P & I risks at fixed premiums.

Claims for compensation

3.4.4 The Committee noted that Terra Nova had incurred expenditure of approximately US$1.6 million (£1.1 million) in respect of a contract for the removal of the oil remaining on the *Mary Anne* and part of the clean-up operations. It was further noted that a local salvage and towing company had

presented the shipowner with a claim for US$1.1 million (£730 000) in respect of clean-up operations. The Committee noted that it was understood that the shipowner had no assets and was in effect in voluntary liquidation. The Committee also noted that Terra Nova had informed the 1992 Fund that there were no other outstanding claims arising from the incident.

3.4.5 The Executive Committee noted that the limitation amount applicable to the *Mary Anne* was 3 million SDR (£2.5 million) and that it was therefore unlikely that the total amount of the established claims would exceed the amount of compensation available under the 1992 Civil Liability Convention. However, the Committee also noted that Terra Nova had informed the 1992 Fund that the shipowner had been in breach of the insurance policy in respect of the vessel on the grounds that the vessel had been operated recklessly and that the crew was grossly incompetent.

3.4.6 The Committee noted that Terra Nova had informed the 1992 Fund that it might request the shipowner and the 1992 Fund to reimburse Terra Nova the amounts it had paid to claimants.

Legal proceedings

3.4.7 The Executive Committee noted that the local salvage and towing company referred to in paragraph 3.4.4 had commenced legal proceedings against the shipowner and Terra Nova in a Court in Manila in respect of its claim for US$1.1 million (£730 000). The Committee further noted that Terra Nova had opposed the claim on the basis of the defences set out in the insurance policy. It was also noted that Terra Nova had maintained that it was entitled to recover from the shipowner and/or the 1992 Fund the amounts it had paid in compensation.

3.4.8 The Committee noted that the Director had informed Terra Nova that the Fund did not recognise any potential claim by Terra Nova against the Fund for reimbursement, since the total amount of the claims fell well below the limitation amount applicable to the *Mary Anne*.

3.4.9 The Committee endorsed the Director's opinion that any claim by Terra Nova for reimbursement on the grounds of the shipowner having been in breach of the insurance policy had to be made against the shipowner, since the total amount of the claims paid fell well below the limitation amount applicable to the shipowner. The Committee noted that the legal situation might be more complicated as regards claims which had not yet been paid and that the Committee might have to consider this issue at a future session.

3.5 *Dolly*

3.5.1 The Executive Committee took note of the information contained in document 92FUND/EXC.9/6 in respect of the *Dolly* incident, which occurred on 5 November 1999 off Martinique (France).

3.5.2 The Committee noted that the *Dolly* had sunk in a port in Martinique while carrying some 200 tonnes of bitumen and that so far no cargo had escaped. It was also noted that there was a national park, a coral reef and mariculture near the grounding site, that artisanal fishing was carried out in the area and that there were fears that the fishery and mariculture would be affected if the bitumen were to escape.

3.5.3 The Committee noted that the *Dolly* had originally been a general cargo vessel, but that special tanks for carrying bitumen had been fitted, together with a cargo heating system. It was also noted that the ship probably did not have any liability insurance. The Committee also noted that the French authorities had instructed several international salvage companies to investigate what measures could be undertaken to remove the bitumen from the wreck and that the French authorities would make this information available to the 1992 Fund by the end of 2000.

3.5.4 It was further noted that the Director had informed the French Government that the 1992 Fund reserved its position as to whether the *Dolly* fell within the definition of 'ship' laid down in the

1992 Civil Liability Convention and the 1992 Fund Convention and whether therefore the 1992 Fund Convention applied to the incident, since more details about the *Dolly* were required in order to enable the 1992 Fund to take a position on this issue.

3.5.5 The French delegation stated that it understood the Director's reservations as to whether the *Dolly* fell within the definition of 'ship' laid down in the 1992 Civil Liability Convention and the 1992 Fund Convention. That delegation stated that whilst trying to obtain further details about the ship, it should be noted that the *Dolly* was carrying a cargo of bitumen, a persistent oil, and also had on board a heating system to keep the oil in such a state that it would be fluid enough for pumping.

3.6 *Erika*

3.6.1 The Executive Committee took note of the developments in respect of the *Erika* incident as contained in documents 92FUND/EXC.9/7, 92FUND/EXC.9/7/Add.1 and 92FUND/EXC.9/7/Add.2.

Operations to remove oil from the wreck

3.6.2 The Executive Committee noted that the operations to remove the oil from the wreck of the *Erika* were carried out during the period 6 June - 15 September 2000 and were completed three weeks ahead of schedule. It was also noted that no significant quantities of oil escaped during the operations.

