INTERNATIONAL OIL POLLUTION COMPENSATION FUND 1971

ADMINISTRATIVE COUNCIL
12th session
Agenda item 25

71FUND/AC.12/22
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RECORD OF DECISIONS OF THE TWELFTH SESSION OF THE ADMINISTRATIVE COUNCIL

(held from 20 to 24 October 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.12/1.

2 Election of the Chairman and Vice-Chairman

2.1 The Administrative Council elected Captain R Malik (Malaysia) as Chairman until the next autumn session of the Council.

2.2 The Chairman thanked the Administrative Council for the renewed confidence shown in him.

3 Participation

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

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

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

Argentina	Ecuador	Philippines
Brazil	Grenada	Singapore
Chile	Latvia	Trinidad and Tobago
Democratic People's Republic of Korea	Peru	Turkey

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

Intergovernmental organisations:

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

International non-governmental organisations:

Comité Maritime International (CMI)
Cristal Ltd
Federation of European Tank Storage Associations (FETSA)
Friends of the Earth International (FOEI)
International Association of Independent Tanker Owners (INTERTANKO)
International Group of P & I Clubs
International Salvage Union (ISU)
International Tanker Owners Pollution Federation Ltd (ITOPF)
Oil Companies International Marine Forum (OCIMF)

4 Report of the Director

4.1 In a joint session of the 1992 Fund Assembly and the 1971 Fund Administrative Council, both bodies took note of the information contained in document 71FUND/AC.12/2

(document 92FUND/A.8/2) on the activities of the 1992 and 1971 Funds since their October 2002 sessions.

4.2 The Director took the opportunity to comment on the achievements of the IOPC Funds in its 25 years of existence and the significant developments of the international compensation regime during this time.

4.3 The Director stated that the 1971 Fund Convention had entered into force on 16 October 1978 and that it was the 25th anniversary of the 1971 Fund that was being celebrated during the week's sessions of the Funds' governing bodies. The Director welcomed Mr Jørgen Bredholt, who had chaired the 1971 Fund Assembly for the first 16 years, and Mr Charles Coppolani, who not only chaired the 1971 Fund Assembly, but also the 1992 Fund Assembly. The Director also welcomed his predecessor Dr Reinhard Ganten, the 1971 Fund's Director for its first six years, and Professor Hisashi Tanikawa and Mr Heikki Muttilainen, who had both participated in the Diplomatic Conference in 1971 adopting the Fund Convention.

4.4 The Director mentioned that the 1992 Fund was created when the 1992 Fund Convention entered into force on 30 May 1996, and that the two Conventions had co-existed until 24 May 2002 when the 1971 Fund Convention ceased to be in force, although the 1971 Fund would remain in existence until such time as all claims had been settled when the Fund could be finally wound up.

4.5 The Director noted that when the 1971 Fund had been set up in 1978 it had just 14 Member States, the membership growing steadily over the years to a maximum of 76, whilst the 1992 Fund started off with just nine Member States, but today a total of 86 States had ratified the 1992 Fund Convention. He mentioned that the Funds had been involved in some 125 incidents in over 20 States during the past 25 years and had paid out some £420 million in compensation, and that the growth of the membership was an indication that the international compensation scheme had in general worked well.

4.6 The Director acknowledged, however, that some recent major incidents had resulted in the compensation regime being subject to criticism for not providing adequate protection to victims of oil pollution, but that the Member States had taken steps to improve the regime, namely by an increase in the limitation amounts by 50.37% with effect from 1 November 2003, the adoption of the Supplementary Fund Protocol and the development of the Fund policy on environmental damage. He stated that the review of the adequacy of the regime would be continued by the intersessional Working Group created for the purpose.

4.7 The Director referred to the fact that the IOPC Funds had acquired over the years considerable experience in handling claims and that the governing bodies had developed criteria for the admissibility of various types of claims, which had been reflected in a Claims Manual, the most recent version of which had been published in November 2002.

4.8 The Director stated that when the 1971 Fund had been set up, it had been decided that it should have a small Secretariat and engage experts on a consultancy basis as and when required, and that although the Secretariat had grown considerably from its original staff complement of four, it remained a compact structure that still relied heavily on external experts. The Director took the opportunity to thank not only the present staff members but also former staff for their outstanding work.

4.9 The Director reminded the governing bodies that when he had presented the budget for 2003 he had included an appropriation for the publication of a commemorative book in the three official languages of the Funds to mark the occasion of the 25th anniversary. In introducing the book, which gave an account in the form of 18 articles of the developments that had taken place within the framework of the international compensation regime over the past 25 years, the Director expressed his gratitude to the authors who had contributed to the publication.

4.10 In conclusion, the Director pointed out that on the occasion of the 25th anniversary it was important not only to look back on what had been accomplished, but also to look ahead so as to ensure that the regime continued to meet the needs and aspirations of the international community in the 21st century.

4.11 Dr Reinhard Ganten expressed his pleasure at being present on the occasion of the 25th anniversary of the setting up of the IOPC Funds. He commented that although 25 years could be considered a short period of time, a great deal had been achieved and many changes had taken place. He recalled that the first meeting of the 1971 Fund Assembly had taken place in a small meeting room at the IMO Headquarters, then in Piccadilly, with only a few Member States at that time present. He compared that meeting to the present session of the Assembly, which he pointed out was being held in a very large and full conference room which, in his view, was an indication of the success of the Organisations.

4.12 Dr Ganten congratulated the authors of the 1969 and 1992 Civil Liability Conventions and the 1971 and 1992 Fund Conventions as well as all those who had played a part over the years in creating and developing an international compensation regime which had been up to the challenges with which it had been faced. He commented that in spite of the problems that the IOPC Funds had encountered over the years the Organisations were in a position to celebrate.

4.13 The United Kingdom delegation expressed, on behalf of the Host Government, the view that all Contracting States should congratulate themselves on being part of and contributing to the creation of a truly international Organisation. That delegation commented that the great strength of the Organisation was, in its view, the mutual support and respect that the representatives of many States had for and gave to each other, particularly in times of crisis. He suggested that this was indeed a time for celebration.

4.14 Professor Hisashi Tanikawa of Japan expressed his congratulations to the IOPC Funds, the Member States and the Secretariat. He explained that he was one of the veteran's of the international compensation scheme, having been involved in the work of the IOPC Funds for about one third of his life, starting with the preliminary work on setting up the organisation, becoming the first Chairman of the 1971 Fund Executive Committee and Vice-Chairman of the 1971 Fund Assembly. He said that he had enjoyed his involvement with the IOPC Funds during 24 years, which he had found both interesting and valuable, and he hoped to be able to continue to serve the Organisations in the future.

4.15 The representative of the International Maritime Organization also congratulated the IOPC Funds on their success and thanked the staff of the Secretariat for their tireless efforts in promoting the international Conventions worldwide and for the help that they had given in compensating the victims of oil pollution incidents.

4.16 Mr Alfred Popp QC (Canada), in his role as Chairman of the 1992 Fund third intersessional Working Group and as Chairman of two Diplomatic Conferences that had made changes to the present system, intervened as a representative of the voice of the future of the IOPC Funds. He expressed the view that as a result of the outstanding work of the two Directors, all Chairmen past and present and the Secretariat, the Funds were among the most efficient Organisations in the family of the United Nations. He recalled that the two Organisations had originally met great scepticism within the international community but that the records would show that millions of pounds of claims had been settled without the need to go to court.

4.17 One delegation led the Assembly in applauding all those who had contributed to the work of the IOPC Funds, the Director, Chairmen and Secretariat in recognition and appreciation of their hard work, which, he said, had ensured the growth in the number of Member States.

4.18 The representative of the Friends of the Earth stated that the existence of the IOPC Funds was undoubtedly a good thing given that it was sometimes difficult to find the person liable who had

the means to pay compensation. He said that whilst it should be recognised that the IOPC Funds were beneficial to victims, it should equally not be forgotten that victims had rarely been happy with the manner in which they had been treated and that the *Erika* and *Prestige* incidents had reinforced this view. He stated that the primary objective of the Funds should be to solve the problems for both victims and the environment and that he hoped the entry into force of the Supplementary Fund Protocol would resolve this problem.

4.19 The Chairman of the 1992 Fund Assembly thanked the Secretariat, the Director and all those involved in the core work that ensured genuine claimants were compensated as quickly as possible.

4.20 The Chairman of the 1971 Fund Administrative Council stated that although his role was to finally liquidate the 1971 Fund, he nevertheless wanted to add his congratulations to those of others in celebrating its 25th anniversary.

4.21 The Director presented copies of the anniversary publication 'The IOPC Funds' 25 years of compensating victims of oil pollution incidents' to the Chairmen of the 1971 Fund Administrative Council and the 1992 Fund Assembly following which copies were distributed to delegates.

5 Report on Investments

5.1 The Administrative Council took note of the Director's report on the 1971 Fund's investments during the period July 2002 to June 2003, contained in document 71FUND/AC.12/3.

5.2 The Administrative Council noted the number of investments made during the twelve-month period, the number of institutions used by the 1971 Fund for investment purposes, and the significant amounts invested by the 1971 Fund. The Administrative Council stated that it would continue to follow the investment activities closely.

6 Report of the Investment Advisory Body

6.1 The Administrative Council took note of the report of the Investment Advisory Bodies, contained in the Annex to document 71FUND/AC.12/4. It also took note of the objectives for the coming year and the Internal Investment Guidelines.

6.2 The Assembly noted a proposal by the Investment Advisory Bodies that the Funds' Financial Regulation 10.4 (b) should be amended so as to enable the Funds to invest in Certificates of Deposits. This proposal was dealt with under agenda item 24 (Any other business).

6.3 The Administrative Council expressed its gratitude to the members of the Investment Advisory Body for their work.

7 Financial Statements, Auditor's Report and Opinion and Audit Body's Report

7.1 The Director introduced document 71FUND/AC.12/5 containing the Financial Statements of the 1971 Fund for the financial year 2002 and the External Auditor's Report and Opinion thereon.

7.2 A representative of the External Auditor, Mr Graham Miller, Director International, introduced the Auditor's Report and Opinion.

7.3 The representative of the External Auditor mentioned that a review had been carried out of the Secretariat's overall financial control systems, particularly in relation to claims payments, contributions and other income, administrative expenditure, cash management and investments. He stated that the review had found that the Secretariat continued to have satisfactory controls in place and continued to adhere to appropriate control procedures and the Fund's financial and

investment policies. He also confirmed that claims had been verified and had been settled as promptly as possible, and that the settlements had properly taken into account the interest of the Fund and the claimants.

7.4 It was noted that a review had been carried out of the global settlement reached in 2002 in relation to the *Nakhodka* and the *Aegean Sea* incidents. It was also noted that in relation to the *Nakhodka* incident the External Auditor had confirmed that the receipts in respect of the global settlement had been applied in accordance with the agreement signed by the Funds and the shipowner's insurer and that the apportionment of this receipt between the Funds had been made in accordance with the decisions of the governing bodies.

7.5 The Representative of the External Auditor mentioned that the External Auditor noted that the 1971 Fund Convention had ceased to be in force on 24 May 2002 and would not apply to incidents occurring after that date. He stated that the winding up of the 1971 Fund would only take place when all pending claims arising from incidents covered by the Convention had been settled and all expenses had been paid.

