INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

ADMINISTRATIVE COUNCIL
10th session
Agenda item 4

71FUND/AC.10/5
7 February 2003
Original: ENGLISH

RECORD OF DECISIONS OF THE TENTH SESSION OF THE ADMINISTRATIVE COUNCIL

(held on 3, 4 and 7 February 2003)

Chairman: Captain R Malik (Malaysia)

Opening of the session

1 Adoption of the Agenda

The Administrative Council adopted the Agenda as contained in document 71FUND/AC.10/1.

2 Participation

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

Algeria	Germany	Norway
Antigua and Barbuda	Greece	Panama
Bahamas	Ireland	Poland
Barbados	Italy	Portugal
Belgium	Japan	Republic of Korea
Cameroon	Liberia	Russian Federation
Canada	Malaysia	Spain
Colombia	Malta	Sweden
Côte d'Ivoire	Marshall Islands	Tunisia
Denmark	Mexico	United Kingdom
Finland	Morocco	Venezuela
France	Netherlands	

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

Argentina	Iran, Islamic Republic of	Singapore
Ecuador	Peru	Turkey
Grenada	Philippines	Uruguay

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

Intergovernmental organisations
European Commission

International non-governmental organisations:
Comité Maritime International (CMI)
Cristal Limited
Federation of European Tank Storage Associations (FETSA)
Friends of the Earth International (FOEI)
International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)
International Group of P & I Clubs
International Salvage Union (ISU)
International Tanker Owners Pollution Federation Limited (ITOPF)
Oil Companies International Marine Forum (OCIMF)

3 Incidents involving the 1971 Fund

3.1 *Aegean Sea*

The Administrative Council took note of the information contained in document 71FUND/AC.10/2 concerning the *Aegean Sea* incident (Spain, 3 December 1992).

Main outstanding issues

3.1.1 The Administrative Council recalled that by 1999 there were three main outstanding issues:

- the quantification of the losses, except those for which an amount was determined by the Courts;
- the distribution of liabilities between the Spanish State and the shipowner/UK Club/1971 Fund; and,
- the issue of time bar in respect of the claimants who brought action in the civil courts.

Global settlement

3.1.2 The Council recalled that at its 5th session held in June 2001 it had authorised the Director to conclude and sign on behalf of the 1971 Fund an agreement with the Spanish State, the owner of the *Aegean Sea* and the shipowner's insurer, the United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited (UK Club), on a global solution of all outstanding issues in the *Aegean Sea* case.

3.1.3 It was further recalled that in July 2001, the Director had made a formal offer on behalf of the 1971 Fund to the Spanish Government to conclude an agreement between the Spanish State, the Fund, the shipowner and the UK Club, which contained the following elements:

(a) The total amount due by the owner of the *Aegean Sea*, the UK Club and the 1971 Fund to the victims as a result of the distribution of liabilities determined by the Court of Appeal in La Coruña amounted to Pts 9 000 million (€54 million or £31 million).

(b) The sum payable by the 1971 Fund to the Spanish State, after deduction of certain sums, amounted to Pts 6 386 921 613 (€38 million or £24 million).

(c) In addition, the 1971 Fund undertook to pay to the victims whose claims had not been included in those agreed with the Spanish State and who were listed in an Annex to the Agreement, the difference between the total agreed amount of the loss or damage and the amount paid to date, amounting to Pts 121 512 031 (€730 000 or £463 000).

(d) As a consequence of the distribution of liabilities determined by the Court of Appeal in La Coruña, the Spanish State would undertake to compensate all the victims who may 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.

3.1.4 It was recalled that the 1971 Fund had made it a condition for the conclusion of the Agreement that the Spanish State presented to the 1971 Fund a copy of the withdrawals by the victims of their legal actions representing at least 90% of the principal of the loss or damage claimed, except for the claim by the UK Club for preventive measures. It was also recalled that the shipowner, the UK Club and the 1971 Fund had expressly reserved their rights to defend before the Spanish courts and tribunals their position with respect to the distribution of liabilities and with respect to a group of claims being time-barred.

3.1.5 The Council recalled that the Spanish State Council had approved the proposed settlement agreement on 4 October 2002. It was also recalled that the Spanish Parliament had adopted a decree ('Decreto-Ley') on 17 October 2002 authorising the Ministry of Finance to sign on behalf of the Spanish Government an agreement between Spain, the shipowner, the UK Club and the 1971 Fund to make out-of-court settlements with claimants in exchange for the withdrawal of their court actions.