Claims for compensation

3.6.3 The Committee noted the information given on the claims situation as follows:

> A total of 1 518 claimants had presented claims totalling FFr245.7 million (£23 million). The claims of 840 claimants, mainly in the fishery and aquaculture sectors, totalling some FFr106.7 million (£10 million), had been assessed and approved for a total of FFr37.7 million (£3.6 million). Payments had been made to 448 of these claimants for a total of FFr17.1 million (£1.6 million). Most of the payments corresponded to 50% of the approved amounts, but some hardship payments and payments made at an early stage had been made in full or at percentages higher than 50%. Claims by 69 claimants, totalling FFr6.1 million (£561 000), had been rejected.
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> Payments to 185 claimants, totalling FFr4.2 million (£393 000), had been withheld pending clarification regarding payments made by OFIMER (Office national interprofessionnel des produits de la mer et de l'aquaculture), a government agency attached to the French Ministry of Agriculture and Fisheries. Payments to a further 138 claimants, totalling FFr3 million (£280 000), had not yet been made since 104 claimants had not yet confirmed their acceptance of the assessed amounts, 20 had not yet signed receipt and release forms and 14 had rejected the assessments.
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> Claims from a further 684 claimants, totalling FFr139 million (£13 million), were either in the process of being assessed, or were awaiting further information from claimants in order to complete assessments. Some 195 of these claims, totalling FFr27 million (£2.5 million), had been received since 1 September 2000, mainly from the tourism sector.
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> Claims totalling FFr30.7 million (£2.9 million) in respect of clean-up costs had been submitted by 50 communes of which 21 claims totalling FFr5.5 million (£514 000) had been assessed for a total of FFr5 million (£467 000). The

assessments of many of the remaining claims in this category had been hampered by insufficient information in support of the claims.

3.6.4 The French delegation expressed concern that only a relatively small amount had been paid to claimants. That delegation was aware of the great effort made by the shipowner's insurer, the Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual), the 1992 Fund and the Claims Handling Office in Lorient, and appreciated that the handling and the assessment of claims were not always straightforward. That delegation expressed general satisfaction of the way in which claims were handled. The point was made that since payments for compensation had been delayed, the French Government had established a system of advance payments. That delegation pointed out that the explanations for delays given to the Committee might not always be understood by claimants. The delegation reminded the Committee that the first anniversary of the incident was approaching and that it was important to avoid, as far as possible, a negative reaction in France.

3.6.5 Several delegations shared the French delegation's concerns that only a relatively low amount had been paid in compensation and emphasised the importance of claims being assessed and paid as promptly as possible.

3.6.6 A number of delegations drew attention to the fact that of some 1 500 claimants who had presented claims, over 50% had had their claims assessed and approved. It was also pointed out that payments had been made to 448 of these claimants and that there were valid reasons why the remaining claimants had not been paid. It was mentioned that a considerable portion of the claims, mainly in the tourism sector, had only been submitted a short time ago. It was also pointed out that since claims had to be properly assessed, the claims handling inevitably took some time.

3.6.7 The Committee noted that a number of claims had not been assessed because the claimants had not presented sufficient supporting information. Delegations stressed the importance of claimants' understanding the system of compensation and the procedure for preparing and presenting a claim. One delegation emphasised the important role of local claims offices in this regard and suggested that Governments and authorities at regional and national level could also assist in the dissemination of information.

Limitation proceedings

3.6.8 The Committee recalled that at the request of the shipowner the Tribunal de Commerce in Nantes had determined the limitation amount applicable to the *Erika* at FFr84 247 733 (£8.4 million).

Maximum amount payable under the 1992 Conventions

3.6.9 The Executive Committee recalled that at its 6th session it had decided that the conversion of 135 million Special Drawing Rights (SDR), the maximum amount payable under the 1992 Fund Convention, into French Francs should be made on the basis of the rates applicable on 15 February 2000, giving 135 million SDR = FFr1 211 966 881 (document 92FUND/EXC.7/5, paragraph 3.3.23).

Payments by the shipowner's insurer

3.6.10 The Committee noted with appreciation that Steamship Mutual had confirmed that it was prepared to continue to pay 50% of the approved amounts of any claims until the total payments approached the limitation amount of some FFr84 million (£7.9 million).

Study carried out within the French Ministry of Economy, Finance and Industry in June 2000

3.6.11 The Committee recalled that it had at its 8th session taken note of the result of an extensive study carried out within the French Ministry of Economy, Finance and Industry on the extent of the

damage caused by the *Erika* incident on the tourism industry. It was recalled that in the study it was estimated that the total amount of the admissible claims would fall within the range of FFr800 - 1 500 million (£75 - 140 million). The Committee also recalled the comments on the results of the study by the 1992 Fund's experts, L & R Consulting (L & R). It was recalled that the Committee had noted that there was great uncertainty following the *Erika* incident as to the effects of the pollution damage on the tourism sector and that the study within the French Ministry of Economy, Finance and Industry emphasised the extreme difficulty in predicting with precision the likely performance of the tourism sector during the summer season of 2000.

Decision by the Executive Committee at its 8th session

3.6.12 It was recalled that, in view of the uncertainty as to the total amount of the claims arising from the *Erika* incident, the Executive Committee had decided, at its 8th session held in July 2000, that the payments by the 1992 Fund should for the time being be limited to 50% of the amount of the loss or damage actually suffered by the respective claimants, as assessed by the 1992 Fund's experts (document 92FUND/EXC.8/8, paragraph 3.3.38).

Further study carried out within the Ministry of Economy, Finance and Industry

3.6.13 The Executive Committee noted that on 19 October 2000 the Director had received a report of a further study (the 'October 2000 study') carried out within the Ministry of Economy, Finance and Industry.

