INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

ADMINISTRATIVE COUNCIL
18th session
Agenda item 8

71FUND/AC.18/6
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RECORD OF DECISIONS OF THE EIGHTEENTH SESSION OF THE ADMINISTRATIVE COUNCIL

(held on 27 February and 1 and 2 March 2006)

Chairperson: Mrs Teresa Martins de Oliveira (Portugal)
Vice-Chairperson: Mr John Gillies (Australia)

Opening of the session

Procedural matters

1 Adoption of the Agenda

The Administrative Council adopted the Agenda as contained in document 71FUND/AC.18/1.

2 Participation

2.1 The following States having at any time been Members of the 1971 Fund were present:

Algeria
Antigua and Barbuda
Australia
Bahamas
Belgium
Cameroon
Canada
China (Hong Kong Special Administrative Region)
Colombia
Côte d'Ivoire
Cyprus
Denmark
Finland
France
Gabon
Germany
Ghana
Greece
India
Ireland
Italy
Japan
Kenya
Liberia
Malaysia
Malta
Marshall Islands
Mexico
Morocco
Netherlands
Nigeria
Norway
Panama
Papua New Guinea
Poland
Portugal
Qatar
Republic of Korea
Russian Federation
Spain
Sri Lanka
Sweden
Tunisia
United Arab Emirates
United Kingdom
Venezuela

2.2 The following States which had not at any time been Members of the 1971 Fund were represented as observers:

Angola	Iran (Islamic Republic of)	Saudi Arabia
Argentina	Lithuania	Singapore
Brazil	Peru	South Africa
Cambodia	Philippines	Turkey
Chile	Saint Vincent and the Grenadines	Uruguay
Ecuador		

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

Intergovernmental organisations:

European Commission
International Maritime Organization (IMO)
International Oil Pollution Compensation Fund 1992 (1992 Fund)
International Oil Pollution Compensation Supplementary Fund 2003 (Supplementary Fund)

International non-governmental organisations:

International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)
International Group of P&I Clubs
International Tanker Owners Pollution Federation Ltd (ITOPF)
International Union of Marine Insurers (IUMI)
Oil Companies International Marine Forum (OCIMF)

Financial matters

3 Joint Audit Body's review of claims handling

3.1 The Administrative Council recalled that in 2005 a review of the claims settlement procedures had been carried out by the Audit Body, with the aim of enabling the Audit Body to form a view about the efficiency of these procedures. The Council also recalled that although the review had not identified any serious past weaknesses or failures by the Funds or the Secretariat, the Audit Body had made a number of recommendations relating to the time taken to handle claims, on interim payments and on the management of claims handling. It further recalled that in the light of these recommendations the governing bodies of the IOPC Funds had, at their sessions in October 2005, instructed the Director to submit a report to their next sessions setting out an action plan that the Secretariat had put in place.

3.2 The Administrative Council took note of the measures taken and to be taken by the Secretariat to address the recommendations of the Audit Body as contained in document 71FUND/AC.18/2.

3.3 A number of delegations expressed their satisfaction with the Secretariat's action plan and were pleased to note that many of the Audit Body's recommendations had already been implemented. Some delegations considered that it was important not to overburden the Secretariat with too much bureaucracy and that bearing in mind that the Funds' existing documents already received widespread circulation, further production of documents should be kept to a minimum.

3.4 One delegation referred to the enormous amount of claims documentation that had been generated in support of the French Government's claim for clean-up costs arising from the *Erika* incident and expressed its concern that this was not conducive to rapid and efficient claims handling. The Director stated that it was inevitable that any major incident would give rise to such voluminous

documentation, which included all relevant receipts and invoices relating to expenditure, although presentation in an electronic format would facilitate claims processing.

3.5 One delegation asked whether it would be possible for the Secretariat to include in its incident documents data on the numbers of claims that had remained dormant for more than two months. That delegation also asked whether the new claims database, which was being developed by the Secretariat, would be accessible to Member States. The Director stated that providing information on claims for which no action had been taken for more than two months could involve a lot of work if the information was to be meaningful, but that he would give further thought to the request and report back to the Council. The Director stated that access to the new database would be restricted to the Secretariat, the P&I insurer involved in the incident, joint experts and claims office staff since the information recorded would to a large extent be confidential.