7.6 The Administrative Council noted that the External Auditor had welcomed the establishment of the Audit Body for the two Organisations and considered that it was a significant initiative in the governance and financial management of the Funds' operation.

7.7 The Administrative Council noted with appreciation the External Auditor's Report and Opinion contained in Annexes II and III to document 71FUND/AC.12/5, and that the External Auditor had provided an unqualified audit opinion on the 2002 Financial Statements, following a rigorous examination of the financial operations and accounts in conformity with audit standards and best practice. The Administrative Council also appreciated that the Report went into great depth and detail.

7.8 The Chairman of the Audit Body, Mr Charles Coppolani, introduced document 71FUND/AC.12/5/1 (document 92FUND/A.8/8/1) containing the Audit Body's Report. In his introduction Mr Coppolani, on behalf of the members, thanked the governing bodies for the trust placed in them. He added that the Body was not a substitute for the External Auditor and that its aim was to help the Director and the Secretariat maintain transparency in respect of the Funds fulfilling their tasks. He also mentioned that the Body intended to address the issue of risk management over the coming year.

7.9 It was noted that the Audit Body had considered *inter alia* procedures to ensure that the Annual Report continued to address the need of increasing numbers of users for comprehensive and accurate financial and other information covering the full range of the Funds' activities, as well as the relationship of the Audit Body with the External Auditor and with the Investment Advisory Bodies.

7.10 The Administrative Council noted the Audit Body's recommendation that the governing bodies should approve the accounts of the 1971 and 1992 Funds for the Financial Year 2002.

7.11 The Administrative Council approved the accounts of the 1971 Fund for the financial period 1 January - 31 December 2002.

7.12 The Administrative Council expressed its gratitude for the important work being carried out by the Audit Body.

7.13 Some delegations suggested that in future the Report of the Audit Body should form a separate agenda item.

7.14 Many delegations expressed the view that the Audit Body should not confine its work to the financial aspects of the Funds but also be involved in reviewing operational and management issues.

8 Honorarium of Members of the Audit Body

The Administrative Council took note of the information contained in document 71FUND/AC.12/6 (document 92FUND/A.8/9) and decided that the six members of the Audit Body elected from Member States should be entitled to an honorarium of £1 500 for a twelve-month period from 1 November to 31 October, payable with effect from the date of their appointment (ie October 2002).

9 Appointment of members of the Investment Advisory Body

The Administrative Council reappointed Mr David Jude, Mr Brian Turner and Mr Simon Whitney-Long as members of the Investment Advisory Body for a term of one year.

10 Report on contributions

10.1 The Administrative Council took note of the Director's report on contributions contained in document 71FUND/AC.12/8.

10.2 The Council expressed its satisfaction with the situation regarding the payment of contributions.

11 Non-submission of oil reports

11.1 The Administrative Council considered the situation in respect of the non-submission of oil reports, as set out in document 71FUND/AC.12/9 (document 92FUND/A.8/12). It was noted that, since the document had been issued, four States (Fiji, Grenada, India and Ireland) had submitted their outstanding oil reports. It was also noted that a total of 31 States therefore still had outstanding oil reports for the year 2002 and/or previous years: 14 States in respect of the 1971 Fund and 24 States in respect of the 1992 Fund. It was further noted that a number of States had reports outstanding for several years.

11.2 The Administrative Council noted with satisfaction that some States which had had outstanding reports for a number of years to either the 1971 Fund or the 1992 Fund or to both had submitted some or all of their reports, notably the Syrian Arab Republic (12 years), Mozambique (7 years), the Maldives (5 years), Kuwait (4 years), Panama (4 years), India, (3 years), Fiji (2 years), Grenada (2 years), Morocco (2 years) and Trinidad and Tobago (2 years).

11.3 Many delegations expressed their very serious concerns as regards the number of Member States which had failed to submit oil reports. It was emphasised that the non-submission of oil reports was a violation of States' treaty obligations under the 1971 Fund Convention.

11.4 The following suggestions were made as to ways in which it might be possible to obtain the outstanding reports:

- A document drawing attention to the issue could be submitted to the forthcoming IMO Assembly, where high-level representatives from a number of the States with outstanding reports would be present;
- The Secretariat could engage lawyers on a contingency basis to obtain the outstanding reports;
- In their national legislation States could provide for severe penalties for contributors who failed to submit reports.

11.5 The Administrative Council instructed the Director to pursue his efforts to obtain the outstanding oil reports. It was noted, however, that there was a limit to what the Secretariat could achieve by persistence. The Council urged all delegations to do their utmost to make sure that their national administrations submitted oil reports.

11.6 The Director pointed out that the issue of whether it was possible to use sanctions against States which had not submitted oil reports had been considered several times by the Administrative Council and mentioned that the conclusion had been that there was not much that could be done under the present text of the Conventions.

11.7 It was decided that the matter should be kept under review and that it should be brought to the attention of the Administrative Council every year.

11.8 The Administrative Council recalled that it had previously recognised that it was its responsibility to find creative solutions to the problem within the constraints of the 1971 Fund Convention and then to support the Secretariat in the implementation of these solutions.

12 Organisation of meetings

12.1 The Administrative Council took note of the information contained in document 71FUND/AC.12/10 (document 92FUND/A.8/13) regarding the organisation of meetings.

Restricted documents

12.2 The Council decided that in future it was not necessary to restrict access to documents relating to the draft Budget and the levy of contributions as these documents did not in general contain information which should not be available to the public.

12.3 It was recalled that the governing bodies had decided, at their October 2002 sessions, that in future the Director should be authorised to decide, after consultation with the respective Chairmen, whether a particular document should be restricted. The Assembly confirmed that the Director's authority in this regard remained.

Content, production and distribution of documents

12.4 The Administrative Council noted the Director's intention to continue to produce shorter documents in future.

12.5 The Council noted the Director's observations regarding deadlines for submission of documents to the Council or Working Groups.

12.6 The Administrative Council noted the Director's recommendation that delegations not already using the document server should do so. Delegations were also invited to consider again whether they could reduce the number of copies received by post or not require any hard copies at all and to inform the Secretariat accordingly.

13 Working methods of the Secretariat

13.1 The Administrative Council took note of the information contained in document 71FUND/AC.12/11 (document 92FUND/A.8/15) regarding the working methods of the Secretariat.

13.2 It was recalled that Staff Regulation 17 of the 1971 Fund provided that the emoluments of members of staff should follow the United Nations common system as applied by IMO. The Council noted the work carried out by a consultant with extensive experience of classification of posts within the United Nations system who had reviewed the job descriptions of all staff within the Secretariat and developed a formal job classification methodology. It was noted that

the Director had, in the light of the consultant's assessments, and in order to bring the Funds' grading of posts in line with the grading of posts in other organisations within the United Nations system, upgraded and reclassified a number of posts with effect from 1 October 2003.

13.3 The Administrative Council noted the staff policies issued by the Director as set out in paragraph 5.2.1 of document 71FUND/AC.12/11.

13.4 One delegation expressed its satisfaction with the work carried out to classify posts, but proposed that at some stage in the future the Administrative Council should give consideration as to whether it was appropriate for a small intergovernmental organisation like the 1971 Fund to stay in step with the United Nations system, or whether some performance related salary should be introduced.

13.5 The Director stated that it could have far reaching consequences if the Funds were to move outside the United Nations common system. He mentioned that the United Nations was reviewing the system to make it more flexible and that he would prefer to await the outcome of this review unless the Secretariat were to face recruitment problems.

13.6 Another delegation acknowledged the progress that had been made in developing a modern management structure, but expressed a reluctance to move out of the United Nations remuneration system entirely, although this need not, in its view, preclude additional remuneration related to performance. That delegation also stated that he did not want the Secretariat to lose sight of the need to introduce recognised management standards into the Funds' operating practices.

14 Review of observer status

14.1 The Administrative Council noted that at its 7th session the 1992 Fund Assembly, held in October 2002, had decided to insert in the Guidelines on relations between the 1992 Fund and inter-governmental organisation and international non-governmental organisations a new provision which read as follows:

> The Assembly will review every three years the list of international non-governmental organisations having observer status in order to determine whether the continuance of observer status for any particular organisation is of mutual benefit.

14.2 It was noted that many international non-governmental organisations having observer status to the 1992 Fund Assembly also had observer status to the 1971 Fund. It was therefore agreed that the review should be carried out on behalf of both governing bodies.

14.3 It was also recalled that the 1992 Fund Assembly had decided at the October 2002 session that the first review should take place at its October 2003 session.

14.4 It was noted that in April 2003 the Director had written to all the international non-governmental organisations having observer status at the meetings of IOPC Funds' bodies - except for the Conference of Peripheral Maritime Regions (CPMR) which had only recently (April/May 2002) been granted observer status with the 1992 Fund on a provisional basis - inviting comments on whether the continuance of observer status would be of mutual benefit to the respective organisation and to the 1992 Fund.

14.5 The Administrative Council took note of the information contained in Annex III to document 71FUND/AC.12/12 (document 92FUND/A.8/14) which set out the responses received from the organisations concerned. In accordance with a decision taken at the October 2002 session of the 1992 Fund Assembly, the Administrative Council decided to set up a group of five States to screen the responses in order to establish whether the continuance of observer status for any

particular international non-governmental organisation was of mutual benefit and to report its findings during the present session to the governing bodies.

14.6 The Administrative Council decided upon the composition of the group as follows:

China (Hong Kong Special Administrative Region)
Cyprus
Liberia
Trinidad and Tobago
United Kingdom

14.7 The group held a meeting during the present session and reported to the Administrative Council as follows.

The group considered the information about non-governmental organisations having observer status provided in document 71FUNDAC.12/12 (document 92FUND/A.8/14), and in particular the information concerning attendance at meetings of the IOPC Funds since 1996.

The group noted that Friends of the Earth International (FOEI) had not attended any meetings during the period 1996-2002, but that it had attended a number of meetings during 2003. It therefore recommended that the Assembly request the Director to write to FOEI encouraging it to continue its active participation.

The group noted that both BIMCO and the International Salvage Union (ISU) had only attended a small number of meetings during the period 1996-2003. It therefore recommended that the Assembly request the Director to write to these two organisations informing them that the Assembly wished to strongly encourage them to attend meetings on a regular basis and that their observer status would be considered again at the next regular review in October 2006.

The group noted that the Advisory Committee on Protection of the Sea (ACOPS) had not attended any meetings during the period 1996-2003 and therefore recommended that the Assembly request the Director to write to ACOPS stating that the Assembly was seriously concerned that ACOPS had not attended any meetings since the establishment of the 1992 Fund, despite enjoying observer status, notifying it of the meeting dates for 2004 and informing it that the Assembly would consider whether to withdraw the observer status of ACOPS at its session in October 2004.

The group recommended that the Assembly should confirm the continuance of observer status of the other non-governmental organisations included in the review, ie:

Comité Maritime International (CMI)
Cristal Limited
European Chemical Industry Council (CEFIC) (1992 Fund only)
Federation of European Tank Storage Associations (FETSA)
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)

The group noted that the provisional observer status of CPMR would need to be reviewed by the Assembly no later than April 2005 and recalled that when observer status was granted to CPMR on a provisional basis some doubt had been expressed as to whether CPMR was an organisation of 'truly international character'. The group therefore recommended that, in advance of that review, the Assembly should clarify the term 'truly international character' and that the Assembly should instruct the Director to write to CPMR requesting an updated membership list.