3.6.14 The Committee noted that the October 2000 study had found that the total amount of the losses in the tourism sector admissible for compensation could be estimated at FFr1 096 million (£103 million) compared to the estimate in the previous study of FFr800 - 1 500 million (£75 - 140 million). The Committee noted the view expressed in the report that this represented a considerable reduction of the potential risk assessed in the June 2000 study and that the assumptions made in the October 2000 study were conservative. It was noted that the October 2000 report mentioned that information obtained during the study from the Tourist Offices confirmed that the tourist season had been better than expected.

3.6.15 The Committee further noted the conclusions of the October 2000 report that, on the basis of the most recent data, the level of compensation payments could be increased while still maintaining a safety margin and that the October 2000 report suggested that, on the assumption that the claims from the sectors other than tourism would amount to FFr300 million (£28 million) (which in the view of the public bodies involved would be on the high side), and adding an extra safety margin of FFr200 million (£19 million) in the tourism sector, the total amount of the admissible claims would reach FFr1 600 million (£150 million). It was noted also that the October 2000 report maintained that this would allow the 1992 Fund to increase the level of payments to 75% and that if the level of payments were increased to 60%, the safety margin would be FFr600 million (£56 million).

3.6.16 The Committee noted that the 1992 Fund's experts had expressed the view that the October 2000 study provided a valuable follow up to the June 2000 study and that it was particularly valuable that the statistical data for the period January - August 2000 had been made available, thus covering the main tourist season. It was noted that the 1992 Fund's experts had stated that they broadly agreed with the interpretations made and the conclusions drawn in the October 2000 study but that they had expressed reservations as regards two of the assumptions used in the study which might have led to an underestimate of the potential admissible losses, namely that the calculations in the October 2000 study were based on tourism spending in 1999 and did not take into account the fact that in the assessment of individual claims the 1992 Fund took into account proven trends of continued growth which might lead to turnover figures higher than those used in the October 2000 study, and that the assumptions made for estimating the losses for types of accommodation other than hotels and camping sites might result in these losses being underestimated.

Consideration by the Executive Committee of the level of payments

3.6.17 The Executive Committee noted that for the purpose of its consideration of the level of the 1992 Fund's payments the claims by Total Fina and the French Government could be disregarded, since these claims would be pursued only if and to the extent that all other claims had been paid in full.

3.6.18 It was noted that there were a number of significant uncertainties in the estimates made in the study carried out within the French Ministry of Economy, Finance and Industry. In addition, the Committee recalled that the French Ministry's October 2000 study was based on the criteria for admissibility applied by the 1992 Fund but that the Director had been advised that the French courts might take a more extensive approach in their interpretation of the notion of 'pollution damage', and that it was not possible to predict the consequences of such an approach. It was also noted that there was risk that re-oiling of the coastline would occur as a result of storms and high tides during the winter months, which could cause further losses in the fishery and mariculture sectors and could give rise to tourism claims for losses suffered in 2001. It was also noted that relatively few claims had been presented so far and that the level of uncertainty might be reduced as more claims were presented.

3.6.19 The Executive Committee recalled that the Assembly had taken the view that - like the 1971 Fund - the 1992 Fund should exercise caution in the payment of claims if there was a risk that the total amount of the claims arising out of a particular incident might exceed the total amount of compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention, since under Article 4.5 of the 1992 Fund Convention all claimants had to be given equal treatment. The Committee further recalled that the Assembly had expressed the view that it was necessary to strike a balance between the importance of the 1992 Fund's paying compensation as promptly as possible to victims of oil pollution damage and the need to avoid an over-payment situation.

3.6.20 The Committee decided that, in view of the continuing uncertainty as to the total amount of the claims arising from the *Erika* incident, the level of payments should be maintained at 50%. It was decided that the level of payments should be reviewed at the Committee's 11th session, to be held on 29 and 30 January 2001.

3.6.21 Several delegations expressed their appreciation of the October 2000 study carried out within the Ministry of Economy, Finance and Industry. It was generally considered very useful if these studies were continued. The French delegation confirmed that further studies would be carried out.

Investigations into the cause of the incident

3.6.22 The Committee took note of the developments in the investigations into the cause of the incident and instructed the Director to continue his investigations into this matter.

3.6.23 The delegation of Malta referred to the investigation into the *Erika* incident carried out by the Malta Maritime Authority mentioned in paragraph 5 of document 92FUND/EXC.9/7/Add.1. That delegation mentioned that in line with IMO Resolution A.849(20) a draft of the report had been forwarded to interested parties for comments prior to its publication. That delegation pointed out that the investigation did not seek to apportion blame or determine civil or criminal liability and that the findings were not binding on any party. That delegation mentioned that the aim of the report was to try and avoid a repeat occurrence through a full understanding of events surrounding the incident. The delegation informed the Committee that the report contained a number of findings and recommendations directed to various parties (including IMO). It was mentioned that the report had been widely circulated and a copy had been sent to the Director of the IOPC Funds. It was stated that the Maltese authorities expressed concerns about the lack of co-operation from certain parties, particularly regarding access to some evidence and information. That delegation

also mentioned that if further evidence came to light the investigating team would consider issuing a supplementary report.