3.1.6 The Council noted that by 30 October 2002 the Spanish Government had reached agreements with claimants representing over 90% of the principal of the loss or damage claimed and that therefore the conditions laid down in the 1971 Fund's offer were fulfilled. It was also noted that the agreement between the Spanish State, the 1971 Fund, the shipowner and the UK Club was signed in Madrid on 30 October 2002.

3.1.7 The Council further noted that, pursuant to the Agreement, the 1971 Fund had paid on 1 November 2002 €38 386 172 corresponding to Pts 6 386 921 613 (£24 411 208) to the Spanish Government. It was noted that during the period November 2002-January 2003 the 1971 Fund had made payments of €1 006 489 (Ptas 167 465 618 or £633 108) in respect of 93 of the 95 claims which had been agreed with claimants at an early stage but that had not been included in the agreement with the Spanish State. It was also noted that the 1971 Fund had so far not been able to pay the remaining two claims with an outstanding balance of €1 819 (Ptas 302 693 or £1 146) because it had not been possible to contact the claimants or because they had not signed the necessary documents. The Council further noted that the payments of compensation made by the 1971 Fund in respect of this incident totalled £30 222 183.

3.1.8 It was also noted that on 17 December 2002 the 1971 Fund had paid €1 672 000 corresponding to Pts 278 197 307 (£1 068 767) to the UK Club in indemnification of the shipowner under Article 5.1 of the 1971 Fund Convention.

3.1.9 The Spanish delegation expressed its satisfaction that a global settlement had been reached and stated that a number of lessons had been learned as a result of the *Aegean Sea* incident.

3.1.10 The Administrative Council expressed its satisfaction that the *Aegean Sea* incident had been settled and that all but a few claims had been paid. The Council also expressed its gratitude to all parties involved who had contributed to the settlement.

3.2 *Nakhodka*

3.2.1 The Administrative Council took note of the information concerning the developments in respect of the *Nakhodka* incident (Japan, 2 January 1997) contained in document 71FUND/AC.10/3 (cf 92FUND/EXC.20/2).

3.2.2 It was recalled that the *Nakhodka* incident had resulted in claims totalling ¥36 045 million (£188 million) and that in view of the total amount of the claims the governing bodies had decided to limit the IOPC Funds' payments to 80% of the amount of the damage actually suffered by the individual claimant. It was noted that all the claims had been finally settled at a total of ¥26 087 879 202 (£136 million).

Legal actions in the Japanese Courts

3.2.3 The Administrative Council recalled that, pursuant to the governing bodies' decisions, the IOPC Funds had brought legal actions in the Fukui District Court against the owner of the *Nakhodka* (Prisco Traffic Limited), Prisco's parent company (Primorsk Shipping Corporation), the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd (UK Club) and the Russian Maritime Register of Shipping, to recover any amounts paid by the Funds in compensation.

Global solution

3.2.4 It was recalled that at their April/May 2002 sessions, the governing bodies had approved the proposal for a global settlement made by the UK Club. It was also recalled that the governing bodies had authorised the Director to conclude a Settlement Agreement provided it contained the elements set out in paragraph 3.1 of document 71FUND/AC.10/3 and to agree with the other parties on the details of such an agreement (documents 92FUND/EXC.16/6, paragraph 3.1.36 and 71FUND/AC.7/A/ES.9/14, paragraph 8.4.36). It was further recalled that the governing bodies had decided that the IOPC Funds should withdraw their actions against the Russian Maritime Register of Shipping.

3.2.5 The Council noted that the Settlement Agreement between the IOPC Funds, on the one hand, and Prisco Traffic Limited and the UK Club, on the other, had been signed on 28 October 2002. It was noted that, in accordance with the Agreement, on 31 October 2002 the UK Club had reimbursed the IOPC Funds ¥5 229 812 901 (£27.3 million) in respect of the compensation payments made by the Funds and £3.6 million in respect of the Club's share of the joint costs. It was also noted that the UK Club had paid the 20% balance of all settled claims, that all claimants had therefore been fully compensated and that as a result, all claimants had withdrawn their court actions. The Council noted that the legal actions taken in the Fukui District Court by the IOPC Funds, Prisco Traffic Limited and the UK Club, as well as the IOPC Funds' actions against Primorsk Shipping Corporation and the Russian Register of Shipping, had been withdrawn on 9 December 2002.

3.2.6 It was noted that, whilst Primorsk Shipping Corporation and the Russian Maritime Register of Shipping were not parties to the Agreement, they had undertaken not to pursue any claims for legal costs against the IOPC Funds.