The group considered that for the next regular review in October 2006 it would be helpful if the Director could also make available information on submission of documents to meetings and on contacts between the Secretariat and the organisations concerned.

14.8 The Administrative Council endorsed the group's recommendations.

14.9 One delegation of a non-governmental organisation with observer status spoke on behalf of all such delegations to express their gratitude for the welcome they were given by the Administrative Council.

15 Incidents involving the 1971 Fund

15.1 Overview

The Administrative Council noted the information contained in document 71FUND/AC.12/13, which contained a summary of the situation in respect of all 20 incidents dealt with by the 1971 Fund during the past 12 months.

15.2 *Aegean Sea*

15.2.1 The Administrative Council took note of the information contained in document 71FUND/AC.12/13/1 concerning the *Aegean Sea* incident.

15.2.2 The Administrative Council recalled that at its June 2001 session it had decided to authorise the Director to conclude and sign on behalf of the 1971 Fund an agreement with the Spanish State, the shipowner and his insurer, the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd (UK Club), on a global solution of all outstanding issues in the *Aegean Sea* case, subject to certain conditions (document 71FUND/AC.5/A/ES.8/10, paragraph 5.1.16).

15.2.3 The Administrative Council recalled that the Spanish State Council (Consejo de Estado) had approved the proposed settlement agreement, that the Spanish Parliament had adopted a decree ('Decreto-Ley') authorising the Minister of Finance to sign on behalf of the Spanish Government an agreement between Spain, the shipowner, the UK Club and the 1971 Fund and that this decree had been approved by the Spanish Parliament on 17 October 2002.

15.2.4 The Council further recalled that the agreement between the Spanish State, the 1971 Fund, the shipowner and the UK Club had been signed in Madrid on 30 October 2002 and that pursuant to the Agreement the 1971 Fund had paid on 1 November 2002 €38 386 172 (£24.4 million) to the Spanish Government.

15.2.5 The Council noted that during the period November 2002-September 2003 the 1971 Fund had made payments of €1 008 308 (£635 000) in respect of all claims which had been agreed with

the claimants as to the quantum at an early stage but in respect of which only 40% of the agreed amounts had been paid. The Council also noted these claims had not been included in the agreement with the Spanish Government.

15.2.6 It was noted that in December 2002 the 1971 Fund had paid €1 672 000 (£1.1 million) to the UK Club in indemnification of the shipowner under Article 5.1 of the 1971 Fund Convention. It was further noted that in March 2003 the 1971 Fund had paid €4 255 362 (£2.8 million) to the UK Club in respect of its claim for preventive measures relating to the costs incurred in respect of the oil removal operation from the wreck.

15.2.7 The Administrative Council noted that the payments of compensation made by the 1971 Fund in respect of this incident totalled £33 086 019.

15.2.8 The Council noted that the only outstanding issue was the reconciliation of the distribution of the costs incurred by the 1971 Fund and the UK Club in the employment of experts and the running of the Joint Claims Office in La Coruña. The Council also noted that the final distribution would be on a 87.71:12.29 basis and that this would result in the 1971 Fund paying the UK Club an estimated £1.2 million.

15.2.9 The Administrative Council noted that legal proceedings in respect of nine claims continued before the Spanish Courts and that it was expected that the Spanish Government would reach a settlement with those claimants in the near future.

15.3 *Braer*

15.3.1 The Administrative Council took note of the information contained in document 71FUND/AC.12/13/2 in respect of the *Braer* incident.

15.3.2 The Council noted that only one claim was outstanding and that the total compensation paid amounted to £51.9 million, of which the 1971 Fund had paid £45.7 million and the shipowner's insurer, Assuranceforningen Skuld (Skuld Club), £6.2 million.

15.3.3 The Council recalled that in 1995 the Executive Committee had considered a claim for £2 million (later reduced to £1.4 million) by a company based on Shetland, Shetland Sea Farms Ltd, in respect of a contract to purchase smolt from a related company on the mainland. It was recalled that the experts engaged by the 1971 Fund and the Skuld Club had assessed the proven losses at £58 000, but that attempts to settle the claim out of court had failed and that the company had taken legal action against the shipowner, the Skuld Club, and the 1971 Fund.

15.3.4 The Council recalled that the Court of first instance in Edinburgh had rendered its decision in 2001 in which it had resolved that responsible officers of the claimant had knowingly presented copies of fake letters in support of Shetland Sea Farms' claim for compensation. It was also recalled that the Court had held that the company should nevertheless be given the opportunity to present a revised case, since not to allow so would be an excessive punishment. The Council noted that the Court had therefore decided that the case should proceed to a hearing restricted to the question of whether Shetland Sea Farms could prove that a contract existed before the *Braer* incident occurred for the supply of smolts to Shetland Sea Farms without reference to false letters and invoices.

15.3.5 The Administrative Council noted that the Court had issued its decision in May 2003 and that it had not accepted Shetland Sea Farms' evidence that there was a contract for supply of smolts for which the company was legally obliged to pay independent of the false letters. It was also noted that the Court had considered that the evidence had disclosed that the management of the company had been involved in a fraudulent scheme and had reported the matter to the Chief Prosecutor in Scotland to consider whether criminal proceedings should be brought against three of Shetland Sea Farms' witnesses. The Council also noted that the Court had, however,

allowed the case to proceed, restricted to a claim for loss of profit by Shetland Sea Farms to the extent that the company could establish the probable number of smolts which would have been introduced to Shetland but for the *Braer* incident. The Council further noted that the shipowner, the Skuld Club and the 1971 Fund had appealed against that part of the Court's decision on the grounds that the loss of profit claim was based on contracts which had been held to be false.

15.4 Korean incidents

15.4.1 The Administrative Council took note of the information contained in document 71FUND/AC.12/13/3 in respect of four Korean incidents.

Keumdong N°5

15.4.2 The Council noted that claims totalling Won 2 756 million (£1.4 million) were the subject of appeal by the claimants to the Korean Supreme Court and that all other claims arising out of this incident had been settled.

Sea Prince

15.4.3 The Council recalled that the 1971 Fund had appealed against judgements of a first instance court awarding 31 claimants compensation in respect of alleged mortality of caged fish and cultivated shellfish and in respect of unlicensed aquaculture farms and an unlicensed fishing boat owner.

15.4.4 The Council further recalled that the Yeosu Fishery Co-operative Union (Yeosu FCU) had appealed against the decision by the Court to reject its claim for lost sales commission. The Council noted that in November 2002 the 1971 Fund had held without prejudice discussions with the Yeosu FCU with a view to agreeing to the quantum of the losses of sales commission, on the basis of which the losses were agreed at Won 72.3 million (£38 000), subject to the decision by the Appellate Court regarding the claim's admissibility.

15.4.5 It was noted that in December 2002 the Appellate Court had rendered a mediation decision in which it had accepted the claim for lost sale commission in the amount Won 72.3 million (£38 000). It was noted that neither the 1971 Fund nor the Yeosu FCU had objected to the mediation decision and that the Fund had paid the FCU Won 99.2 million (£52 000), including interest.

15.4.6 The Council noted that in March and April 2003 the Appellate Court had conducted mediation hearings at which the Court had requested the 1971 Fund to reconsider its position regarding the claims in respect of caged fish culture and abalone culture. The Council also noted that at a subsequent hearing the Fund had proposed that, in recognition of the fact that the caged fish farms in question had been more severely oiled than the others affected by the pollution, the claimants should be allowed additional cleaning costs to include the floating pontoons supporting the fish cages. The Council further noted that the Fund had also proposed allowing an extra 15 days, ie a total of 4.5 months business interruption, to allow for the time taken to complete the cleaning work. It was noted that as regards the abalone culture claims, the Fund had proposed allowing compensation in respect of management and labour costs resulting from business interruption caused by the presence of oil in the vicinity of the culture farms.

15.4.7 The Council noted that in May 2003 the Appellate Court had issued a Settlement Recommendation Decision based upon the Fund's proposals and that the total compensation recommended by the Court was Won 18.2 million (£9 500), including interest. The Council noted that the Court had not admitted the mortality of caged fish as requested by the claimants.

15.4.8 The Council noted that since the claimants did not lodge an objection to the Court's Settlement Recommendation Decision, that Decision had become final in June 2003 and that the Fund had

paid the recommended settlement amount. The Council also noted that there were no outstanding claims arising from the *Sea Prince* incident and that the 1971 Fund would not be required to make any further payments.

Yeo Myung

15.4.9 The Administrative Council noted that all claims but one had been settled for a total of Won 1 554 million (£990 000) and that the outstanding claim had become time-bared. It was noted that the Fund had requested the Court in charge of the limitation proceedings to issue an Assessment Decision so that the limitation fund could be distributed and the limitation proceedings terminated.

Yuil N°1

15.4.10 The Council noted that all clean-up claims arising from the incident had been settled for a total of Won 12 393 million (£8.5 million). It was noted that the shipowner's insurer had paid some of these claims in full and that the 1971 Fund had reimbursed 60% of these payments to the insurer. The Council noted that the 1971 Fund would reimburse the insurer the balance (40%) of these payments minus the limitation amount after that amount had been established in Won. The Council also noted that claims had been settled and paid by the 1971 Fund for a total of Won 6 824 million (£3.2 million) for the cost of removing the remaining cargo on board the wreck of the *Yuil Nº1*. It was noted that fishery claims totalling Won 22 490 million (£14.3 million) had been settled for Won 5 222 million (£2.8 million).

15.4.11 The Council recalled that the shipowner had commenced limitation proceedings in April 1996 and that the limitation amount applicable to the *Yuil Nº1* was estimated at Won 250 million (£130 000).

15.4.12 The Council noted that most of the claimants that had filed their claims in the limitation proceedings had also filed claims against the 1971 Fund in separate legal actions. It was noted that the total amount claimed had been Won 14 399 million (£7.5 million), but that between November 2002 and July 2003 the majority of the claimants had agreed out-of-court settlements with the Fund, as a result of which claims totalling Won 13 466 million (£7 million) had been settled for a total of Won 1 428 million (£742 000), including interest. It was noted that claims totalling Won 973 million (£506 000), which had been rejected by the Fund, had been deemed by the Court to be withdrawn, since the claimants had failed to file any motion to the Court within the prescribed time limit.

15.4.13 The Council noted that the 1971 Fund and the shipowner's insurer had been subrogated to all of the claims that had been filed in the limitation proceedings but that the limitation fund had not been constituted and the limitation amount in Won had therefore not yet been fixed.

15.4.14 The Council noted that under Article V.9 of the 1969 Civil Liability Convention (as amended by the 1976 Protocol thereto), the limitation amount applicable to the *Yuil Nº1* should be converted into the national currency by reference to the Special Drawing Rights (SDR) on the date of the constitution of the shipowner's limitation fund. In view of the considerable time that could elapse before the limitation amount would be determined by the Court, the Council authorised the Director to agree with the shipowner's insurer on an exchange rate between the SDR and Won to be applied to establish the limitation amount applicable to the *Yuil N°1*.

15.5 *Sea Empress*

15.5.1 The Administrative Council took note of the information contained in document 71FUND/AC.12/13/4 in respect of the *Sea Empress* incident.

Claims situation

15.5.2 The Council noted that compensation payments had been made to 797 claimants totalling £36.8 million, of which £29.9 million had been paid by the 1971 Fund and £6.9 million by the Skuld Club.