Court proceedings

3.6.24 The Committee took note of the developments in the various court proceedings.

Consideration of individual claims

3.6.25 The Executive Committee considered a number of claims for pure economic loss, ie loss of earnings suffered by persons where property had not been contaminated.

3.6.26 The Committee recalled that the criteria for the admissibility of claims for pure economic loss had been considered in 1994 within the 1971 Fund by the 7th Intersessional Working Group and that the report of that Working Group (document FUND/A.17/23) had been considered by the 1971 Fund Assembly at its 17th session, held in October 1994. It also recalled that the 1971 Fund Assembly had endorsed the Working Group's Report and thereby laid down certain criteria for the admissibility of claims for pure economic loss (document FUND/A.17/35, paragraph 26.8) which could be summarised as follows.

> Claims for pure economic loss are admissible only if they are for loss or damage caused by contamination. The starting point is the pollution, not the incident itself.
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> To qualify for compensation for pure economic loss, there must be a reasonable degree of proximity between the contamination and the loss or damage sustained by the claimant. A claim is not admissible for the *sole* reason that the loss or damage would not have occurred had the oil spill not happened. When considering whether the criterion of reasonable proximity is fulfilled, the following elements are taken into account:

- the geographic proximity between the claimant's activity and the contamination
- the degree to which a claimant was economically dependent on an affected resource
- the extent to which a claimant had alternative sources of supply or business opportunities
- the extent to which a claimant's business formed an integral part of the economic activity within the area affected by the spill.

3.6.27 The Executive Committee recalled that at its 1st session, the 1992 Fund Assembly had adopted a resolution (Resolution Nº3) in which the Assembly resolved that the report of the 7th Intersessional Working Group of the 1971 Fund should form the basis of the policy of the 1992 Fund on the criteria for the admissibility of claims (document 92FUND/A.1/34, Annex III).

3.6.28 The Executive Committee recalled that the 7th Intersessional Working Group had emphasised that a uniform interpretation of the definition of 'pollution damage' was essential for the functioning of the regime of compensation established by the Civil Liability Convention and the Fund Convention. It also recalled that it was considered important that there was consistency in the decisions taken by the Executive Committee regarding the payment of compensation arising from incidents in different Member States. The Committee recalled that the Working Group took the view that, for this reason, the 1971 Fund should be guided, when taking decisions on individual claims, by the criteria developed within the Fund concerning the admissibility of claims, on the

basis of the interpretation of the definitions of the terms 'pollution damage' and 'preventive measures' as adopted by the Assembly or the Executive Committee.

3.6.29 The Executive Committee confirmed that in its consideration of the admissibility of claims the 1992 Fund should base itself solely on the criteria for admissibility laid down and the practice developed by the governing bodies of the 1971 and 1992 Funds over the years.

3.6.30 It was noted that claims which the Committee considered admissible in principle should be examined to establish that the alleged loss had actually been caused by the incident.

Fish trader in Spain

3.6.31 The Committee considered a claim which had been presented by a seller of fish and shellfish located in the Basque country in Spain. The Committee noted that the claimant had stated that he imported goose barnacles from one supplier in Brittany and sold them to customers (restaurants, hotels, markets) in Bilbao in Spain and that he had been deprived of his supply as a result of the *Erika* incident. The Committee noted that the claimant had maintained that the sales of the produce from Brittany represented some 80% of his turnover.

3.6.32 The Committee agreed with the Director that the claimant appeared to be economically dependent to a high degree on the produce from the area affected by the oil spill and might have had only limited possibilities of replacing the supply from the affected area by other supplies. The Committee took the view, however, that since the claimant's business was located some 800 kilometres from the area affected by the pollution there was no geographic proximity between the claimant's activity and the contamination and that the claimant's business could not be considered as forming an integral part of the economic activity within the area affected by the *Erika* oil spill. For these reasons, the Committee considered that there was not a reasonable degree of proximity between the contamination and the alleged losses and that the claim should be rejected.

Businesses within the affected area

3.6.33 The Executive Committee considered claims by:

(a) a fishmonger in Auray, Morbihan;
(b) a fish trader in Etel, Morbihan;
(c) an itinerant fish trader in La Barre de Monts, Vendée; and
(d) a fish merchant in Bouin, Vendée.

3.6.34 The Executive Committee noted that these claimants carried out their activities within the area affected by the spill. The Committee took the view that these claims fulfilled the criterion of geographic proximity and that the claimants' businesses formed an integral part of the economic activity within the area affected by the spill. The Committee noted that the claimants received their supplies or part of their supplies from the area affected by the spill but had not experienced any significant difficulty in obtaining supplies and that the alleged losses were caused by market resistance. The Committee nevertheless considered that since the area had been affected by the spill, the alleged losses resulting from market resistance should be considered as damage caused by contamination. The Committee decided therefore that these claims should be considered admissible in principle.

