



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
7th session
Agenda item 5

92FUND/EXC.7/5
6 April 2000
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RECORD OF DECISIONS OF THE SEVENTH SESSION OF THE EXECUTIVE COMMITTEE

(held from 3 to 6 April 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.7/1.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

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

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

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:

Fiji	Malta	Russian Federation
Italy	Poland	Trinidad and Tobago

Other States

Antigua and Barbuda	Ecuador	Nigeria
Brazil	Estonia	Peru
Chile	Georgia	Saudi Arabia
Colombia	India	Turkey
Côte d'Ivoire	Malaysia	United States

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

International non-governmental organisations:

Cristal Ltd
Comité Maritime International (CMI)
International Association of Independent Tanker Owners (INTERTANKO)
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 *Nakhodka*

Claims for compensation

3.1.1 The Executive Committee took note of the developments in respect of the *Nakhodka* incident, as contained in document 92FUND/EXC.7/2 and 71FUND/EXC.63/7.

3.1.2 It was noted that as at 31 March 2000 claims totalling ¥35 871 million (£210 million) had been received and that payments totalling ¥10 354 million (£52 million) had been made by the 1971 Fund and the shipowner and his insurer, the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd (UK Club). It was also noted that out of this amount, ¥2 314 million (£11.2 million) had been paid after the Executive Committees' October 1999 sessions.

- 3.1.3 The Committee noted that it was expected that the assessment of all claims in the tourism sector would be completed by summer 2000.
- 3.1.4 The Japanese delegation observed that, although the *Nakhodka* incident had taken place in January 1997, ie more than three years ago, the damage caused by this incident had not yet been fully compensated. That delegation noted that the prolonged financial difficulties suffered by the victims due to the lack of full compensation had now become a serious problem, in particular for fishermen and small-scale tourism businesses. The Japanese delegation also noted that victims recently had to take actions in the Japanese courts - because if legal actions had not been taken, their rights to compensation would have been extinguished under Article VIII of the Civil Liability Convention and Article 6 of the Fund Convention – which had resulted in additional costs for them and further anxiety. That delegation considered that it was no exaggeration to say that the victims now felt uncertainty as to their future life.
- 3.1.5 The Japanese delegation stated that the Japanese Government highly valued and endorsed the proposal made by the Director to increase the level of the Funds' payments to 70%, as it would be a significant step towards giving victims as much relief as possible pending the final settlement of the case, and that that delegation considered the proposal to be totally in line with the ultimate aim of the IOPC Funds of ensuring that adequate compensation was available to persons who suffered damage caused by oil pollution.
- 3.1.6 The Japanese Government requested that the IOPC Funds and all other parties concerned should make further efforts so that prompt and adequate compensation could be provided to the victims of the *Nakhodka* incident. That delegation also stressed that such efforts would be essential in dealing with the *Erika* incident.
- 3.1.7 The Director assured the Executive Committee that every effort would be made to assess the remaining claims as soon as possible. He mentioned that it was expected that another ¥1 200 million (£7.1 million) would be paid to claimants in the near future. He added that, should his proposal to increase the level of payments from 60% to 70% of the loss or damage actually suffered by the individual claimants be approved by the Committee, another ¥1 645 million (£9.7 million) would be made available to claimants.

Legal actions taken against the shipowner/UK Club and the IOPC Funds

- 3.1.8 The Executive Committee noted that before the third anniversary of the incident on 2 January 2000 a large number of claimants had taken action against the shipowner, the UK Club and the IOPC Funds for ¥20 309 million (£119 million). It was also noted that in December 1999 the shipowner and the UK Club had taken legal actions against the 1971 and 1992 Funds for ¥537 million (£3.2 million) in respect of the payments which they had made to certain contractors.

Level of payments

- 3.1.9 The Executive Committee recalled that 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%. The Committee also recalled that the Executive Committees of the two organisations had confirmed, most recently at their October 1999 sessions, that the level of payments should be maintained at 60%.
- 3.1.10 The Committee noted that claims against the IOPC Funds had become time-barred on or shortly after 2 January 2000.
- 3.1.11 The Committee noted further that the total exposure of the Funds could be estimated at some ¥30 500 million (£179 million) and that the total amount available for compensation under the 1992 Fund Convention was ¥23 164 515 000 (£136 million).