15.5.3 The Council noted with satisfaction that all claims arising out of this incident that had been the subject of legal actions had been either rejected by the Court, settled, discontinued or withdrawn.

15.5.4 It was recalled that one claim, for £645 000, which had been presented by a whelk processor based in Devon, had been rejected by the 1971 Fund and the shipowner's insurer, Assuranceforeningen Skuld (Skuld Club), on the grounds of lack of reasonable proximity between the oil pollution and the alleged loss. It was also recalled that the Court of first instance had held in favour of the 1971 Fund and had found that the claim was inadmissible for being secondary, derivative, relational and/or indirect and that this lack of proximity rendered the processor's claim too remote. It was noted that the claimant had been granted permission to appeal on the grounds that the case raised issues of principle of general importance in the development of substantive law. 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 Court of first instance to reject the claim. The Court of Appeal had held that the loss suffered did not fall within the ambit of the Merchant Shipping Act 1995. The Council noted the following summary of the Court's reasons:

> 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.

Recourse action by the 1971 Fund

15.5.5 The Administrative Council recalled that in February 2002 the 1971 Fund and Skuld Club had commenced proceedings against the Milford Haven Port Authority (MHPA) in the Admiralty Court to recover the amounts paid in compensation, as well as administrative and legal expenses in the region of £2.6 million, and that this action had been taken also on behalf of a number of claimants who had been paid compensation by the Fund and the Skuld Club. The Council further recalled that the 1971 Fund had set out a detailed claim against the MHPA alleging negligence and/or breach of duty. It was also recalled that the 1971 Fund had maintained that MHPA had failed to take reasonable care to avoid the risk of a laden tanker grounding and

spilling oil and that in particular MHPA had failed to give proper consideration to the risk of a laden tanker going aground and causing serious pollution and had failed to put in place procedures to control or reduce the risk as much as possible. It was also recalled that the 1971 Fund had alleged that MHPA's response to the grounding of the vessel had been improvised and negligent and had resulted in the unnecessary escape of some 69 300 tonnes of crude oil (document 71FUND/AC.12/13/4, paragraphs 4.3 and 4.4).

15.5.6 It was recalled that the Skuld Club had authorised the 1971 Fund to pursue the recourse action in the Club's name and after consultation to take all decisions relating to the conduct of the proceedings.

15.5.7 It was recalled that an agreement had been reached between the 1971 Fund and the Skuld Club as to the distribution of any amount recovered as a result of the recourse action. It was also recalled that under this agreement the 1971 Fund was entitled to retain any sums recovered up to a level at which the Fund had been reimbursed in full for all sums paid by the 1971 Fund to claimants, as well as the costs incurred by the Fund in relation to the claims handling and the costs of pursuing the recourse action, and that any balance would be passed to the Skuld Club.

15.5.8 The Council recalled that the MHPA had submitted a lengthy and detailed defence denying any liability for the incident and the ensuing oil pollution, arguing that it did not owe any duty of care and/or statutory duty to claimants in respect of the economic loss suffered and also denying owing any duty of care to the 1971 Fund. It was noted that MHPA had not admitted that any of the loss or damage covered by the claims by the 1971 Fund and the Skuld Club was caused by the grounding of the *Sea Empress* and that no admissions had been made as to the nature of the alleged loss or damage nor as to whether the alleged loss or damage (or any of it) was sufficiently proximate to be recoverable from MHPA (document 71FUND/AC.12/13/4, paragraphs 4.7 - 4.9).

15.5.9 The Administrative Council noted that at a Case Management Conference (CMC) held in February 2003, the 1971 Fund had applied for the Court's permission to amend its claim after the expiry of the time bar period so as to include also the ground that the actions or omissions of MHPA had created or caused a public nuisance, which was a concept of common law. The Council also noted that MHPA had opposed the request but that the Court had granted the 1971 Fund permission to amend its claim.

15.5.10 It was noted that at the CMC, the 1971 Fund, the Skuld Club and MHPA had agreed with the Court's proposal that the parties should explore the possibility of settlement by mediation and that the mediation had taken place in October 2003.

15.5.11 The Administrative Council held a meeting in private, pursuant to Rule 12 of the Rules of Procedures, to consider the outcome of the mediation. During the closed session, covered by paragraphs 4.5.12 – 4.5.18, only representatives of former Member States of the 1971 Fund were present.

15.5.12 At the closed session the Director informed the Council that the parties had agreed that it was in their mutual interest to resolve the matter in order to avoid protracted and costly litigation. The Director stated that he had made it clear to MHPA that he did not have the authority to commit the 1971 Fund to an out-of-court settlement, but that any settlement would be subject to approval by the Council.

15.5.13 The Director reported that the mediation had resulted in a proposal that all claims by the 1971 Fund, Skuld Club and the other claimants should be fully and finally settled by means of a payment by MHPA's insurers to the Fund of £20 million, to be paid by 31 December 2003. He stated that under the proposed settlement agreement, the settlement was subject to the approval by the Administrative Council at its October 2003 session and that if such approval were not given the agreement would become null and void. The Director recommended that the

Administrative Council should approve the proposed settlement. He mentioned that the Skuld Club had accepted the proposed settlement although this would result in the Skuld Club not making any recovery.

15.5.14 The Administrative Council noted with satisfaction the result of the mediation and approved the proposed settlement, under which the MHPA's insurer would pay the 1971 Fund £20 million in full and final settlement. It agreed with the Director that this decision should be made available to the public prior to the adoption of the Record of Decisions at the end of the session.

15.5.15 The Council expressed its gratitude to the Director for his efficient and professional handling of the recourse action which had resulted in an excellent outcome. The Council also thanked the 1971 Fund's legal and technical advisers who had assisted the Fund in relation to the recourse action.

15.5.16 The Council noted with satisfaction that all outstanding issues in relation to the *Sea Empress* incident had been resolved.

Action by Texaco

15.5.17 The Administrative Council noted that in February 2002, Texaco, which operated an oil terminal in Milford Haven, had commenced legal action against the MHPA and Milford Haven Pilotage Limited (MHPL), the company which employed the pilots working in the port of Milford Haven.

15.5.18 The Director informed the Council that an out-of-court settlement of Texaco's action had been agreed between Texaco and MHPA.

15.6 *Nissos Amorgos*

15.6.1 The Administrative Council took note of the information contained in document 71FUND/AC.12/13/5 concerning the *Nissos Amorgos* incident.

Claims situation

15.6.2 The Administrative Council recalled that the incident had given rise to legal proceedings in a Criminal Court in Cabimas, Civil Courts in Caracas and Maracaibo, the Criminal Court of Appeal in Maracaibo and the Supreme Court and that a number of claims had been settled out of court and the corresponding legal actions had been withdrawn.

15.6.3 The Administrative Council noted the situation in respect of the claims for compensation in Venezuela as set out in the table in paragraph 3.6 of document 71FUND/AC.12/13/5 and that the 1971 Fund's exposure was therefore US$ 175.2 million.

15.6.4 It was recalled that the Republic of Venezuela had presented a claim for pollution damage for US$60 250 396 (£36 million) against the master, the shipowner and the shipowner's insurer, Assuranceforeningen Gard (Gard Club), in the Criminal Court in Cabimas, based on a report on the economic consequences of the pollution by a Venezuelan university. It was also recalled that, at the request of the 1971 Fund, the Criminal Court had appointed a panel of three experts to advise the Court on the technical merits of the claim presented by the Republic of Venezuela and that in its report, presented in July 1999, the panel had unanimously agreed with the findings of the 1971 Fund's experts that the claim had no merit. The Council recalled that the Republic of Venezuela had also presented a claim against the shipowner, the master of the *Nissos Amorgos* and the Gard Club before the Civil Court of Caracas for US$60 250 396 (£36 million).

15.6.5 The Council noted that the two claims presented by the Republic of Venezuela were duplications, since they were based on the same university report and related to the same items

of damage. It was also noted that the Procuraduria General de la Republica (Attorney General) had accepted this duplication in a note submitted to the 1971 Fund's Venezuelan lawyers in August 2001.

15.6.6 It was recalled that, at the Administrative Council's June 2001 session, the Venezuelan delegation had stated that the Republic of Venezuela had decided to withdraw the claim presented in the Civil Court of Caracas for an amount of $60 million, that the withdrawal would take place as soon as the necessary documents had been signed by the shipowner and his insurer, and that the withdrawal had been decided for the purpose of contributing to the resolution of the *Nissos Amorgos* case and to assist the victims, especially the fishermen, who had suffered and were still suffering the economic consequences of the incident. The Council noted that this claim had not yet been withdrawn.

15.6.7 It was recalled that at its July 2003 session, the Administrative Council had emphasised the importance of a uniform application of the Conventions as regards the admissibility of claims and referred to the Resolution on the interpretation and application on the 1992 Civil Liability Convention and 1992 Fund Convention (Resolution No 8) adopted by the 1992 Fund Administrative Council at its May 2003 session (document 92FUND/AC.1/A/ES.7/7, Annex).

Level of payments

15.6.8 It was recalled that, at its March 2001 session, the Administrative Council had increased the level of the 1971 Fund's payments from 25% to 40% of the loss or damage actually suffered by each claimant as assessed by the experts engaged by the 1971 Fund and the Gard Club. It was further recalled that the Council had at that session authorised the Director to increase the level of the 1971 Fund's payments to 70% when the Fund's total exposure in respect of the incident fell below US$100 million or to increase the payments to between 40% and 70% if and to the extent that actions withdrawn from the courts would allow it (document 71FUND/AC.4/ES.7/6, paragraph 3.3.9).

15.6.9 The Council recalled that the level of payments had again been considered at its July 2003 session. The Council also recalled the Director's view that, when considering the level at which payments could be made, account should be taken of the fact that the claims by the Republic of Venezuela were duplicated, that the Procuradora General de la Republica had admitted this duplication in writing, and that the duplication had also been recognized by the Public Prosecutor of Venezuela to the Director at a meeting in Caracas in April 2001.

15.6.10 The Administrative Council recalled the view expressed by the Director at its July 2003 session that it appeared that the courts would not be able to hold the 1971 Fund liable to pay compensation twice for the same loss. The Council also recalled that it had at that session considered that, in the unlikely event that the Venezuelan Courts were to accept both claims submitted by the Republic of Venezuela, the 1971 Fund would nevertheless disregard one of them. It was noted that if the claims submitted by the Republic of Venezuela were considered as one single claim of US$60.3 million, the total exposure of the 1971 Fund would be US$114.9 million and the maximum amount available for compensation would represent 72.4% of the 1971 Fund's exposure.

15.6.11 The Council recalled that at the July 2003 session it had noted that this level of exposure could enable the level of payments to be increased to 65%, which would give the 1971 Fund a margin of US$6.5 million against overpayment. It was also recalled that the Council had decided, taking into account the special circumstances in the *Nissos Amorgos* case, to increase the 1971 Fund's level of payments from 40% to 65% of the loss or damage actually suffered by each claimant (document 71FUND/AC.11/3, paragraph 3.26).

15.6.12 The Venezuelan delegation stated that the outcome of the incident was now in the hands of the Venezuelan Supreme Court that was now dealing with all the legal proceedings arising out of

the incident as a result of the 'avocamiento' proceedings and that the Venezuelan Government had also to await the Supreme Court's decision on this issue.