Manufacturer of fishing equipment

3.6.35 The Executive Committee considered a claim by a manufacturer of nets and other fishing equipment for reduction in sales. The Committee noted that the claimant's business was located in Brie-sous-Montagne some 100 kilometres south of the area affected by the oil spill and that a considerable part of his sales were to businesses which in their turn sold nets and other fishing

equipment to fishermen operating in the area affected by the oil spill. It also noted that the claimant had maintained that his customers had reduced their purchases during the period following the *Erika* incident.

3.6.36 The Committee considered that, since the claimant's activity was located some distance outside the area affected by the oil spill, his business could not be considered an integral part of the economic activity in the affected area and that there was therefore not a reasonable degree of proximity between the alleged losses and the contamination. The Committee also took the view that there had not been any general ban imposed on fishing which could have caused a reduction in the sales of the claimant's products. The Committee therefore decided that the claim should be rejected.

Oyster farm

3.6.37 The Executive Committee considered a claim by a company producing oysters at a farm in Cancale (Northern Brittany) some 100 kilometres outside the affected area, but which carried out its trading activity in Crach (Morbihan) for losses allegedly caused by a reduction in sales as a result of the *Erika* incident.

3.6.38 It was noted that the production activity of the claimant's business was located outside the area affected by the oil spill, whereas the trading activity was based within that area. It was also noted that the spill had not interfered with the production of oysters. It was further noted that the alleged losses were caused by market resistance.

3.6.39 The Executive Committee considered that the information available was not sufficient to enable it to take a position as to the admissibility of the claim. The Committee instructed the Director to obtain further details of the claimant's business, in particular, the extent to which the business was dependent on the affected area and whether it had opportunities to find alternative markets, and to resubmit the claim to the Committee at its 11th session.

British holiday group

3.6.40 The Executive Committee noted that a British-based holiday company, which was part of a major tour operator in the United Kingdom, had notified the 1992 Fund of its intention to submit a claim in respect of financial losses suffered as a result of the incident. It was noted that the company owned mobile homes at various sites along the coastline affected by the *Erika* oil spill, as well as in other locations in continental Europe, and that the company had maintained that it had taken all opportunities to relocate business from the affected area, but that the incident had nevertheless resulted in a substantial loss in terms of holidays sold and margins achieved. It was also noted that the company had stated that the mobile home industry on the French Atlantic coast was a major part of its activity and that it employed a significant number of local people to install and maintain its facilities.

3.6.41 The Committee considered whether the fact that the company in question was a foreign entity should preclude the claim from being admissible. Several delegations took the view that the domicile of a claimant was not relevant for the purpose of deciding questions of admissibility but that the location of the particular activity was the important factor. These delegations noted that a major part of the business carried out by the British holiday group was in the area affected by the oil spill and that for this reason there was a reasonable degree of proximity between the alleged losses and the contamination.

3.6.42 The Committee considered that although the company was based in the United Kingdom, part of its business activity was undertaken in the affected area. The Committee took the view that, given that the company owned and operated mobile homes in the affected area, there was geographic proximity between the claimant's activity and the contamination. The Committee also considered that by employing significant numbers of local people the part of the company's business should

be considered as forming an integral part of the economic activity of the area affected by the *Erika* oil spill. It further noted that although the company had alternative sources of income, it would appear that its sites on the French Atlantic coast represented a major part of its business and that the company was economically dependent on this activity. The Committee decided, therefore, that a claim submitted by the company for losses suffered in the business carried out in the affected area should be considered admissible in principle.

Request by a committee of shellfish producers for contribution to the cost of publicity campaign

3.6.43 The Executive Committee noted that Le Comité National de la Conchyliculture (CNC) (the national committee of shellfish producers) had requested the 1992 Fund to contribute to the cost of a publicity campaign to restore the confidence of the French consumers in oysters, thereby preventing potential losses by the CNC's members as a result of market resistance, in particular during the critical period over Christmas and New Year 2000/2001.

3.6.44 The Committee recalled that the 7th Intersessional Working Group set up by the 1971 Fund Assembly had considered that claims for the costs of measures to prevent pure economic loss may be admissible if they fulfil the following criteria:

- the cost of the proposed measures is reasonable
- the cost of the measures is not disproportionate to the further damage or loss which they are intended to mitigate
- the measures are appropriate and offer a reasonable prospect of being successful
- in the case of a marketing campaign, the measures relate to actual targeted markets.

  To be admissible, the costs should relate to measures to prevent or minimise losses which, if sustained, would qualify for compensation under the Conventions. Claims for the cost of marketing campaigns or similar activities are accepted only if the activities undertaken are in addition to measures normally carried out for this purpose. In other words, compensation is granted only for the additional costs resulting from the need to counteract the negative effects of the pollution.

3.6.45 The Committee noted that the Director had informed the CNC at an early stage that the 1992 Fund did not normally accept claims for measures to prevent pure economic loss until they had been carried out and that the 1992 Fund was reluctant to grant advance payments for such measures, since it would not take on the role of a claimant's banker.