- 3.1.12 In the light of the foregoing the Executive Committee decided to increase the level of the 1992 Fund's payments to 70% of the amount of the damage actually suffered by the respective claimants. It was agreed that the level of payments should be reviewed again at the Committee's session in October 2000.
- 3.1.13 The Executive Committee noted that the Administrative Council of the 1971 Fund had, at its 1st session, taken the corresponding decision on the level of payments (document 71FUND/AC.1/EXC.63/11, paragraph 3.6.12).

Recourse actions taken by the IOPC Funds

- 3.1.14 It was recalled that at their October 1999 sessions the Executive Committees of the 1971 Fund and the 1992 Fund had decided that if the shipowner, Prisco Traffic Limited, initiated limitation proceedings, the 1971 and the 1992 Funds should oppose its right to limit its liability. It was further recalled that the Committees had also decided that the Funds should take recourse action against Prisco Traffic Limited, its parent company Primorsk Shipping Corporation ('Primorsk'), the UK Club and the Russian Maritime Register of Shipping.
- 3.1.15 The Executive Committee noted that in November and December 1999 the 1971 Fund and the 1992 Fund had brought legal actions against Prisco Traffic Limited, Primorsk, the UK Club and the Russian Maritime Register of Shipping for a total of ¥23 000 million.
- 3.1.16 The Executive Committee recalled that at the October 1999 sessions the Executive Committees of the two Organisations had noted that significant repairs had been carried out on the *Nakhodka* in 1993 at a shipyard in Singapore and that the Committees had decided that the question of whether or not the 1971 and 1992 Funds should take legal action against the shipyard should be left to the discretion of the Director, in the light of what was in the best interest of the Organisations. The Committee noted that, in the light of the advice received from the Funds' lawyers and experts, the Director had decided not to take legal action against the shipyard.

3.2 *Dolly*

- 3.2.1 The Executive Committee took note of the information contained in document 92FUND/EXC.7/3 in respect of the *Dolly* incident, which occurred on 5 November 1999 off Martinique (France).
- 3.2.2 The Committee noted that the *Dolly* was originally a general cargo vessel, but special tanks for carrying bitumen had been fitted, together with a cargo heating system, and that the ship probably did not have any liability insurance. It was further noted that the Director had informed the French Government that the 1992 Fund had 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.

3.3 *Erika*

- 3.3.1 The Executive Committee took note of the developments in respect of the *Erika* incident, as contained in documents 92FUND/EXC.7/4 and 92FUND/EXC.7/4/Add.1.

Operations to prevent further oil escaping from the wreck

- 3.3.2 The Committee noted that the two sunken parts of the *Erika* contained significant quantities of oil. The Committee also noted the various options for preventing further oil escaping from the wreck which had been considered, as set out in paragraphs 4.7 – 4.10 of document 92FUND/EXC.7/4. The Committee further noted that, following the studies carried out by Total Fina, the French Government had taken the decision that oil removal operations should be carried out by using a pumping method. It was noted that it was expected that the contract for the operation would be awarded in late April 2000, and that work would commence in June 2000 and be carried out during the period June – September 2000.

Claims for compensation

- 3.3.3 The Committee noted that as at 31 March 2000 the Claims Handling Office in Lorient established by the 1992 Fund and the shipowner's P & I insurer, the Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual) had received 721 claims for compensation plus 111 supplementary claims and that as of that date the Steamship Mutual had made interim payments to 84 claimants for a total of FFr1 014 936 (£93 000). It was also noted that the Steamship Mutual had authorised interim payments for a further FFr322 752 (£30 000) to 33 claimants. It was further noted that the Director had approved all these payments.