15.6.13 The Administrative Council endorsed the Director's proposal to maintain the level of payments at 65%.

15.6.14 The Council also confirmed that the authorisation given to the Director at its 4th session should be maintained, namely that the Director was authorised to increase the level of payments to 70% when the 1971 Fund's total exposure fell below US$100 million.

15.7 *Pontoon 300*

15.7.1 The Administrative Council took note of the developments in respect of the *Pontoon 300* incident contained in document 71FUND/AC.12/13/6.

Claims for compensation

15.7.2 The Council recalled that it was decided at its 1st and 2nd sessions that in view of the magnitude of the pending claims the level of payment of settled claims should be maintained at 75% of the established loss (documents 71FUND/AC.1/EXC.63/11, paragraph 3.7.4 and 71FUND/AC.2/A.23/22, paragraph 17.11.5).

15.7.3 The Council noted that claims in respect of clean-up operations had been settled for a total of Dhs 6.3 million (£1.2 million) and that the 1971 Fund had paid a total of Dhs 4.8 million (£900 000), corresponding to 75% of the settlement amounts.

15.7.4 The Council recalled that the Municipality of Umm Al Quwain had presented claims against the 1971 Fund totalling Dhs 199 million (£39 million) in respect of economic losses, property damage, clean-up and environmental damage suffered by fishermen, tourist hotel owners, private property owners, a marine research centre and the municipality itself.

Legal actions

15.7.5 The Council recalled that in September 2000 the Umm Al Quwain Municipality had brought legal action in the Umm Al Quwain Court against the owner of the tug which was towing the *Pontoon* 300 at the time of the incident and against the owner of the cargo on board the *Pontoon 300*. It was also recalled that in December 2000 the UAE Ministry of Agriculture and Fisheries had joined the Umm Al Quwain Municipality's action as a co-plaintiff, claiming Dhs 6.4 million (£1.2 million). It was recalled that at a court hearing in September 2001 the 1971 Fund had maintained that the claims submitted by the Municipality were time-barred.

15.7.6 It was recalled that in December 2001 the Court had decided to refer the matter to a panel of experts experienced in oil pollution and the environment, to be appointed by the UAE Ministry of Justice. It was also recalled that the Court had further decided to combine all the pleadings relating to issues of jurisdiction and time bar and to review these after the experts had submitted their report.

15.7.7 The Council noted that the experts had submitted their report to the Umm Al Quwain Court of First Instance in February 2003. The Council also noted that the municipalities claims for Dhs 199 million (£39 million) had been assessed by the court experts at Dhs 3.2 million (£500 000).

15.7.8 The Council noted that notwithstanding the Fund's position that the Municipality's claims were time-barred, the assessments by the panel of experts were generally in line with the 1971 Fund's policy as regards the admissibility of claims for compensation and that the Fund had submitted its comments to the Court on the experts' report

15.7.9 The Council noted that the Umm Al Quwain Municipality and the Ministry of Agriculture and Fisheries had submitted pleadings to the Court raising objections to the experts report and requesting that that the Court should refer the matter back to the experts with the instruction to re-assess the claims. The Council also noted that the owner of the tug *Falcon 1* had submitted pleadings objecting to the experts' report and requesting that the Court set aside the entire report. It was noted that the Court had recently referred the matter back to the experts.

Recourse action by the 1971 Fund

15.7.10 The Council recalled that in January 2001, the 1971 Fund had taken legal action against the individual who owned the tug *Falcon 1* maintaining that, since the sinking of the *Pontoon 300* had occurred due to its unseaworthiness and the negligence of the master and owner of the *Falcon 1* during the towage, the tug owner was liable for the ensuing damage.

15.7.11 It was recalled that in December 2000, the Dubai Court of first instance had rendered a judgement in which it had rejected the 1971 Fund's claim against the owner of the tug *Falcon 1,* but had ordered the owner of the cargo on board the *Pontoon 300,* who had allegedly chartered the *Falcon 1,* to pay the Fund Dhs 4.5 million (£760 000). It was also recalled that the basis of the rejection of the claims against the owner of the *Falcon 1* was that under the terms of the charter party the master of the tug had been under the control of the charterer.

15.7.12 The Council noted that the 1971 Fund had appealed against the judgement, contesting the validity of the charter party, and maintaining that in any event the charter party was only binding upon the parties thereto and not on the Fund. It was noted that in February 2002 the Dubai Court of Appeal had upheld the judgement of the Court of first instance against the same parties, but had increased the amount awarded to the 1971 Fund to Dhs 4.7 million (£800 000).

15.7.13 It was recalled that the Fund had appealed to the Dubai Court of Cassation against the Court of Appeal's judgement on the grounds that under UAE maritime law, even if the cargo owner had chartered the tug, the management of the tug would remain under the control of the tug owner unless the charter party had specified otherwise. It was recalled that the Fund had further maintained that since the tug had relied on an illegible photocopy of the charter party it was impossible to verify whether the cargo owner had assumed responsibility for the management and operation of the tug and tow.

15.7.14 The Council noted that in his pleadings to the Court of Cassation, the tug owner had maintained that the original charter party had been submitted in the criminal proceedings and that he could therefore only submit a photocopy thereof in connection with the recourse action, and that since the Criminal Court had accepted the validity of the original charter party, it should be deemed valid for the purpose of the recourse action.

15.7.15 The Council noted that in October 2002 the Court of Cassation had allowed the Fund's appeal and had referred the matter back to the Court of Appeal for it to reconsider the matter.

15.7.16 The Council noted that in January 2003 the Court of Appeal had issued a preliminary judgement appointing a local marine expert to review all documents of this case in order to establish the terms of the charter party, its commencement date and duration and the identity of the tug owner. It was noted that the expert had further been instructed to verify the extent of the pollution damage suffered by the victims who had been paid compensation by the Fund.

15.8 <u>*Al Jaziah 1* and *Zeinab* incidents</u>

Al Jaziah 1

15.8.1 It was noted that claims totalling £1.4 million had been submitted in relation to clean-up and pollution prevention and that these claims had been settled at £1.1 million. The Administrative

Council noted that all further claims had become time barred on 24 January 2003 and that therefore the Funds would not be required to make any further compensation payments.

15.8.2 The Council recalled that the Abu Dhabi Public Prosecutor had brought criminal proceedings against the master of the *Al Jaziah 1*. It was recalled that the Court had held, *inter alia*, that the vessel had caused damage to the environment and that it did not fulfil basic safety requirements, was not fit to sail, had many holes in the bottom and had not been authorised by the Ministry of Communications of the UAE to carry oil. It was further recalled that the conclusion of the Court was that the sinking of the vessel had been due to these deficiencies and that the master had been fined Dhs 5 000 (£850) for causing damage to the environment.

15.8.3 It was recalled that, at their October 2002 sessions, the governing bodies of the 1971 and 1992 Funds had considered the question of whether to pursue recourse action against the owner of the *Al Jaziah 1*. The Council recalled that in the view of the Funds' lawyers in the UAE the findings of the criminal court regarding the vessel's unseaworthiness would be persuasive in any civil action against the shipowner in the UAE. It was also recalled that it was the Director's view that the shipowner must have known or ought to have known that the ship was unseaworthy and that the sinking of the vessel was therefore due to the fault or privity of the shipowner. It was further recalled that, in the Director's view, the shipowner was not entitled to limit his liability, pursuant to Article V.2 of the 1969 Civil Liability Convention, and that any attempt by the shipowner to limit his liability should be opposed by the Funds.

15.8.4 It was recalled that the Funds' lawyers had expressed the view that there were reasonably good prospects for the Funds to obtain a favourable judgement against the shipowner and that it was likely that he would not be entitled to limit his liability. It was also recalled, however, that in the Funds' lawyers' view, the Funds might encounter considerable difficulties in enforcing a judgement against the assets of the defendant and that it was in any event uncertain whether the defendant would have sufficient assets to enable the Funds to recover any substantial amount.

15.8.5 The Administrative Council recalled that at the October 2002 sessions most delegations had expressed the view that the question of whether or not to pursue a recourse action against the shipowner raised an important issue of principle and that the IOPC Funds should play a part in discouraging the operation of sub-standard ships and enforcing the 'polluter pays principle'.

15.8.6 It was recalled that the governing bodies of the 1971 and 1992 Funds had decided that the Funds should pursue recourse action against the shipowner and that in so deciding it had been recognised that the decision to pursue a recourse action in this particular case represented a deviation from the Funds' policy of basing their decisions in part on the prospects of recovery in the event of a favourable judgement. (documents 92FUND/EXC.18/14, paragraph 3.5.9 and 71FUND/AC.9/20, paragraph 15.10.9).

15.8.7 The Administrative Council noted that the Funds had commenced legal action in the Abu Dhabi Court of first instance against the shipowning company and its sole proprietor in January 2003, requesting that the defendants should be ordered to pay Dhs 6.4 million (£1.1 million) to the Funds, the amount to be distributed equally between the 1971 Fund and the 1992 Fund.

15.8.8 It was noted that the defendants had filed pleadings in May 2003 arguing that the Funds had not submitted admissible legal evidence in respect of the incident or details of the alleged losses suffered by the parties who had subrogated their rights to the Funds, that none of those persons had filed any claims directly against the shipowner under UAE law, that the subrogation of the claimants' rights had not been done correctly under UAE law and that these rights had not existed legally as the claimants had not exercised their right to claim against the shipowner under the Civil Liability Convention.

15.8.9 It was also noted that the Funds had submitted a reply maintaining that the shipowner had failed to set up a limitation fund in accordance with the 1969 Civil Liability Convention or the

1992 Civil Liability Convention and that the Funds had paid compensation to those who had suffered pollution damage instead of waiting for the shipowner to provide compensation under the Civil Liability Convention, since there was no indication that the shipowner had any intention to pay compensation. It was further noted that the Fund had argued that the subrogation of the claimants' rights was based on Article 9 of the Fund Conventions and not on UAE law, which required a court judgement for a party to acquire subrogated rights in order to be able to commence proceedings against a third party. The Council noted that the Funds had also presented the Court with further evidence in relation to the incident and the losses caused, including documents issued by various government authorities.

Zeinab

15.8.10 The Council recalled that the Georgian-registered vessel *Zeinab*, suspected of smuggling oil from Iraq, had sunk about 16 miles from the Dubai coastline in April 2001. It was recalled that the *Zeinab* had not been entered with any classification society or covered by any liability insurance.

15.8.11 It was noted that claims in relation to clean-up and pollution prevention measures had been settled at £1.0 million. It was also noted that no further claims had been submitted and that claims arising from this incident would be time barred on or shortly after 14 April 2004.

15.8.12 It was recalled that the 1971 Fund's liability for compensation and indemnification for incidents occurring between 25 October 2000 and 24 May 2002, the date when the 1971 Fund Convention ceased to be in force, was covered by insurance, subject to a deductible of 250 000 SDR for each incident. It was also recalled that in July 2002 the Administrative Council had decided that the relevant date for conversion of this amount into Pounds Sterling should be the date of the incident, ie 14 April 2001, and that on the basis of the SDR: pounds sterling exchange rate on 12 April 2001, 1 SDR=£0.88130, (13, 14, 15 and 16 April being non-banking days), the deductible under the policy would be £220 325 (document 71FUND/AC.8/6, paragraph 3.5.6).