3.6.46 The Committee noted that in order to assess whether a publicity campaign of the type envisaged by the CNC was justified, the Director had engaged a French consulting firm specialising in marketing and cost control of publicity campaigns and that, on the advice of that consultant, the Director had commissioned Ipsos, one of the leading French institutes for opinion research, to investigate the attitude of French consumers to oysters in the aftermath of the *Erika* incident. The Committee also noted that the questions to be used were drafted after consultation with the CNC and that an opinion poll had been carried out over the weekend of 7 and 8 October 2000 in the form of telephone interviews with 1 025 persons representative of the French population. It was noted that the main result of the opinion poll was that 88% of those questioned who ate oysters had considered generally that they would eat oysters as normal during the coming months, and in particular during the Christmas/New Year season. It was further noted that 89% of those questioned who ate oysters had stated that they had confidence in the health control put in place by the authorities and that 78% of them had considered that it was not risky to eat oysters.

3.6.47 The Committee noted that the CNC had been given access to the results of the poll and did not agree with the interpretation of the data, drawing attention to the fact that 50% of the persons who ate oysters had expressed the view that the *Erika* incident had had an impact on the quality of oysters and that 20% of those persons had stated that it was risky to eat oysters.

3.6.48 It was noted that in the light of the result of the poll, the Director had informed the CNC that he did not consider that the proposed publicity campaign to counteract market resistance was justified.

3.6.49 The Executive Committee endorsed the position taken by the Director in respect of the CNC's request.

3.6.50 The French delegation stated that it was reluctant to intervene in respect of claims arising from the *Erika* incident but considered that clarification was required as regards certain aspects of the request from the CNC. That delegation emphasised that the CNC was an organisation that represented mariculture interests nationally, that it was therefore in an excellent position to target the proposed campaign accurately and that only the CNC would present claims for publicity campaigns in respect of oysters. In addition, that delegation stated that part of the campaign in respect of which funds had been requested had already been carried out and that the 1992 Fund was no longer requested to act as the CNC's banker in relation to the costs thereof. That delegation asked whether the 1992 Fund would reconsider its position if the CNC were able to provide further information justifying its request.

3.6.51 The Director stated that in his response to the request by the CNC he had not only addressed the issue of whether the 1992 Fund would be prepared to grant an advance but that he had also taken the view that, in the light of the results of the opinion poll carried out by Ipsos, the marketing campaign was not justified. The Director confirmed that the 1992 Fund would be prepared to reconsider its position in the light of new information.

Claim by the Tourism Committee of the Department of Vendée

3.6.52 The Executive Committee considered a claim for FFr10.2 million (£950 000) by the Tourism Committee of the Department of Vendée (Comité Départemental du Tourisme de Vendée (CDT)) in respect of the cost of a publicity campaign to restore the confidence of traditional Vendée tourists in the area following the clean-up of the polluted beaches and in response to extensive negative media coverage of the spill. The Committee noted that the Vendée was an important tourism destination with an annual tourism spend of FFr5 500 million (£500 million).

3.6.53 The Committee noted that the beaches of the Vendée had been contaminated by the oil spill and had been the subject of negative media coverage following the spill. The Committee shared the Director's view that it was reasonable for the CDT to undertake a publicity campaign in an attempt to mitigate potential losses in the tourism industry and noted that in the view of the experts engaged by the 1992 Fund and the Steamship Mutual, the claim was very well documented. The Committee also noted the experts' view that the costs incurred, which represented only 1.8% of the reduction in tourism spending that might have resulted if the number of visitors has dropped by 10%, were reasonable and not disproportionate to the potential losses that the campaign was intended to mitigate. It further noted that a 35% reduction had been obtained on the costs of the television advertising campaign as a result of the CDT having obtained approval from the Ministry of Tourism for the campaign, a condition of which was that it did not duplicate or conflict with any publicity measures taken at a national level or through other government-approved local initiatives. The Committee noted that as a result of the high level of knowledge of Vendée's tourism client base, the CDT had been able to target accurately its campaigns on actual markets and shared the Director's view that the measures therefore offered a reasonable chance of success at the time they were undertaken. For these reasons the Committee decided that the claim for the costs of the publicity campaign undertaken by CDT fulfilled the

criteria for admissibility referred to in paragraph 3.6.44 and that the claim should therefore be considered admissible in principle.

3.7 *Natuna Sea*

3.7.1 The Executive Committee took note of the information contained in document 92FUND/EXC.9/9 (cf document 71/FUND/A.23/14/13) concerning the *Natuna Sea* incident, which occurred on 3 October 2000 in the Singapore Strait off Batu Behanti (Indonesia).

3.7.2 The Committee noted that the vessel had been carrying a cargo of 70 000 tonnes of Nile Blend crude oil at the time of the incident, that an estimated 7 000 tonnes of crude oil had been spilled as a result of the grounding and that the vessel had been lightened of its remaining cargo and refloated on 12 October 2000 without significant further spillage. It was also noted that the oil had affected Indonesia, Malaysia and Singapore.