3.6 In response to a statement by one delegation on the need for a database of decisions by the Funds' governing bodies, the Director informed the Council that work on such a database was already progressing and that it was hoped that it would be completed some time in 2006.

3.7 One delegation noted that costs of legal advisers and other experts often appeared excessive and suggested that such costs needed to be managed carefully in future. That delegation proposed the creation of a database of lawyers in each Member State and the establishment of pre-contracts, including rates to be charged in the event that their services were required in response to a particular incident. The Director stated that a database of lawyers and experts had already been created but that it was not always possible to find experienced lawyers and experts, particularly lawyers in the maritime field, in Member States. He further stated that it was difficult to agree pre-contracts since the Funds could never guarantee that services would be required in a particular State. He also pointed out that the Funds had often found itself competing with shipowners' insurers in securing the services of the most able maritime lawyers.

4 Appointment of External Auditor

4.1 The Chairman of the Audit Body, Mr Charles Coppolani, introduced document 71FUND/AC.18/3 containing the Audit Body's considerations as regards the issue of the procedure for appointment of the External Auditor of the 1992 Fund, the 1971 Fund and the Supplementary Fund.

4.2 In his introduction Mr Coppolani pointed out that, under the 1971 and 1992 Fund Conventions and the Supplementary Fund Protocol, the External Auditor should be appointed by the respective Fund's Assembly. He reminded the Administrative Council that the Funds' Financial Regulations (Regulation 14.1) provided that the External Auditor should be the Auditor-General (or officer holding the equivalent title) of a Member State, to be appointed in the manner and for the period decided by the Assembly.

4.3 It was recalled that the Comptroller and Auditor General of the United Kingdom had been the External Auditor of the 1971 and 1992 Funds since these Organisations were created in 1978 and 1996 respectively, having been reappointed for successive periods of four years, and that his present mandate expired on 31 December 2006. It was also recalled that at its 1st session, held in March 2005, the Supplementary Fund Assembly had appointed the Comptroller and Auditor General of the United Kingdom as the External Auditor for the Supplementary Fund for an initial period up to 31 December 2006 in order that the expiry of the terms of office of the External Auditor of the three Organisations should coincide.

4.4 The Administrative Council recalled that at their October 2006 sessions the governing bodies of the 1992 Fund, the 1971 Fund and the Supplementary Fund would have to appoint the External Auditor of the Funds for a period to be determined by these governing bodies commencing with the financial period 2007.

4.5 Mr Coppolani informed the Administrative Council that it was normal business practice, where an Audit Committee or corresponding body existed, for such a Committee to review the performance of external auditors and to consider questions of reappointment or audit tender and explained that the Committee then reported to the body having the power of appointment.

4.6 Mr Coppolani informed the Administrative Council that the Audit Body was prepared to assume responsibility for making recommendations to the governing bodies with regard to the appointment of the External Auditor. He emphasised that, in the Audit Body's view, the present External Auditor had over the years always carried out his task in an efficient and competent manner, provided good value for money, and had given the Organisations valuable support, eg in respect of the development of better corporate governance. Whilst drawing attention to the fact that the Funds were under no obligation to open the nomination of External Auditor to competition, Mr Coppolani, on behalf of the Audit Body, invited the Administrative Council to consider whether it would wish to initiate a tendering procedure for the nomination of the External Auditor.

4.7 The Administrative Council noted that since the term of office of the External Auditor expired at the end of 2006, the Audit Body took the view that there would not be sufficient time for the governing bodies to consider proposals on new procedures for the appointment of the External Auditor for the next period.

4.8 The Administrative Council noted the Audit Body's intention to recommend that the present External Auditor be reappointed for a further term. All delegations supported the proposal that the Administrative Council should reappoint the existing External Auditor at its October 2006 session, although there were some differences of opinion as to whether the appointment should be for the usual four years or for a shorter period.