Distribution between the 1971 and 1992 Funds of the amount recovered on the basis of the global settlement

3.2.7 It was recalled that the governing bodies had decided at their October 2002 sessions that the financial benefits of the global settlement should be distributed in proportion to the respective liabilities of the two Funds, resulting in the 1971 Fund receiving 43.268% and the 1992 Fund 56.732% of these benefits, and that all costs borne by the Funds should be apportioned between the two Funds on the same basis (document 92FUND/EXC.18/14, paragraph 3.2.23 and 71FUND/AC.9/20, paragraph 15.6.23). The Council noted that the distribution of the amount recovered from the UK Club, ¥5 229 812 901 (£27 288 353), had been made according to those decisions, resulting in the 1992 Fund recovering ¥2 966 977 455 (£15 481 228) and the 1971 Fund ¥2 262 835 446 (£11 807 125). It was also noted that the UK Club's contribution to joint costs, £3 617 526, had been distributed on the same basis.

Benefits of the global settlement

3.2.8 The Director drew the Council's attention to the fact that the financial benefits to the IOPC Funds totalled some £42 million, namely £27.3 million reimbursed by the UK Club in respect of the compensation payments, £3.6 million in respect of the UK Club's share of the joint costs and £11 million as a result of the 1992 Fund not having to pay compensation up to its limit. He expressed the view that the global settlement presented three major benefits: firstly all claimants had been compensated in full; secondly, the IOPC Funds and the other parties concerned did not need to be involved in protracted legal proceedings; thirdly, the 1971 and 1992 Funds had recovered significant portions of the amounts paid by them in compensation.

3.2.9 The Japanese delegation expressed its satisfaction with the global settlement.

3.2.10 The Administrative Council expressed its satisfaction that the *Nakhodka* incident had been settled, that all claimants had been paid in full, and that the 1971 and 1992 Funds had recovered significant portions of the amounts paid by them in compensation.

Lesson to be learned

3.2.11 One delegation proposed that the Director should be instructed to prepare a document for consideration by the Council on the experience of the claims handling in the *Nakhodka* case so as to enable the Funds to learn from their experiences for future cases.

3.2.12 The Director drew attention to the fact that the Administrative Council had at its 9th session, held in October 2002, endorsed a proposal by the Director that he should submit a report to the governing bodies at their October 2003 sessions on certain points raised by the Japanese delegation concerning the need to improve the claims handling and settlement process in the light of the lessons learned from the *Nakhodka* incident (document 71FUND/AC.9/20, paragraph 15.6.33).

3.3 *Alambra*

3.3.1 The Administrative Council took note of the information contained in document 71FUND/AC.10/4 concerning the *Alambra* incident, which occurred in Estonia on 17 September 2000.

Claims for compensation

3.3.2 The Administrative Council recalled that daims for clean-up costs had been submitted to the owner of the *Alambra* and his insurer, the London Steam-Ship Owners' Mutual Insurance Association Ltd (London Club) by the Tallinn Port Authority for EEK 6.5 million (£270 800) and by the Estonian State (Ministry of Environment) for EEK 4 million (£166 700).

3.3.3 The Council recalled that a claim for EEK 45.1 million (£1.9 million) was being pursued against the shipowner by the Estonian State. The Council also recalled that this amount, which had the character of a fine or charge, appeared to have been calculated on the basis of the estimated quantity of oil spilled and could not therefore be considered a claim for compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention.

3.3.4 It was recalled that a claim for US$100 000 (£63 000) was being pursued against the shipowner and the London Club by a charterer of a vessel said to have been delayed whilst clean-up operations were being undertaken. It was also recalled that the owner of the berth in the Port of Muuga from which the *Alambra* was loading cargo at the time of the incident, and a company contracted by the owner of the berth to carry out oil loading activities on its behalf, had submitted claims to the shipowner and the London Club for EEK 29.1 million (£1.2 million) and EEK 9.7 million (£404 000) respectively for loss of income due to the unavailability of the berth whilst clean-up operations were undertaken.

Legal actions

3.3.5 It was recalled that in November 2000 the owner of the berth in the Port of Muuga and the company it had contracted to carry out oil loading operations had taken legal actions against the shipowner and the London Club and that the 1971 had been notified of the actions in accordance with Article 7.6 of the 1971 Fund Convention in February 2002. It was also recalled that the 1971 Fund had intervened in the proceedings and that in the context of these legal actions, the question had arisen as to whether the 1969 Civil Liability Convention and the 1971 Fund Convention had been correctly implemented into Estonian national law.