3.7.3 The Committee noted that the response to the spill from the evening of the first day of the incident included several applications of dispersants. It was noted that although initial reports indicated that the dispersants were effective, the experts from the International Tanker Owners Pollution Federation Ltd (ITOPF) engaged by the shipowner's insurer and the IOPC Funds had drawn attention to the oil's high pour point (the temperature below which the oil does not flow) compared with the ambient sea temperature and had recommended a cautious approach to the large-scale use of chemicals until their efficacy could be evaluated through laboratory/field testing. The Committee also noted that in order to facilitate a proper evaluation of the efficacy of the use of dispersants, the shipowner's insurer, the London Steam-Ship Owners' Mutual Insurance Association Ltd (London Club), and the IOPC Funds had instructed two scientists from AEA NETCEN in the United Kingdom to travel to Singapore with specialised monitoring equipment for measuring concentrations of oil underneath slicks treated with dispersants and that the scientists arrived in Singapore on 5 October and were able to conduct tests later the same day. It was noted that although there was minor dispersion of oil alongside the *Natuna Sea*, which was heavily dosed with chemicals, no dispersion of oil 500 metres from the vessel was observed. The Committee noted that AEA NETCEN scientists and the ITOPF experts concluded that for all practical purposes Nile Blend crude oil was no longer amenable to dispersants.

3.7.4 The delegation of Singapore thanked the Director for bringing this incident to the attention of the Executive Committee. That delegation stated that in addition to the islands of Sentosa and St Johns and the Raffles lighthouse, the Sisters' Islands of Hantu and Kusu were polluted. That delegation mentioned that on the Indonesian side, the beaches of several islands were severely oiled and this had affected the livelihoods of thousands of fishermen and other groups.

3.7.5 The Singapore delegation further stated that the Maritime and Port Authority of Singapore, in co-ordinating the oil spill response, was aware of the limited window period during which dispersants could be effective and had therefore mounted a swift response and made arrangements with East Asia Response Ltd to conduct aerial spraying on the first day, which occurred at about 16:00 hrs, Singapore time. This delegation stated that the dispersant was effective, and that as time was of the essence, MPA made arrangements for a second aerial spraying run on the morning of the second day. The Singapore delegation stated that this attempt had to be aborted as the ITOPF experts had taken the position that spraying should be held back until they had completed a site visit, and in the afternoon of the second day, at about 15:00 hrs, insisted on laboratory and field tests, the results of which were available only on the third day, thus setting back the response to the spill.

3.7.6 The delegation of Singapore also drew attention to an erroneous statement in paragraph 3.4 of document 92FUND/EXC.9/9 regarding the decision not to allow disposal in Singapore of oily waste collected at sea. This delegation assured the Executive Committee that the environmental authorities of Singapore, Malaysia and Indonesia had good working relationships and that the issue of not allowing the recovered oil to be landed in Singapore never arose, and that the MPA

had informed the managers of the *Natuna Sea* that Singapore would assist in the disposal of oil and oily debris, regardless of whether it had been collected inside or outside Singapore waters. The Singapore delegation expressed MPA's appreciation of the excellent co-operation shown by its counterparts in Malaysia and Indonesia and the responsible attitude of the managers of the *Natuna Sea.*

3.7.7 The Head of the Claims Department explained that analyses had shown that the particular oil spilled by the *Natuna Sea* had a very high wax content, that the pour point of the oil was higher than ambient sea temperatures in the Singapore Strait and that it had to be transported in heated cargo tanks. He stated that the oil would have rapidly solidified after being spilled from the ship and that therefore dispersants would not have been effective. He also stated that this had been demonstrated by the tests carried out by AEA NETCEN. He pointed out that ITOPF's role was purely advisory in recommending a cautious approach over the use of dispersants and that the MPA could have continued using them if it was confident that they were effective against the oil.

3.7.8 In answer to the Singapore delegation's statement that ignoring ITOPF's advice could jeopardise MPA's ability to recover its costs, the Director pointed out that the IOPC Funds did not automatically follow the advice of their experts, but reached their own conclusions on the basis of all the information and opinions available to them including that provided by claimants and their own experts.

Applicability of the Conventions

3.7.9 It was noted that Singapore was Party to the 1992 Civil Liability Convention and to the 1992 Fund Convention, that Indonesia was Party to the 1992 Civil Liability Convention but not Party to the 1992 Fund Convention and that Malaysia was Party to the 1969 Civil Liability Convention and the 1971 Fund Convention but not the 1992 Conventions. The Committee noted that as a consequence of two different regimes being applicable to the incident, the shipowner might be required to establish two limitation funds, one in Malaysia and one in Singapore or Indonesia. The Committee also noted that the limitation amount applicable to the *Natuna Sea* under the 1992 Civil Liability Convention was approximately 22.4 million SDR (£17 million) and under the 1969 Civil Liability Convention approximately 6.1 million SDR (£5.4 million).

Claims for compensation

3.7.10 The Executive Committee noted that it was too early to predict the level of the claims arising from this incident.

3.7.11 The Executive Committee authorised the Director to make final settlements on behalf of the 1992 Fund of all claims arising out of the *Natuna Sea* incident to the extent that the claims did not give rise to questions of principle which had not been decided by any of the governing bodies of the 1971 Fund or 1992 Fund.

3.8 *Al Jaziah 1*

3.8.1 The Executive Committee took note of the developments in respect of the *Al Jaziah 1* incident, as contained in document 92FUND/EXC.9/11.