4.9 Some delegations expressed doubts about using an Auditor from outside the country in which the Funds were located unless there was a specific, compelling reason for change. The view was also expressed that an open competition involving the External Auditors of a large number of Member States was undesirable and that it was important to consider the likely time and cost implications for the Funds.

4.10 Some delegations, while stressing that competence was paramount, considered that the rotation of External Auditors was good in principle. One delegation made the point that since the 1992 Fund and the Supplementary Fund should have a common auditor it was important to take into account the composition of the two Funds so as to adhere strictly to Regulation 14.1 of the Funds' Financial Regulations, which required the External Auditor to be from Member States.

4.11 Most delegations were in favour of requesting the Audit Body to look at the procedure for the appointment of the External Auditor in future, including the possibility of competitive tender.

4.12 The Administrative Council decided to request the Audit Body to look into the procedure for the appointment of the External Auditor in future, including the possibility of competitive tender, and to report to the Council at its October 2006 session.

4.13 In response to a question as to whether the Audit Body's mandate needed to be revised the Chairman stated that the existing mandate allowed the Audit Body to make proposals to the Administrative Council on specific studies.

4.14 In response to a question from the same delegation as to whether the Audit Body should consider appointments other than the Director and the External Auditor, the Director stated that the Audit Body could, in his view, consider the procedures for the future appointment of other external persons such as the members of the Investment Advisory Body and the external member of the Audit Body.

4.15 It was noted that the 1992 Fund Assembly and the Supplementary Fund Assembly had, at their 10th extraordinary session and 2nd extraordinary session respectively, endorsed the 1971 Fund Administrative Council's decisions as set out in paragraph 4.12 above.

5 Incidents involving the 1971 Fund

5.1 *Aegean Sea*

5.1.1 The Administrative Council took note of the information contained in document 71FUND/AC.18/4 concerning the *Aegean Sea* incident.

5.1.2 The Council recalled that on 3 December 1992 the *Aegean Sea*, carrying approximately 80 000 tonnes of crude oil, had run aground while approaching La Coruña harbour in north-west Spain, spilling an unknown quantity of oil. It was recalled that several stretches of coastline east and north-east of La Coruña had been contaminated.

5.1.3 The Council recalled that claims totalling Pts 48 187 million (£199 million) had been submitted before the criminal and civil courts.

5.1.4 It was recalled that criminal proceedings had been initiated in the Criminal Court of first instance in La Coruña against the master of the *Aegean Sea* and the pilot in charge of the ship's entry into the port of La Coruña. It was also recalled that the Court had not only considered the criminal aspects of the case but also the claims for compensation which had been presented in the criminal proceedings against the shipowner, the master, the shipowner's insurer (the United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited (UK Club)), the 1971 Fund, the owner of the cargo on board the *Aegean Sea* and the pilot.

5.1.5 The Council recalled that the Criminal Court had held that the master and the pilot were both liable for criminal negligence.

5.1.6 It was recalled that in June 2001 the Administrative Council had authorised the Director to conclude and sign on behalf of the 1971 Fund an agreement with the Spanish State, the shipowner and the UK Club on a global solution of all outstanding issues in the *Aegean Sea* case, provided the agreement contained certain elements. It was also recalled that in July 2001 the Director had made the formal offer of such an agreement, conditional upon the withdrawal of the legal actions by claimants representing at least 90% of the total amount claimed in court.

5.1.7 The Council further recalled that on 30 October 2002 an agreement had been concluded between the Spanish State, the 1971 Fund, the shipowner and the UK Club, whereby, *inter alia*, as a result of the distribution of liabilities determined by the Court of Appeal in La Coruña the total amount due from the owner of the *Aegean Sea*, the UK Club and the 1971 Fund to the victims amounted to Pts 9 000 million (£37 million), and the Spanish State undertook to compensate all the victims who might obtain a final judgement by a Spanish court in their favour which condemned the shipowner, the UK Club or the 1971 Fund to pay compensation as a result of the incident.