15.8.13 It was noted that, since the 1971 Fund's payments had exceeded the deductible, the 1971 Fund had recovered £220 000 from the insurer and that it was expected that further amounts paid by the 1971 Fund in excess of the deductible would be recovered from the insurer shortly.

15.8.14 The Administrative Council noted that the Funds had carried out an investigation into the identity and whereabouts of the owner of the *Zeinab*. It was noted that available documents had confirmed that the registered shipowner was an Iraqi national and that there was evidence that the shipowner was a shareholder of two other companies unrelated to shipping in the UAE.

15.8.15 The Council noted that the UAE immigration authorities had confirmed that the shipowner had left the UAE in March 2002, that there was no record of him returning to the UAE since and that there were indications that the shipowner was living in Baghdad (Iraq).

15.8.16 Most delegations shared the Director’s view that, as long as the shipowner was not living in UAE but probably in Iraq, it would not be meaningful to take recourse action against him.

15.8.17 Some delegations expressed the view that the fact that the shipowner was probably living in Iraq should not in itself prevent the Funds from taking recourse action against him outside the UAE provided that he had assets against which a favourable judgement could be enforced.

15.8.18 It was decided that the matter should be reconsidered by the 1992 Fund before the expiry of the three-year time bar period (14 April 2004) in case the shipowner were to return to the UAE. It was also decided that the Director should investigate further the financial standing of the two companies in which the shipowner allegedly held shares as well as whether he still held the shares and if so their value.

15.9 *Alambra*

15.9.1 The Administrative Council took note of the information contained in document 71FUND/AC.12/13/8 concerning the *Alambra* incident, which occurred in Estonia on 17 September 2000.

Claims for compensation

15.9.2 The Council recalled that claims for clean-up costs had been submitted to the shipowner and his insurer, the London Steamship Owners Mutual Insurance Association Ltd (London Club), by the Tallinn Port Authority for EEK 6.5 million (£265 000) and by the Estonian State for EEK 4 million (£160 000).

15.9.3 The Council also recalled that a claim for EEK 45.1 million (£1.8 million) was being pursued against the shipowner by the Estonian State. The Council noted 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.

15.9.4 The Council also recalled that a claim for US$100 000 (£65 000) 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 undertaken. The Council further recalled that the owner of the berth in the Port of Muuga at 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 had submitted claims to the shipowner and the London Club for EEK 29.1 million (£1.1 million) and EEK 9.7 million (£379 000) respectively for loss of income due to the unavailability of the berth whilst clean-up operations were undertaken.

Legal actions

15.9.5 The Administrative Council 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 action in the first instance court in Tallinn against the shipowner and the London Club and had requested the Court to notify the 1971 Fund of the proceedings in accordance with Article 7.6 of the 1971 Fund Convention. The Council further recalled that having been notified of the actions in February 2002, the 1971 Fund had intervened in the proceedings. The Council also recalled 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.

15.9.6 The Council noted that the shipowner and the London Club had raised this issue in their pleadings in court, as had the 1971 Fund in its submission to the court in order to protect its position.

15.9.7 The Council recalled that at its July 2002 session the Director had expressed the view that it appeared that the procedure for ratification of international treaties laid down in the Estonian Constitution had not been observed and that it was possible, therefore, 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 (document 71FUND/AC.8/4). The Council further recalled that he had taken 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 recalled that this issue had been raised in the legal proceedings and that 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.

15.9.8 It was noted that in his pleadings to the Court, the shipowner had maintained, *inter alia*, that although the Estonian Merchant Shipping Act provided that the shipowner was liable for pollution damage, the Act's definition of pollution damage did not provide for civil liability for further loss or damage caused by preventive measures and that the shipowner had also argued that the Estonian Constitution required that in order for international agreements to be applicable under national law, such agreements must be passed by Parliament. It was also noted that the shipowner had further maintained that the relevant provisions in the Act were in conflict with the provisions of the 1969 Civil Liability Convention.

15.9.9 The Council recalled that the claimants had, in their pleadings, argued that a provision in the Merchant Shipping Act stipulated that if both an international agreement to which Estonia was a party and the Act apply different legal standards, the standard of the international agreement should be applied. The Council also recalled the claimant's view that the Estonian courts would therefore apply the Convention rather than the Act and that the courts should not take into account the restrictions placed by the Constitution as regards the ratification of treaties.

15.9.10 It was recalled that the claims for compensation filed in 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 might be called upon to pay indemnification to the shipowner. It was also recalled that for this reason, the Director had at the July 2002 session taken the view that it was very unlikely that the 1971 Fund would be called upon to pay compensation or indemnification, that the constitutional issue referred to above was mainly of academic interest and that the Fund did not need to take an active part in the ongoing proceedings.

15.9.11 The Council 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 Merchant Shipping Act, the Club was not liable to pay compensation for the damage resulting from the incident.

15.9.12 The Council recalled that in its pleadings the Club had stated that the *Alambra* had a history of corrosion problems both prior and subsequent to its purchase by its owner at the time of the incident in Estonia and that in June 2000 the master of the *Alambra* had reported a corrosion hole in the bottom plating of a cargo tank, in spite of which, and in contravention of the classification society's rules, the shipowner had allowed the vessel to load a full cargo. It was recalled that in addition 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, and that when the vessel arrived at Mohammédia (Morocco), its discharge port, there had been a leakage of cargo from one of the cargo tanks prior to the vessel sailing to Algeciras (Spain) for further underwater repairs (unreported in the deck log book) before returning to Mohammédia to continue its cargo discharge. It was also recalled that the Club had maintained 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 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.

15.9.13 The Council recalled that the 1971 Fund had filed 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 effect thereof, ie that the shipowner deliberately caused pollution damage. It further recalled that the Fund had 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.

15.9.14 The Council noted that discussions concerning an out-of-court settlement between the shipowner, the Club and the claimants had not been successful and that in May 2003, the 1971 Fund had been informed that the claimants had requested that the Court should refer the issue of the applicability of the 1969 Civil Liability Convention in Estonia to the Supreme Court for constitutional review. It noted that since the Fund had taken the position that the Conventions had not been properly implemented in Estonian law, the Director had decided not to oppose the claimants' request, which had not yet been ruled upon.

15.9.15 It was noted that in August 2003, the Fund had been notified in accordance with Article 7.6 of the 1971 Fund Convention of legal proceedings taken by the Estonian State against the shipowner to recover EEK 4.0 million (£179 000) in respect of costs incurred by the State in conducting the clean-up operations in relation to this incident and that the Fund had submitted pleadings in relation to this claim. It was further noted that the Fund had assessed the admissible quantum of the Estonian State's claim at EEK 2.4 million (£107 000) and had informed the Court of this assessment, emphasising that the assessment was without prejudice to its position on the applicability of the Conventions.

15.9.16 One delegation expressed its disappointment with the position taken by the shipowner's insurer, since it was likely to result in the 1971 Fund becoming involved in the payment of claims for compensation. That delegation urged the Director to try and persuade the insurer to reconsider his position.

15.10 *Singapura Timur*

15.10.1 The Administrative Council took note of the information contained in document 71FUND/AC.9/13/9 concerning the *Singapura Timur* incident. The Council recalled that the *Singapura Timur* had sunk in the Strait of Malacca (Malaysia) after colliding with another tanker, the *Rowan.*

Removal of the remaining bunker fuel from the wreck and study to determine the environmental risk posed by the bitumen cargo

15.10.2 The Council recalled that in view of the temporary nature of the measures that were undertaken to prevent the escape of bunker fuel from the vessel, the Malaysian Department of Environment (DOE) had concluded that the remaining bunkers posed a threat to nearby coastal resources and had therefore decided to engage a contractor to remove the bunker fuel oil. It was also recalled that the DOE had decided to conduct a study to ascertain whether the bitumen cargo remaining onboard the wreck posed a threat to these resources. It was noted that the 1971 Fund and its experts had provided technical advice to the authorities during the planning of the bunker removal operation and the proposed study.

15.10.3 The Council noted that the operations to remove the bunker fuel, inspect the condition of the wreck and collect samples of water, sediment and bitumen had been carried out from 20 October 2002 to 8 November 2002. The Council also noted that some 5 tonnes of heavy fuel oil had been pumped from the No.1 port and starboard fuel tanks together with a quantity of oily water from the engine room, and that dispersant chemical had been added to these spaces after completion of the pumping operation. It was further noted that the DOE had issued a completion certificate confirming that to the extent practicable all remaining bunkers had been removed from the wreck.

15.10.4 The Council noted that in August 2003 the experts had submitted a report on the environmental risk posed by the bitumen cargo. It was noted that the DOE had informed the Fund that it did not accept the report due to the lack of information specifically required by the DOE and the Malaysian Marine Department in order to enable them to make a judgement on the environmental risk posed by the cargo. The Council also noted that the Director had informed the DOE that although the Fund was disappointed with the quality of the report issued by the

experts, it agreed with the conclusions, namely that the remaining cargo of bitumen in the wreck of the *Singapura Timur* did not pose a significant risk to the marine and coastal resources.

15.10.5 The Council noted that the DOE had reserved its position regarding the environmental risk posed by the bitumen cargo and had informed the Fund that it intended to consider the matter further during meetings between the various government departments before concluding what, if anything, should be done with the cargo.

Claims for compensation

15.10.6 The Council noted that the insurer of *Singapura Timur*'s owner, the Japan Ship Owner's Mutual Protection and Indemnity Association (Japan P & I Club), had paid claims totalling US$150 000 (£94 000) in respect of clean-up and preventive measures.

15.10.7 The Council recalled that at the request of the Japan P&I Club, and in view of the low limitation amount applicable to the *Singapura Timur*, the Administrative Council had decided at its May 2002 session to waive the requirement under Article V.3 of the 1969 Civil Liability Convention that the shipowner should constitute a limitation fund (document 71FUND/AC.7/A/ES.9/14, paragraph 8.6.8).

15.10.8 The Council noted that it had been agreed between the 1971 Fund and the Japan P&I Club that the limitation amount applicable to the *Singapura Timur* under the 1969 Civil Liability Convention was 82 327 SDR which, on the basis of the exchange rate between SDR and the US dollar on the date of the incident (28 May 2001), was US$103 378 (£65 000). The Council noted that on the basis of this amount, the Fund had paid Japan P&I Club a total of US$47 000 (£30 000) being the amount the Club had paid in compensation above the limitation amount applicable to the ship.

15.10.9 The Council noted that the Fund had also paid indemnification of US$25 000 (£16 000) to the Japan P&I Club in accordance with Article 5.1 of the 1971 Fund Convention.

Recourse action

15.10.10 The Administrative Council noted that any action by the 1971 Fund against the colliding vessel's (the *Rowan*) interests to recover compensation amounts paid by the Fund would, as regards the right of limitation, be governed by the conventions dealing with this matter in general, namely the 1957 Convention relating to the Limitation of the Liability of Owners of Sea-going Ships or the 1976 Convention on Limitation of Liability for Maritime Claims. The Council also noted that the limitation amount applicable to the *Rowan* under the 1976 Convention was estimated at £3.7 million whereas the limit under the 1957 Convention was estimated at £768 000 and that the test for breaking the shipowner's right to limitation was much stricter in the 1976 Convention than in the 1957 Convention.