Payments of compensation

- 3.3.4 It was recalled that Total Fina had undertaken not to pursue its claims against the 1992 Fund or against the shipowner's limitation fund relating to the cost of any inspections and operations in respect of the wreck (including removal of the oil), if and to the extent that the presentation of such claims would result in the total amount of the claims arising out of this incident exceeding the maximum amount of compensation available under the 1992 Conventions, ie 135 million Special Drawing Rights (SDR). It was also recalled that Total Fina had made a corresponding undertaking in respect of the cost of the collection and disposal of the oily waste generated by the clean-up operations, of the cost of its participation in the beach clean-up up to a maximum of FFr40 million and of the cost of a publicity campaign to restore the tourist image of the Atlantic coast up to a maximum of FFr30 million.
- 3.3.5 The Committee recalled that also the French Government had undertaken not to pursue claims for compensation against the 1992 Fund or the limitation fund if and to the extent that the presentation of such claims would result in the maximum amount available under the 1992 Conventions being exceeded. It was also recalled that this undertaking covered all the expenses incurred by the French State in combating the pollution, *inter alia* those expenses falling within the framework of Plan Polmar, as well as all measures which the State might take in different sectors to reduce the consequences of the incident, including any publicity campaigns to this effect. It was further recalled that the French delegation had made the point that the French Government's claims would rank before any claims by Total Fina.
- 3.3.6 It was noted that the total costs incurred by the French authorities and Total Fina had been estimated to be in the region of FFr1 500 million (£137 million) but that these costs could be substantially higher.
- 3.3.7 It was recalled that the French Government had taken steps to establish a procedure under which claimants whose claims had been assessed by the 1992 Fund's technical experts and approved by the Fund could obtain advance payments from the Banque du développement des petites et moyennes entreprises (Small and medium enterprise development Bank).
- 3.3.8 The Executive Committee noted that it was not yet possible to estimate the losses in the fishery sector, since some fishing bans were still in force, and that it was not possible to estimate the magnitude of the losses in the tourism sector since the tourism season had not yet started. The Committee also noted the opinion of the French Government and the Director that in the light of this situation it was not possible to make any meaningful assessment of the total amount of the established claims.
- 3.3.9 During the discussion it was emphasised that the 1992 Fund should make all efforts to make compensation available to victims as soon as possible, in order to demonstrate that the regime of compensation established by the 1992 Conventions worked satisfactorily and that there was no need to create any alternative liability scheme.
- 3.3.10 The Committee noted that the Steamship Mutual was prepared to continue to make funds available for interim payments in appropriate cases.

- 3.3.11 The Executive Committee recalled that at its 6th session the Committee had authorised the Director to make final settlements on behalf of the 1992 Fund of all claims arising out of this incident, to the extent that the claims did not give rise to questions of principle which had not previously been decided by the Committee (document 92FUND/EXC.6/5, paragraph 3.9). The Committee confirmed that decision, clarifying that the Director was authorised to make final settlements of all claims arising out of the *Erika* incident, to the extent that the claims did not give rise to questions of principle which had not previously been decided by one of the governing bodies of the 1971 Fund or the 1992 Fund, ie their Assemblies or Executive Committees.
- 3.3.12 In the light of the uncertainty as to the total level of the established claims, the Executive Committee decided that the Director's authority to make payments should for the time being remain limited to provisional payments under Internal Regulation 7.9.
- 3.3.13 The Committee noted that it was expected that the claims situation would become clearer by mid-June 2000, since at that time it would probably be possible to make an evaluation of the impact of the incident on the fishery sector and it should be possible to assess the potential impact on the tourism sector.
- 3.3.14 The Executive Committee decided to hold a session on 5 July 2000 to consider the developments in the *Erika* case.

Notion of 'pollution damage'

- 3.3.15 One delegation mentioned that it had been suggested that the oil carried by the *Erika* was residual oil which contained certain toxic components. That delegation raised the question of whether damage caused by such toxic components could be considered as covered by the definition of 'pollution damage' laid down in the 1992 Conventions.
- 3.3.16 The Director stated that, in his view, property damage and economic losses resulting from contamination by oil would fall within the definition of 'pollution damage' even if caused by the toxicity of the oil. He recognised that the situation might be different as regards negative health effects caused by the oil.
- 3.3.17 The delegation referred to in paragraph 3.3.15 agreed with the position of the Director and took the view that claims alleging negative effects on health should be submitted to the Executive Committee for consideration.