5.1.8 It was noted that six claimants had not reached agreement with the Spanish Government on the amount of their losses and had pursued their claims in the first instance Court in La Coruña against the Spanish State, the master, the UK Club, the shipowner and the 1971 Fund for a total amount of €3 646 000 (£2.5 million). It was also noted that the 1971 Fund had submitted pleadings to the Court to the effect that the 1971 Fund was not liable to compensate these claimants since the Spanish Government had, in the above-mentioned agreement with the 1971 Fund, undertaken to compensate all the victims of the incident with outstanding claims and that this undertaking had been approved by a Royal Decree.

5.1.9 The Council noted that in December 2005, the Court had rendered judgements in respect of three of the claims, rejecting the argument of the 1971 Fund on the grounds that the Royal Decree did

not exonerate the 1971 Fund from responsibility vis-à-vis the victims since it related to a contract between the 1971 Fund and the Spanish State and that the Spanish State had not been authorised by the victims to reach agreement on their claims with third parties. It was noted that the Court had held that the Government and the Fund had joint liability to the claimants but that it had awarded amounts considerably lower than those claimed. The Council noted that all parties had appealed against the judgements.

5.1.10 It was noted that the Spanish Government would, under the agreement with the 1971 Fund, pay any amounts awarded by these judgements.

5.2 *Plate Princess*

5.2.1 The Administrative Council took note of the information contained in document 71FUND/AC.18/4/1 concerning the *Plate Princess* incident.

The incident

5.2.2 The Council recalled that on 27 May 1997 the Maltese tanker *Plate Princess* (30 423 GRT) had discharged 3.2 tonnes of oil together with ballast water into Lake Maracaibo (Venezuela) whilst loading a cargo of 44 250 tonnes of Lagotreco crude oil at an oil terminal at Puerto Miranda.

5.2.3 It was recalled that the limitation amount applicable to the *Plate Princess* under the 1969 Civil Liability Convention had been estimated at 3.6 million SDR (£3 million) and that the shipowner had provided a bank guarantee from Banco Venezolano de Credito (BVC) in the amount of Bs 2 844 million (£740 000).

Legal actions

5.2.4 It was recalled that immediately after the incident the Criminal Court of first instance in Cabimas had commenced an investigation into the cause of the incident and had decided that criminal proceedings should be brought against the master of the *Plate Princess.*

5.2.5 The Council recalled that in June 1997 a fishermen's trade union (FETRAPESCA) had brought an action against the master and the owner of the *Plate Princess* in the Criminal Court on behalf of 1 692 fishing boat owners, claiming an estimated US$10 060 per boat (£5 650), ie a total of US$17 million (£9.5 million) for damage to fishing boats and nets and for loss of earnings. It was also recalled that FETRAPESCA had brought a claim for fishermen's loss of earnings against the shipowner and the master of the *Plate Princess* before the Civil Court of Caracas for an estimated amount of US$10 million (£5.6 million). It was further recalled that in June 1997 a local fishermen's union, the Sindicato Único de Pescadores de Puerto Miranda, had presented a claim in the Civil Court in Caracas against the shipowner and the master of the *Plate Princess* for an estimated amount of US$20 million (£11.2 million).

Time-bar issue

5.2.6 It was recalled that at the October 2005 session of the Administrative Council, the Venezuelan delegation had stated that although it had been assumed that claims arising from this incident had become time-barred, its legal advisers were of the opinion that this was not the case by virtue of Article 7.6 of the 1971 Fund Convention. It was also recalled that the Venezuelan delegation had referred to a recent decision by the Venezuela Supreme Court in respect of this incident and had stated that it wished to include the *Plate Princess* incident on the agenda of the next session of the 1971 Fund Administrative Council (document 71FUND/AC.17/20, paragraph 15.3).

5.2.7 The Council noted that the Fund had recently learned that both fishermen's unions had in 1997 requested the Court to notify the 1971 Fund of their actions but that it was only on 31 October 2005 that the 1971 Fund had been formally notified through diplomatic channels of the actions for compensation brought by FETRAPESCA and the Sindicato Único de Pescadores de Puerto Miranda against the shipowner and the master of the *Plate Princess* in June 1997 (cf paragraph 5.2.5).