Claims for compensation

3.8.2 The Executive Committee authorised the Director to make final settlements on behalf of the 1992 Fund of all claims arising out of the *Al Jaziah 1* incident to the extent that the claims did not give rise to questions of principle which had not been decided by any of the governing bodies of the 1971 Fund or 1992 Fund.

Definition of 'ship'

3.8.3 The Committee recalled that it had considered at its 8th session the question of whether the *Al Jaziah 1* fell within the definitions of 'ship' laid down in the 1969 Civil Liability Convention and the 1992 Civil Liability Convention and as incorporated into the 1971 Fund Convention and 1992 Fund Convention respectively. The Committee further recalled that during the discussions it was generally considered that a craft fell within the concept of 'seagoing ship or other seaborne craft' if it was actually operating at sea. It was also recalled that the Committee took the view therefore that the *Al Jaziah 1* fell within the definitions of 'ship' laid down in the 1969 Civil Liability Convention and the 1992 Civil Liability Convention (document 92FUND/EXC.8/8, paragraph 4.2.5).

3.8.4 The Executive Committee noted that the Administrative Council of the 1971 Fund had decided at its 2nd session that the *Al Jaziah 1* fell within the definition of 'ship' laid down in the 1969 Civil Liability Convention and the 1971 Fund Convention (document 71FUND/AC.2/A.23/22, paragraph 17.15.4).

Applicability of the 1971 and the 1992 Fund Conventions

3.8.5 The Executive Committee recalled that it had also at its 8th session considered the applicability of the 1971 and 1992 Fund Conventions to the *Al Jaziah 1* incident, since the United Arab Emirates at the time of the incident was Party to both Conventions. The Committee further recalled that it had decided that the Director should inform the authorities of the United Arab Emirates that, in the view of the 1992 Fund, the 1971 and 1992 Fund Conventions applied to the *Al Jaziah 1* incident (document 92FUND/EXC.8/8, paragraph 4.2.11).

3.8.6 It was noted that the Administrative Council of the 1971 Fund had also considered at its 2nd session the applicability of the 1971 and 1992 Fund Conventions to the *Al Jaziah 1* incident and that the Council had decided that both Conventions applied to the incident (document 71FUND/AC.2/A.23/22, paragraph 17.15.6).

Distribution of liabilities between the 1971 Fund and the 1992 Fund

3.8.7 The Committee noted that the simultaneous application of the 1969 Civil Liability Convention and the 1971 Fund Convention as well as the 1992 Civil Liability Convention and the 1992 Fund Convention in respect of incidents occurring during the transitional period up to 15 May 1998 was governed by Article 36bis of the 1992 Fund Convention. The Committee further noted that under the transitional provisions the 1992 Fund would pay compensation only if and to the extent that the claimant had been unable to obtain full compensation under the 1969 Civil Liability Convention, the 1971 Fund Convention and the 1992 Civil Liability Convention in that order. The Committee endorsed the Director's view that Article 36bis did not apply to the *Al Jaziah 1* incident since the incident had occurred after the expiry of the transitional period.

3.8.8 The Committee noted that there were no corresponding provisions regarding the applicability of these four instruments after the expiry of the transitional period. The Committee also noted the Director's view that the issue would therefore have to be resolved on the basis of the general rules of treaty law. It was noted however that the 1969 Vienna Convention on the Law of Treaties did not give any guidance in this respect.

3.8.9 Several delegations emphasised that it was clear that double compensation could not be paid to claimants and that they could only receive compensation up to the amount of the loss actually suffered.

3.8.10 The Committee noted the Director's proposal that the liabilities should be distributed between the 1992 Fund and the 1971 Fund on a 50:50 basis.

3.8.11 One delegation suggested that it might be most appropriate to apportion the liabilities of the two Funds in the same way as liabilities would be apportioned under insurance law where double insurance existed, ie that the liabilities of the two Funds should be apportioned on the basis of the maximum amounts of compensation available under the respective Conventions.

3.8.12 One observer delegation stated that each claimant had the right to pursue his claim against either the 1971 Fund or the 1992 Fund, that the Fund against which the claim was pursued was liable for the total amount of the damage up to the limit of its liability under the respective Convention and that the distribution of liabilities between the two Funds would have to be negotiated between them.

3.8.13 In conclusion, the Executive Committee considered that, since there were neither provisions in the Fund Conventions nor any rules under general treaty law governing the issue under consideration, a practical and equitable solution should be agreed between the two Funds.

3.8.14 The Executive Committee decided that, subject to the agreement of the 1971 Fund, the liabilities should be distributed between the 1992 Fund and the 1971 Fund on a 50:50 basis.

3.8.15 It was noted that the Administrative Council of the 1971 Fund had at its 2nd session agreed to a distribution of liabilities on a 50:50 basis (document 71FUND/AC.2/A.23/22, paragraph 17.15.15).

4 Future sessions

4.1 The Executive Committee decided to hold its 10th session on 27 October 2000.

4.2 The Committee decided to hold a further session on 29 and 30 January 2001.

4.3 It was decided that the Committee would hold its normal autumn session during the week of 15 October 2001.

5 Any other business

No items were raised under this agenda item.

6 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.9/WP.1, was adopted, subject to certain amendments.