3.3.6 It was noted that the total amount of the claims for compensation filed in the court fell well below the limitation amount applicable to the *Alambra* under the 1969 Civil Liability Convention and also below the amount at which the 1971 Fund may be called upon to pay indemnification to the shipowner.

3.3.7 The Council recalled that Estonia had ratified the 1969 Civil Liability Convention and the 1971 Fund Convention on 1 December 1992 and that the Conventions had entered into force for Estonia on 1 March 1993. It was however recalled that the lawyers acting for the shipowner and the London Club, as well as the Estonian lawyers acting for the 1971 Fund were of the view that, under the Estonian Constitution, ratification of the Conventions should not have taken place before the Estonian Parliament had given its approval and adopted the necessary amendments to the national legislation. It was also recalled that, as the Conventions had not been submitted to Parliament and the necessary amendments to national law had not been made, the 1969 Civil Liability Convention did not, in the Club's and Fund's lawyers' view, form part of national law and could not be applied by the Estonian courts.

3.3.8 It was recalled that a Bill containing a proposal for a new Maritime Act had been submitted to the Estonian Parliament in 2002, in which it was stated that the 1969 Civil Liability Convention was a treaty which needed parliamentary approval, since it required amendments to Estonian national law, and that although accession to the Convention had been made in contradiction with the Constitution, at the international level Estonia was deemed to be a party to the 1969 Civil Liability Convention. It was further recalled that the Bill recognised the same problem in respect of the 1971 Fund Convention, which required ratification by Parliament although it did not require amendments to national law.

3.3.9 It was recalled that the shipowner and the London Club had raised this issue in their pleadings in the court, as the 1971 Fund had done in its submission to the court in order to protect its position, pending the Administrative Council's consideration of this matter.

3.3.10 It was also recalled that at the July 2002 session of the Administrative Council the Director had expressed the view that the procedure for ratification of international treaties laid down in the

Estonian Constitution had not been observed and that it was possible that the 1969 and 1971 Conventions would be considered by the Estonian courts as not forming part of Estonian law but that it could not be ruled out that the courts might find that the Conventions were nevertheless applicable. The Council recalled that the Director had also expressed the view that, since the purpose of the 1971 Fund was to compensate victims of oil pollution damage, the Fund should normally not take a formalistic approach in dealing with claims for compensation and that for this reason, if the claims in the *Alambra* case were settled out of court, the issue of the non-applicability of the Conventions should not be raised by the Fund. The Council further recalled that, since this issue had been raised by the shipowner and the London Club and by the 1971 Fund in the legal proceedings, if the courts were to hold that the claims against the shipowner and the Club could not be pursued under the Conventions but only under other provisions in Estonian national law, the question would arise as to the basis of the 1971 Fund's obligation to pay compensation.

3.3.11 It was recalled that in September 2002 the London Club had filed pleadings in court maintaining that the shipowner had deliberately failed to make the necessary repairs to the *Alambra* resulting in the ship becoming unseaworthy and that therefore under the insurance contract as well as under the Estonian Merchant Shipping Act, the Club was not liable to pay compensation for the damage resulting from the incident.

3.3.12 The Council noted that the Director had examined the pleadings submitted by the London Club in which it was stated that the *Alambra* had had a history of corrosion problems both prior and subsequent to its purchase by its owner at the time of the incident in Estonia. It was also noted that the Club had stated that in June 2000 the master of the *Alambra* had reported a corrosion hole in the bottom plating of a cargo tank, but that, in contravention of the classification society's rules, the shipowner had allowed the vessel to load a full cargo. It was also noted that the Club had stated that during the laden voyage the vessel had made a deviation to Kalamata (Greece) for repairs by divers, although this had not been recorded in the vessel's engine or deck log books. It was further noted that the Club had stated that when the vessel arrived at Mohammédia (Morocco), its discharge port, there had been a leakage of cargo from one of the cargo tanks, that the vessel had sailed to Algeciras (Spain) for further underwater repairs before returning to Mohammédia to continue its cargo discharge, and that these events had not been reported in the deck log book. It was further noted that the London Club had pleaded that the shipowner must have been aware of the condition of the vessel, and that in failing to report the holes in the cargo tanks to the classification society and in allowing the vessel to continue trading in such a condition, the pollution in Estonia was a result of the shipowner's intentional wrongful act and that the Club therefore had no liability for the pollution damage.

3.3.13 It was recalled that the case was considered by the Administrative Council at its session in October 2002 but that the Council had not given the Director any instructions as regards the court proceedings.