5.2.8 The Council recalled the provisions of Article 6.1 of the 1971 Fund Convention which provide as follows:

> Rights to compensation under Article 4 or indemnification under Article 5 shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 7, paragraph 6, within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident that caused the damage.

5.2.9 It was noted that claims for compensation before the Venezuelan Courts had been brought against the master and the shipowner in June 1997 and that the 1971 Fund had not been named as a defendant in these actions. It was also noted that the 1971 Fund had not been notified of the action against the shipowner until 31 October 2005, ie nearly eight and a half years after the damage occurred.

5.2.10 It was noted that the Director had examined the judgement by the Supreme Court referred to by the Venezuelan delegation at the Council's October 2005 session and had noted that it related to an action by Sindicato Único de Pescadores de Puerto Miranda against BVC, the bank that had issued the guarantee provided by the shipowner in connection with the incident (cf paragraph 5.2.3), and that the issue dealt with in the judgement was whether the bank guarantee should be given back to BVC.

5.2.11 The Venezuelan delegation stated that it did not share the Director's view that the claim by the fishermen was time-barred, since legal action had been taken against the shipowner within the time set out in Articles 6 and 7.6 of the 1971 Fund Convention.

5.2.12 The Venezuelan delegation stated that Article 6 of the 1971 Fund Convention referred directly to Article 7.6 of that Convention which established that there had to be an action for compensation against the shipowner under the 1969 Civil Liability Convention or a notification to the 1971 Fund of such an action. The delegation further stated that both conditions did not have to be fulfilled; one of them was sufficient.

5.2.13 The Venezuelan delegation also stated that the legal actions against the shipowner were brought in June 1997, ie within the three-year time limit, and that therefore the 1971 Fund had been aware of these actions from that date. That delegation further stated that the 1971 Fund had been formally notified of these actions, under Article 7.6 of the 1971 Fund Convention, and that it had had sufficient time to intervene in the proceedings if it had found it appropriate.

5.2.14 That delegation stated that the time taken to notify the 1971 Fund of the proceedings was irrelevant since the action against the shipowner under the 1969 Civil Liability Convention, as could be seen from a correct interpretation of Articles 7.6 and 6 of the 1971 Fund Convention, automatically informed the 1971 Fund of such action since the 1971 Fund represented the second level of compensation to the victims once the shipowner's limitation amount under the Civil Liability Convention had been exhausted.

5.2.15 The Venezuelan delegation further stated that the delay in notifying the 1971 Fund of the actions for compensation was due to the suspension of proceedings caused by the claimants' request for 'avocamiento'[<1>].

5.2.16 The Venezuelan delegation expressed the view that any decision by the Court was binding on the 1971 Fund and that the Fund had sufficient time to present its arguments before the courts since points of defence had not yet been submitted. The delegation requested the Administrative Council to instruct the Director to intervene in the proceedings, examine the claims for compensation presented and pay the compensation due to the victims.

5.2.17 The Director stated that while he recognised that the final decision on whether the claims were time-barred vis-à-vis the 1971 Fund was a matter for the Venezuelan Courts, he disagreed with the analysis by the Venezuelan delegation of the provisions of the 1971 Fund Convention.

5.2.18 The Director stated that the provisions on time bar were always brutal in their application since, if not respected, claimants lost their rights to obtain compensation but that the 1971 Fund and the 1992 Fund governing bodies had decided that the provisions on time bar of the Conventions should be strictly adhered to. The Director also stated that the 1971 Fund had not been notified of the action against the shipowner in accordance with the formalities required by the law of the court seized and that, in his view, the claims were therefore time-barred under the first sentence of article 6.1 of the 1971 Fund Convention. The Director further stated that, in his view, the claims were also time-barred under the second sentence of Article 6.1 since no action had been brought against the 1971 Fund within six years from the date when the incident occurred.