15.10.11 The Council noted that documentary evidence had suggested that the owner of the *Rowan* had resided in Belgium at the time of the incident and that whilst Malaysia was a party to the 1957 Convention, Japan and Belgium were parties to the 1976 Convention. The Council also noted that in order to prevent the 1971 Fund's claim against the *Rowan's* interests from becoming time barred, the Director had decided to take legal action against the shipowner in Malaysia and Belgium.

15.10.12 The Council noted that the total costs incurred by the *Singapura Timur*'s interests (Japan P&I Club and the hull insurers) were in the region of US$4.8 million (£3 million), which was less than the limitation amount applicable to the *Rowan* under the 1976 Convention.

15.10.13 The Council recalled that in December 2001, the *Singapura Timur*'s interests had commenced proceedings in Japan against the *Rowan* interests in order to recover the costs they had incurred,

the costs that they would incur and the costs that the Fund might incur as a result of this incident. It was also recalled that the Fund did not take part in these proceedings and that the Director had informed the Japan P & I Club that the 1971 Fund reserved its position with regard to a recourse action, as the extent of the liability of the Fund had not been established at that time.

15.10.14 The Council noted that the *Rowan* interests had commenced proceedings in Malaysia against the *Singapura Timur* and its owner *in rem* and against the owner in person and in limitation. The Council also noted that the Japan P & I Club had contested the action *in rem* on the ground that such an action could only be taken against a ship and not against a wreck. It was further noted that the Club had contested the action against the owner in person and in limitation on the ground that Malaysian courts did not have jurisdiction in this case.

15.11 Other incidents

The Administrative Council noted the information contained in document 71FUND/AC.9/13/14 in respect of the following incidents: *Vistabella, Iliad, Kriti Sea, Katja, Evoikos* and *Natuna Sea*.

16 Lessons learned from the *Nakhodka* incident

16.1 The Administrative Council took note of the information contained in document 71FUND/AC.12/14 (document 92FUND/EXC.22/12).

16.2 The Council noted that at its October 2002 session the 1992 Fund Executive Committee had endorsed a proposal by the Director that he should submit a report to the governing bodies at their October 2003 sessions on the points raised by the Japanese delegation and other related issues after a further examination of what lessons could be learned from the *Nakhodka* incident (documents 92FUND/EXC.18/14, paragraph 3.3.33 and 71FUND/AC.9/20, paragraph 15.6.33).

16.3 The Council noted that in his Report the Director had acknowledged the excellent work of all of the experts and claims office staff engaged by the UK Club and the Funds to deal with the claims arising from the *Nakhodka* incident and that no criticism of their objectivity and professionalism should be inferred from the statements in document 71FUND/AC.12/14 or the lessons learned and the conclusions drawn.

16.4 The Council noted that a number of lessons had been learned in the handling of claims arising from the *Nakhodka* incident in the light of which different procedures had been put in place for dealing with claims arising from the *Erika* and *Prestige* incidents and that these procedures might also be applicable in the event of another major incident in Japan. The Council noted the main lessons learned and conclusions for improvements:

(i) There was a shortage of marine surveyors in Japan who had the necessary expertise to assess claims in respect of the costs of clean-up and preventive measures, had a sufficiently good knowledge of the English language and would be willing and able to work for the 1992 Fund and the shipowner's insurer on a full time basis for a minimum of three years. In order to enable the Fund's experts to focus their efforts on the assessment of claims so as to speed up the overall process it was concluded that they should, to the extent possible, not be used to manage and run the Claims Handling Office. The Funds had already adopted this policy in the setting up of such Offices in France and Spain in response to the *Erika* and *Prestige* incidents. The primary role of the managers and staff appointed to run these offices was to facilitate the submission and prompt processing of claims for pollution damage and the payment of compensation. Although the Claims Handling Office in these cases served as a focal point for claimants, the staff were not authorised to make assessments of claims nor to express any opinions to the claimants regarding the admissibility of their claims or on the amounts claimed.

(ii) One of the most time consuming parts of the claims handling process was the scrutinising and collation in an electronic format of the voluminous amounts of documents submitted by claimants. It was concluded that claimants should be given greater assistance by the Secretariat in the presentation of their claims and be encouraged to submit them in electronic format. It should be recognised, however, that the processing of claims submitted in a language other than one of the 1992 Fund's official languages would still take considerable time in the case of large incidents involving thousands of claims.

(iii) The production of assessment reports was also very time-consuming due to the level of detail contained in the reports. It was concluded that the Fund should provide experts with generic report formats for different categories of claims to ensure that the assessments were presented in a uniform way and with only the level of detail required by the Fund and shipowner's insurer to process claims. Such generic reports had already been prepared for recent incidents in respect of some fishery and other economic loss claims and these reports should be extended to include all types of claims.

(iv) Fishery claims were assessed by the same group of surveyors that had dealt with claims for clean-up costs, thereby adding to their already heavy workload. Japan and the Republic of Korea were the only Fund Member States where the Fund and the insurer had tended to rely on marine surveyors to undertake the assessment of fishery claims. Although these surveyors had considerable experience in dealing with such claims, the limited pool of qualified people inevitably resulted in delays in completing assessments. It was concluded that if a major incident were to result in a large number of individual fishery claims, the Fund and the insurers should consider recruiting Japanese fishery experts to assess claims in the future. The Technical Guidelines, which were being developed by the Funds' experts, should be of assistance in this regard (cf document 92FUND/A.8/24).

(v) As indicated above, prior to the *Nakhodka* incident the marine surveyors who had undertaken the assessments of claims in the tourism sector had no previous experience of such claims and this inevitably contributed to delays in completing the assessments. In the event of another incident in Japan involving a large number of claims in the tourism sector, the Fund should consider engaging people with specialised accounting skills recognising that it would still be necessary to provide training and supervision. The 1992 Fund's experience of having had to deal with some 3 500 tourism claims arising from the *Erika* incident showed that people with accounting experience, as well as being in greater supply than marine surveyors, were better equipped to interpret the financial documentation provided in support of tourism claims.

16.5 A number of delegations expressed their appreciation for the objective information contained in the document and considered that similar reviews should be carried out following other major incidents. One delegation proposed that the findings of the study should be incorporated into the Funds' Annual Report and that they might also be examined by the intersessional Working Group which had been set up by the Assembly to consider the adequacy of the 1992 Conventions.

16.6 The Chairman of the intersessional Working Group stated that it was important to keep in mind that the purpose of the Working Group was to consider fundamental changes to the provisions of the Conventions and that the lessons learned from the claims handling process was a matter for the Funds' internal management procedures.

16.7 One delegation stated that it had not had sufficient time to consider the document in detail and proposed that a further discussion of the lessons learned would be appropriate at the next session of the governing bodies.

16.8 Another delegation noted that the question of cost recovery was an essential but often overlooked aspect of contingency planning for oil spills and that Member States could draw on the lessons learned in deciding what further steps they should take to facilitate this. The point was made that it could be useful for the Funds to interface with the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) Working Group established by the Marine Environment Protection Committee of IMO.

16.9 One delegation proposed that the Audit Body created by the 1992 Fund Assembly should carry out a review of the management of incidents by the Fund.

16.10 The Director stated that the intention was to carry out further reviews in the light of the experiences gained in dealing with the *Erika* and *Prestige* incidents and that this could lead to changes in the Funds' claims handling procedures. He suggested that once these reviews had been completed and the governing bodies had had a chance to discuss the lessons learned in more detail, it might be appropriate for the Audit Body to take them into account in the context of its risk management assessment.

16.11 The Executive Committee decided to revert to the issue of the lessons learned from the *Nakhodka* and other major incidents at a future session.

17 Winding up of the 1971 Fund

17.1 The Administrative Council took note of the information in document 71FUND/AC.12/15 regarding the winding up of the 1971 Fund.

17.2 The Council noted that the Director anticipated that by the end of 2004 there would only be outstanding compensation and indemnification claims in respect of the *Nissos Amorgos* incident and, possibly, in respect of the *Iliad, Pontoon 300* and *Alambra* incidents. It was noted that it was possible, however, that the 1971 Fund would still be involved in recourse proceedings in respect of the *Vistabella, Pontoon 300, Al Jaziah 1* and *Singapura Timur* incidents.

17.3 The Council considered how the remaining assets of the 1971 Fund should be distributed. It was recalled that under Article 44.2 of the 1971 Fund Convention the Assembly should take all appropriate measures to complete the winding up of the Fund, including the distribution in an equitable manner of any remaining assets among those persons who have contributed to the Fund. It was further noted that the Assembly had delegated this function to the Administrative Council (paragraph (c) of the Council's Mandate as set out in Resolution N°13).

17.4 It was noted that when all claims and expenses had been paid it was expected that there would be surpluses on a number of Major Claims Funds.

17.5 It was noted that the proposals submitted to the Administrative Council by the Director on the distribution of the surpluses on a number of Major Claims Funds were dealt with under agenda item 22 (document 71FUND/AC.12/20).

17.6 The Administrative Council recalled that there were no provisions in the Financial Regulations on the distribution of the surplus on the General Fund, if any.

17.7 The Council further recalled that at its October 2002 session it had instructed the Director to carry out a study of the different options for distributing the surplus on the General Fund and the ramifications for contributors, and to report to the Council at its October 2003 session.

17.8 The Director gave the Council an overview of levies of contributions made during the history of the 1971 Fund. The Council noted that contributors had been reimbursed on two occasions, namely following the October sessions in 1996 and 1997 of the 1971 Fund Assembly, when it had decided to reduce the working capital of the General Fund by reimbursing contributors

some £5 million and some £2 million respectively, the reimbursement being made the following year.

17.9 The Council noted the Director's proposal that the most equitable and practicable solution would be first to distribute any surplus on the General Fund between the States on the basis of the percentage of the total contributions made to the General Fund by contributors in the respective State and that the amount allocated to a given State should then be distributed between the contributors in that State on the basis of the quantities of contributing oil reported as having been received during 1997 by each contributor in that State, ie the last full year before the end of the transitional period (15 May 1998). The Council decided to consider this issue at a future session.

17.10 It was recalled that at its October 2002 session, the Administrative Council had considered the question of whether the reimbursement of surpluses from any Major Claims Funds (after offset had been made against any arrears) should be postponed in respect of all contributors in Member States that had oil reports outstanding. It was further recalled that the Council had also considered at that session what action should be taken in the event that outstanding reports had not been submitted by the time all pending incidents had been resolved and the 1971 Fund should be wound up.

17.11 The Administrative Council decided that reimbursement from surpluses on Major Claims Funds or the General Fund (after offset had been made against any arrears) to contributors in those States which had any oil reports outstanding should be postponed until all such reports had been submitted.

17.12 The Council considered what action should be taken against the 27 contributors in arrears, 19 of which were for the principal of contributions. It was noted that the amount owed by many of these contributors was relatively low.

17.13 It was noted that if the Director's proposal on the distribution of the surpluses on certain Major Claims Funds were to be adopted by the Administrative Council, the number of contributors in arrears would be reduced to 19 and the total amount of remaining arrears would be in the region of £1 040 000.

17.14 One delegation agreed that the Fund should take legal action against defaulting contributors including a defaulting contributor in his country.

17.15 The Council instructed the Director to concentrate his efforts on the remaining contributors in arrears and consider, on a case-by-case basis, whether legal action should be taken against a particular contributor and present a report on the developments to the Administrative Council's October 2004 session.