3.3.14 The Council noted that the Director had examined, together with the 1971 Fund's Estonian lawyers, the documentation submitted by the Club. It was also noted that the Director had considered the legal aspects of the Club's position and that, as a result of this analysis, the 1971 Fund had filed further pleadings arguing that under Estonian law the concept of wilful misconduct was to be interpreted as an intentional act, not only in respect of the incident but also in respect of the effects thereof, ie that the shipowner had deliberately caused pollution damage. The Council further noted that the Fund had in its pleadings maintained that the evidence presented regarding the condition of the *Alambra* did not establish that the shipowner was guilty of wilful misconduct and that the insurer was therefore not exonerated from its liability for pollution damage. It was also noted that the Court's judgements were expected in May 2003.

3.3.15 The Administrative Council supported the steps taken by the Director to protect the 1971 Fund's interests.

3.3.16 One delegation stated that it was not happy with the position taken by the London Club and urged the Club to reconsider its position in order to ensure payment of the victims.

3.3.17 The representative of the observer delegation of the International Group of P & I Clubs informed the Council that the Club had been prepared in principle to settle the claims for pollution damage referred to in paragraph 3.3.2 but contested the claims relating to the water charge mentioned in paragraph 3.3.3 which in the Club's view did not fall within the scope of the 1969 Civil Liability Convention.

3.4 *Sea Empress*

3.4.1 The Administrative Council recalled that a claim for £645 000 resulting from the *Sea* Empress incident (United Kingdom, 15 February, 1996) presented by a whelk processor based in Devon had been rejected by the 1971 Fund and the Skuld Club on the grounds of lack of reasonable proximity between the oil pollution and the alleged loss and that the whelk processor had pursued his claim in court. It was also recalled that in May 2002 the High Court (Court of First Instance) had considered the preliminary issue of whether the claim for loss of profits constituted pollution damage within the meaning of the United Kingdom Merchant Shipping Act 1995 (which implements the 1969 Civil Liability Convention and the 1971 Fund Convention). It was further recalled that the Court had found that the claim was inadmissible for substantially the same reasons as those given in the decision by the Scottish Inner House (Appeal Court) in the Landcatch case, ie that the claim was secondary, derivative, relational and/or indirect and that this lack of proximity rendered the claim too remote. The Council also recalled that the claimant had lodged an appeal against the High Court's decision.

3.4.2 It was noted that the Court of Appeal had held a hearing on 17 January 2003 and that the Court's judgement was rendered on 7 February 2003. The Council noted that the Court of Appeal, composed of three judges, in a unanimous judgement, had dismissed the appeal and upheld the decision by the High Court to reject the claim.

3.4.3 It was noted that in its judgement the Court of Appeal, applying the Landcatch case, held that the loss suffered did not fall within the ambit of the Merchant Shipping Act 1995. It was noted that the Court's reasons could be summarised as follows:

> The Court took account of the fact that the claimant was not engaged in any local activity in the physical area of the contamination and that his loss arose from his inability to carry out processing and packing and deliveries of processed and packed whelks at points far away from the contaminated areas. The claimant's loss, like that of the claimant in the Landcatch case, was caused by the inability of the persons with whom he had (or would, but for the fishing ban, have had) trading relations to carry on their operations within the designated area. The Court found that this was a form of secondary economic loss, which was outside the intended scope of a statute which was closely focused on physical contamination and its consequences. The Court thought it reasonable to assume that the intention of the Contracting States who were parties to the 1971 Fund Convention was that those who established the causal link between their loss and the contamination should be compensated in full (so far as that were possible within the Fund's limit). The Court considered that it was consistent with that intention for the Fund to operate so as to enable those whose loss was more proximate to recover in full by excluding from participation in the common fund those whose loss was less proximate. There was no doubt as to the need to draw a line to include some claims and exclude others. This claim fell on the wrong side of that line. However the Court of Appeal did not think it appropriate to offer guidelines as to the causative test to be applied by the Fund when making decisions in the future. The precise extent of the Fund's obligations under the statute was best left for determination on a case by case basis.

4 Any other business

No issues were raised under this agenda item.

5 Adoption of the Record of Decisions

The Administrative Council adopted the parts of the Record of Decisions contained in document 71FUND/AC.10/WP.1 (paragraphs 1, 2, 3.1-3.3.17 and 4), with certain amendments. The Council authorised the Director to prepare the remaining part of the Record of Decisions (paragraphs 3.4.1-3.4.3) in consultation with the Chairman.