Publicity campaigns

- 3.3.18 The Executive Committee noted that the French Government, through the Ministry of Tourism, was carrying out a co-ordinated campaign to counteract the negative impact of the *Erika* incident on tourism in the affected area, consisting mainly of press and television advertising and mail marketing activities directed at travel operators, and that it was targeted at specific foreign markets. It was noted that a television advertising campaign for the French domestic market would also be undertaken. It was further noted that, in order to avoid internal competition, the campaigns were aimed at restoring the image of the Atlantic coast as a whole and that the purpose of those campaigns was also to provide support for the various regions and Départements which would carry out their own promotion activities targeting the French market.
- 3.3.19 The Committee reiterated the need for co-ordination of any publicity campaigns and noted that the French Government would co-ordinate any such campaigns.

Limitation proceedings

- 3.3.20 The Committee noted that on 14 March 2000 the Tribunal de Grande Instance in Nantes had issued an order opening the limitation proceedings, that the Court had determined the limitation amount applicable to the *Erika* at FFr84 247 733 (£7.7 million) and that it had declared that the shipowner had constituted the limitation fund by means of a letter of guarantee issued by the Steamship Mutual.

- 3.3.21 It was noted that the liquidator appointed by the Court had issued a public notice inviting claimants to present their compensation claims within 30 days from the date of the notice (24 March 2000) and that claims not presented within this period would be barred.
- 3.3.22 The French delegation expressed the view that the period of 30 days for the submission of claims fixed by the liquidator appeared not to be in conformity with the provisions of the 1992 Civil Liability Convention which laid down a time bar period of three years from the date of the damage. That delegation mentioned that the French Government was examining how to reconcile the French procedures with the applicable provisions of the Convention.

Maximum amount payable under the 1992 Fund Convention

- 3.3.23 The Executive Committee recalled that it had decided at its 6th session that the conversion of 135 million SDR into French Francs should be made on the basis of the value of that currency *vis-à-vis* the SDR on the date of the adoption of the Executive Committee's Record of Decisions of its 6th session, ie 15 February 2000 (document 92FUNDEXC.6/5, paragraph 3.2.9). The Committee endorsed the Director's calculation of the conversion on the basis of the rates applicable on that day, giving 135 million SDR = FFfr1 211 966 881.

Cause of the incident

- 3.3.24 The Committee noted that the French Permanent Enquiry Commission for Incidents at Sea (Commission Permanente d'enquête sur les événements de Mer) was carrying out an investigation into the cause of the *Erika* incident and that the Commission's preliminary report had been published on 13 January 2000. The Committee noted that the shipowner and the Steamship Mutual had expressed reservations in respect of several points in these preliminary conclusions.
- 3.3.25 The Executive Committee noted that the Maltese authorities and the Tribunal de Grande Instance in Paris were also carrying out investigations into the cause of the incident.
- 3.3.26 The Executive Committee instructed the Director to continue to follow the investigations into the cause of the incident.
- 3.3.27 It was recalled that the Tribunal de Commerce in Dunkirk had appointed experts to investigate the cause of the incident ('expertise judiciaire'). It was noted that the Court had decided that, since Total Fina had requested the expertise judiciaire, it should make an advance payment to cover the ensuing costs. It was further noted that Total Fina had requested that the 1992 Fund should contribute to the advance payment, and that the Director had informed Total Fina that the Fund was not prepared to do so. The Committee endorsed the Director's position.
- 3.3.28 The Italian observer delegation informed the Committee that the Registro Italiano Navale (RINA) had acted in respect of the *Erika* as the certifying registry in accordance with an agreement with the Maltese authorities. That delegation stated that the Italian Government had however decided to carry out an investigation into the cause and responsibilities of the incident. The Italian delegation also mentioned that the Italian Government shared the concern of the French Government on the need to deepen the analysis of the safety of navigation with regard to sea transport of dangerous or polluting substances.

4 **Any other business**

No issues were raised under this item.

5 **Adoption of the Record of Decisions**

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.7/WP.1, was adopted, subject to certain amendments.