17.16 The Council decided that the Director should request the Audit Body to become involved at some stage in the winding up of the 1971 Fund, since it could play a useful role.

18 Transfer within the 2003 budget

The Administrative Council authorised the Director to transfer to Chapter V (Miscellaneous expenditure) within the 2003 budget from Chapter I (Personnel) or Chapter VI (Unforeseen expenditure) the amount required to cover the costs of the Audit Body.

19 Sharing of joint administrative costs between the 1992 Fund and the 1971 Fund

19.1 The Assembly approved the Director's proposal that the 1971 Fund should pay a flat management fee for the costs of running the joint Secretariat for 2004 set approximately at 10% of the joint administrative expenses (document 71FUND/AC.12/17 and 92FUND/A.8/20).

19.2 It was noted that the 1992 Fund Assembly had agreed at its 8th session to the distribution proposed by the Director.

20 Working Capital

The Administrative Council noted that the balance on the General Fund was expected to fall below £5 million during 2003 and considerably below that amount during 2004 (cf document 71FUND/AC.12/19 - Budget for 2004). It further noted that the working capital would partly be used during 2003 and 2004. It recalled that since the 1971 Fund Convention had ceased to be in force it was no longer possible to levy further contributions to the General Fund.

21 Budget for 2004

21.1 The Administrative Council considered the draft 2004 Budget for the administrative expenses of the 1971 Fund and 1992 Fund.

21.2 One delegation stated in relation to the proposed increase in the budget that since the Fund had a limited number of staff, the administration of the Secretariat should be more efficient by restricting the activities of the 1971 Fund to those really necessary. That delegation proposed that to ensure the efficiency and effectiveness of the IOPC Funds, the Audit Body should include in its remit a management audit of the Secretariat.

21.3 The Administrative Council adopted the budget for 2004 for the administrative expenses for the joint Secretariat with a total of £3 292 250, as reproduced in the Annex of this document.

21.4 It was noted that the 1992 Fund Assembly had at its 8th session adopted the same budget appropriations for the administrative expenses for the joint Secretariat.

21.5 The Administrative Council renewed its authorisation to the Director to create positions in the General Service category as required provided that the resulting cost would not exceed 10% of the figure for salaries in the budget.

21.6 In response to a question by the Chairman in connection with the consideration of the budget for administrative expenses, the Director informed the Administrative Council that he would be very honoured to continue to serve as Director after 31 December 2004 (the date when his present contract with the IOPC Funds would expire) if the Administrative Council were to decide to reappoint him. However, he indicated that given his age he would be prepared to serve for a couple of years or so but not for a full five-year term.

21.7 A number of delegation welcomed the Director's indication that he would be prepared to continue to serve for a couple of years or so after the expiry of his present contract.

21.8 One delegate proposed that the Audit Body be entrusted to outline a procedure for consideration by the Administrative Council for the recruitment of the Director in the future. Most delegations supported this proposal on the understanding that it was the Assembly that would make the final decision on any selection procedure.

21.9 The Administrative Council decided to invite the Audit Body to consider the procedures to be followed in the recruitment of future Directors and give advice to the Assembly in this regard.

21.10 The delegation of Cyprus expressed the desire of clarifying exactly what the task of the Audit Body would be. In that delegation's view the development of any such procedures or guidelines should be the responsibility of the Assembly. In light of the above decision that delegation reserved the position of Cyprus.

22 Assessment of contributions to Major Claims Funds

22.1 The Director introduced documents 71FUND/AC.12/20 and 71FUND/AC.12/20/Add.1 which contained proposals for the levy of 2003 contributions to four Major Claims Funds and reimbursements to contributors of six Major Claims Funds.

22.2 In order to enable the 1971 Fund to balance the *Vistabella*, *Nissos Amorgos*, *Osung N°3* and *Pontoon 300* Major Claims Funds the Administrative Council decided to raise contributions payable by 1 March 2004 as set out below:

Vistabella Major Claims Fund	£0.6 million
Nissos Amorgos Major Claims Fund	£11.5 million
Osung N° 3 Major Claims Fund	£1.7 million
Pontoon 300 Major Claims Fund	£3.0 million
Total	**£16.8 million**

22.3 It was decided that the deficit on the *Braer* Major Claims Fund should be covered from the General Fund.

22.4 The Council noted the Director's proposal for reimbursements of the surpluses on certain Major Claims Funds and decided to reimburse the following amounts to contributors to the Major Claims Funds mentioned below:

Aegean Sea Major Claims Fund	£17.7 million
*Sea Prince/Yeo Myung/Yuil N°*1 Major Claims Funds	£19.0 million
Sea Empress Major Claims Fund	£18.4 million
Nakhodka Major Claims Fund	£14.7 million
Total	**£69.8 million**

22.5 It was decided that the reimbursements referred to in paragraph 22.4 should be made on 1 March 2004.

22.6 The Council endorsed the Director's view that it was premature to make a decision at this stage regarding the distribution of the surplus on the *Keumdong N°5* Major Claims Fund.

22.7 It was further decided that any remaining balances on the Major Claims Funds referred to in paragraph 22.4 as well as any surplus on the *Osung Nº3* Major Claims Fund should be transferred to the General Fund on 1 March 2004.

22.8 The Council decided that any outstanding contribution received after 1 March 2004 in respect of the Major Claims Funds closed at that date should be transferred to the General Fund.

22.9 The Council noted that its decision in respect of the levy of 2003 contributions and reimbursements to contributors could be summarised as follows:

Fund	Oil year	Estimated total oil receipts (million tonnes)	Total levy/ (repayment) £	Payment /repayment by 1 March 2004	
				Levy £	Estimated levy/repaymentper tonne £
Vistabella	1990	944 206 115	600 000	600 000	0.0006355
Nissos Amorgos	1996	1 226 219 834	11 500 000	11 500 000	0.0093784
Osung No 3	1996	1 226 219 834	1 700 000	1 700 000	0.0013864
Pontoon 300	1997	1 258 135 349	3 000 000	3 000 000	0.0023845
Aegean Sea	1991	963 262 971	(17 700 000)	(17 700 000)	-0.0183750
Sea Prince/Yeo Myung/Yuil No1	1994	1 195 996 699	(19 000 000)	(19 000 000)	-0.0158863
Sea Empress	1995	1 181 121 314	(18 400 000)	(18 400 000)	-0.0155784
Nakhodka	1996	1 221 810 897	(14 700 000)	(14 700 000)	-0.0120313
Total			**(53 000 000)**	**(53 000 000)**	

23 Future sessions

23.1 The Administrative Council decided to hold its next autumn session during the week of 18 - 22 October 2004.

23.2 It was noted that the weeks of 23 February and 24 May 2004 were available for IOPC Fund meetings.

24 Any other business

Amendment to Financial Regulations

24.1 The Administrative Council took note of the information contained in document 71FUND/A.8/21 regarding a proposal by the Investment Advisory Bodies to amend Financial Regulation 10.4 (b) so as to enable the Funds to invest in Certificates of Deposits.

24.2 It was noted that at present the Financial Regulations only allowed the Funds to place funds on term deposits. It was further noted that in the IABs' opinion Certificates of Deposit (CDs) would be very useful financial instruments for the Fund as even with a 12 month maturity, CDs could be sold at any time prior to maturity so satisfying the liquidity requirements set out in the Internal Investment Guidelines (cf document 71FUND/A.C12/4 and 92FUND/A.8/7, paragraph 3.2(b)).

24.3 In view of the proposal by the Investment Advisory Bodies the Administrative Council decided to amend Financial Regulation 10.4 (b) to read as follows (amendment underlined):

(b) the assets shall be placed on term deposit or by purchase of Certificates of Deposit with banks or building societies enjoying a high reputation and standing in the financial community; the term of the investments shall not exceed one year.

25 Adoption of the Record of Decisions

The draft Record of Decisions of the Administrative Council, as contained in documents 71FUND/AC.12/WP.1 was adopted, subject to certain amendments.

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ANNEX

2004 ADMINISTRATIVE BUDGET FOR 1992 FUND AND 1971 FUND

	STATEMENT OF EXPENDITURE	Actual 2002 expenditure for 1971 and 1992 Funds		2002 budget appropriations for 1971 and 1992 Funds		2003 budget appropriations for 1971 and 1992 Funds		2004 budget appropriations for 1992 Fund	2004 budget appropriations for 1971 Fund
	SECRETARIAT	£		£		£		£	
I	**Personnel**								
(a)	Salaries	*1 067 450*		*1 190 291*		*1 275 816*		1 341 000	
(b)	Separation and recruitment	*5 479*		*55 000*		*35 000*		115 000	
(c)	Staff benefits, allowances and training	*420 021*		*481 922*		*523 341*		551 800	
	Sub-total		***1 492 950***		***1 727 213***		***1 834 157***	**2 007 800**	**0**
II	**General Services**								
(a)	Rent of office accommodation (including service charges and rates)	*225 311*		*240 450*		*249 700*		249 700	
(b)	Office machines, including maintenance	*67 840*		*71 500*		*71 500*		90 000	
(c)	Furniture and other office equipment	*11 437*		*17 500*		*17 500*		17 500	
(d)	Office stationery and supplies	*17 547*		*20 000*		*20 000*		20 000	
(e)	Communications (courier, postage, telephone, e-mail/internet)	*59 922*		*65 500*		*65 000*		65 000	
(f)	Other supplies and services	*32 493*		*38 000*		*41 000*		41 000	
(g)	Representation (hospitality)	*14 675*		*16 500*		*22 500*		18 000	
(h)	Public Information	*91 205*		*180 000*		*180 000*		180 000	
	Sub-total		***520 430***		***649 450***		***667 200***	**681 200**	**0**
III	**Meetings**								
	Sessions of the 1992 and 1971 Fund Governing Bodies and Intersessional Working Groups		***114 685***		***126 500***		***126 500***	**145 000**	**0**
IV	**Travel**								
	Conferences, seminars and missions		***66 328***		***70 000***		***70 000***	**100 000**	**0**
V	**Miscellaneous expenditure**								
(a)	External audit fees for 2003 Financial Statements- 1992 and 1971 Funds	*45 300*		*50 000*		*50 000*		53 250	
(b)	Payment to IMO for general services	*0*		*6 500*		*0*		0	
(c)	Consultants' fees	*111 130*		*100 000*		*125 000*		125 000	
(d)	Audit Body	*0*		*0*		*50 000*		90 000	
(e)	Investment Advisory Bodies	*27 000*		*27 000*		*30 000*		30 000	
	Sub-total		***183 430***		***183 500***		***255 000***	**298 250**	**0**
VI	Unforeseen expenditure (such as consultants' and lawyers' fees, cost of extra staff and cost of equipment)		***6 028***		***60 000***		***60 000***	**60 000**	
Total Expenditure I-VI			***2 383 851***		***2 816 663***		***3 012 857***	**3 292 250**	**0**
VII	**Expenditure relating only to 71Fund**								
(a)	Management fee payable to 1992 Fund (cf documents 92FUND/A.8/20 and 71FUND/AC.12/17)							**(325 000)**	**325 000**
(b)	Costs for winding up of the 1971 Fund		***16 000***		***250 000***		***250 000***		**250 000**
(c)	External audit fees for 2003 Financial Statements-1971 Fund only		***0***		***0***		***0***	**(15 000)**	**15 000**

Budget for 1992 Fund and 1971 Funds respectively	**2 952 250**	**590 000**