5.2.19 One delegation stated that it had not fully understood the arguments put forward by the Venezuelan delegation and requested that delegation to submit a document for consideration by the 1971 Fund Administrative Council at its next session.

5.2.20 The Director pointed out that it might be necessary for the 1971 Fund to intervene in the legal proceedings in the near future to defend its position with regard to the time-bar issue since the 1971 Fund might otherwise lose its rights of that defence before the Venezuelan courts. For this reason the Director invited the Administrative Council to instruct him to defend the 1971 Fund position with regard to time bar before the Venezuelan Courts.

5.2.21 The Administrative Council instructed the Director to take the necessary action to defend the 1971 Fund's position on time bar before the Venezuelan Courts.

6 Co-operation with P&I Clubs

6.1 The Administrative Council took note of the information contained in document 71FUND/AC.18/5 and in particular the proposed text of a revised Memorandum of Understanding between the 1992 Fund/Supplementary Fund and the International Group of P&I Clubs as contained in Annex II to that document.

6.2 The Administrative Council agreed with the Director's view that there was no need to revise the 1980 Memorandum as regards the 1971 Fund, since the 1971 Fund would not become involved in any new incidents and that co-operation in respect of pending incidents could be carried out on the basis of that Memorandum.

[<1>] Under Venezuelan law, in exceptional circumstances, the Supreme Court may assume jurisdiction, 'avocamiento', and decide on the merits of a case. Such exceptional circumstances are defined as those which directly affect the 'public interest and social order' or where it is necessary to re-establish order in the judicial process because of the great importance of the case. If the request of 'avocamiento' is granted, the Supreme Court would act as a court of first instance and its judgement would be final.

7 Any other business

7.1 Venue for October 2006 and spring 2007 sessions

7.1.1 The Director drew the Administrative Council's attention to the fact that the IMO building would be closing for refurbishment for 14 months from 1 July 2006 and that as a result, whilst the IOPC Funds would be able to hold its sessions in May 2006 at the IMO building as usual, the October 2006 and spring 2007 sessions would need to be held at an alternative venue.

7.1.2 The Director informed the Administrative Council that the autumn 2006 meetings of the governing bodies of the IOPC Funds would take place at Inmarsat during the week of 23 October 2006. He stated that the venue had good facilities and that it was reasonably-priced, compared with other venues which had been considered, some of which would cost in the region of £20 000 per day.

7.1.3 The Director informed the Administrative Council that further details in respect of the venue and general meeting arrangements would be provided nearer the time.

7.2 Premises of the IOPC Funds' Secretariat at Portland House

The Director drew the Administrative Council's attention to the fact that the IOPC Funds Secretariat had moved into its current premises at Portland House in June 2000 and that in consultation with the United Kingdom Government, the Funds had signed a ten-year lease. The Director informed the Council that the Funds were made aware at the time of signing the lease that the landlord intended to carry out external refurbishment of the building at some point during the coming ten years. The Director also informed the Council that, contrary to what he had been led to believe at that time, he had recently been informed that the necessary work could not be carried out whilst the tenants were in the building and that, as a result, the landlord was negotiating with the tenants to obtain their agreements to terminate the lease so as to enable him to carry out the refurbishment, which was expected to take two or three years. The Director mentioned that the landlord had offered the tenants alternative office space in two new office buildings close to Portland House. The Director stated that he was considering the issue in consultation with the United Kingdom Government. He mentioned that he had only very recently been informed of this situation and that, as a result, had been unable to assess the possible implications. The Director stated that he would submit a document on this issue to the next session of the Council.

7.3 Winding up of the 1971 Fund

In response to a question, the Director stated that the Administrative Council was informed each year at its October sessions on the developments as regards the winding up of the 1971 Fund. He mentioned that a study would be carried out of the legal problems relating to the winding up.

8 Adoption of the Record of Decisions

The draft Record of Decisions of the Administrative Council, as contained in documents 71FUND/AC.18/WP.1 and 71FUND/AC.18/WP.1/Add.1 was adopted, subject to certain amendments.