INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

ADMINISTRATIVE COUNCIL
4th session
ASSEMBLY
7th extraordinary session

71FUND/AC.4/A/ES.7/6
15 March 2001
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RECORD OF DECISIONS OF THE FOURTH SESSION OF THE ADMINISTRATIVE COUNCIL

ACTING ON BEHALF OF THE 7TH EXTRAORDINARY SESSION OF THE ASSEMBLY

(held on 15 March 2001)

Chairman:	Mr V Knyazev (Russian Federation)
Vice-Chairman:	Mr R Musa (Malaysia)

Opening of the session

0.1 It was noted that the acting Chairman of the Assembly had attempted to open the 7th extraordinary session of the Assembly at 9.30 am on Thursday 15 March 2001, but that the Assembly had failed to achieve a quorum.

0.2 It was recalled that at its 4th extraordinary session the Assembly had adopted 1971 Fund Resolution N°13 whereby, with effect from the first session of the Assembly at which the latter was unable to achieve a quorum, various functions of the Assembly would be delegated to the Executive Committee, thereby enabling the Committee to take decisions in place of the Assembly. It was noted that this Resolution was reproduced in the Annex to the draft annotated agenda for the 7th extraordinary session of the Assembly (document 71FUND/A/ES.7/1). If the Executive Committee should also fail to achieve a quorum, however, the functions of the Committee shall revert to the Assembly. In such a case, the Administrative Council established under Resolution N°13 shall assume the functions of the Assembly (and therefore also of the Executive Committee). It was noted that only seven of the 15 States elected to the Executive Committee by the Assembly at the last ordinary session at which it had a quorum (its 20th session, held in October 1997) remained Members of the 1971 Fund. As the quorum

requirement for the Committee is ten States, it would no longer be possible for this Executive Committee to achieve a quorum. It was noted that, for that reason, unless the Assembly achieved a quorum and elected new members to the Executive Committee, further sessions of the Committee could not be convened, and the functions of the Assembly could not be delegated to the Committee if the Assembly did not achieve a quorum.

0.3 Accordingly, if no quorum was achieved within 30 minutes of the time indicated above for the opening of the Assembly's session, the agenda items set out below should be dealt with by the Administrative Council established under Resolution N°13 and convened on 15 March 2001.

0.4 At 9.30 am on Thursday 15 March 2001 the Head of the Delegation of the Russian Federation, Mr V Knyazev, acting in his capacity as head of the delegation from which the second Vice-Chairman had been elected at its 4th extraordinary session, attempted to open the 7th extraordinary session of the Assembly. Only the following two 1971 Fund Member States were present at that time:

Estonia Russian Federation

0.5 The acting Chairman then adjourned the session for 30 minutes and when the meeting was resumed only four 1971 Fund Member States were present, the additional States being Côte d'Ivoire and Portugal.

0.6 In view of the fact that no quorum was achieved, the Chairman concluded the Assembly meeting.

0.7 In accordance with Resolution N°13, the items on the Assembly's agenda were therefore dealt with by the Administrative Council.

0.8 The session of the Administrative Council, acting on behalf of the Assembly, was opened by the Council's Chairman, Mr V Knyazev.

Procedural matters

1 Adoption of the Agenda

The Administrative Council adopted the Agenda as contained in document 71FUND/A/ES.7/1.

2 Participation

2.1 The following 1971 Fund Member States were present:

Côte d'Ivoire Portugal Russian Federation
Estonia

2.2 The following former 1971 Fund Member States were present:

Australia	Italy	Panama
Belgium	Japan	Poland
Canada	Liberia	Republic of Korea
Cyprus	Malta	Spain
Denmark	Marshall Islands	Sweden
Finland	Mauritius	United Kingdom
France	Mexico	Vanuatu
Germany	Netherlands	Venezuela
Greece	Norway	

2.3 The following non-Member States which had not been previously been members of the 1971 Fund were represented as observers:

Ecuador	Georgia	Singapore
Egypt	Latvia	

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

Intergovernmental organisations:
International Oil Pollution Compensation Fund 1992

International non-governmental organisations:
International Tanker Owners Pollution Federation Ltd
International Union for the Conservation of Nature and Natural Resources
Oil Companies International Marine Forum

3 Incidents involving the 1971 Fund

3.1 *Braer*

3.1.1 The Administrative Council took note of the developments in respect of the *Braer* incident, as set out in document 71FUND/A/ES.7/2, in particular as regards the situation in respect of the claims pursued in court.

3.1.2 It was recalled that in view of the total amount of the claims presented, the Executive Committee had decided in October 1995 to suspend further payments.

3.1.3 The Administrative Council recalled that, after a number of claims had been dismissed by the courts, settled out of court, withdrawn from the court proceedings or reduced in amounts, the Executive Committee had decided at its 62nd session, held in October 1999, to authorise the Director to make partial payments to those claimants whose claims had been approved but not paid, if the claims pending in the court proceedings together with the claims which had been approved but not paid fell below £20 million. It was also noted that the Committee had further decided that the proportion of the approved amounts to be paid should be decided by the Director on the basis of the total amount of all outstanding claims (document 71FUND/EXC.62/14, paragraph 3.4.5).

3.1.4 The Council noted that the claims pending in court in April 2000 totalled £7 611 436, that the claims settled but not paid totalled £5 838 649, or together £13 450 085, and that the Director had therefore decided that the Fund should pay 40% of the claims which had been approved but not paid. The Administrative Council noted that payments at 40% totalling £2 022 068 had been made in respect of these claims in 2000. It was also noted that as a result of the Shetland Island Council's claim having been settled and withdrawn from the court, a payment of £260 688 had been made to the Shetland Island Council in January 2001, representing 40% of the settlement amount of £651 721.

3.1.5 It was recalled that claims had been submitted for damage to asbestos cement tiles and corrugated sheets, used as roof coverings for homes and agricultural buildings, which the claimants alleged was a result of pollution. It was noted that on 14 February 2001 the Court of Session in Edinburgh had rendered judgement in respect of six of these roof claims, which had been selected to provide a wide geographical spread and variety of type of roof materials. It was also noted that the Court had rejected these claims and that the claimants had not appealed against the judgement. It was further noted that 43 claims in this category were pending in court, that it was not known whether these claims would be pursued but that, since the six claims considered by the Court had been selected as being representative, it was not unlikely that the remaining asbestos roof claims would be withdrawn.

3.1.6 It was further noted that in a judgement rendered on 6 March 2001 the Court had rejected two claims in the fishery sector totalling £123 357.

3.1.7 The Director stated that although it was satisfactory that the Court of Session had agreed with the 1971 Fund that the six asbestos roof claims were not admissible, there was in his view no reason to be happy, since it was regrettable that these claimants and a number of other claimants had felt it necessary to pursue these claims in court. He expressed the view that lessons should be learned from the *Braer* case of the importance of avoiding litigation and that consideration should be given to whether the use of mediation or other alternative methods for settlement of disputes could be used.

3.1.8 The United Kingdom delegation shared the Director's view that the lessons from the *Braer* incident should be used to improve the handling of future incidents. That delegation mentioned that the United Kingdom Government would take steps to ensure that the competent authorities did so.

3.1.9 It was noted that the following opposed claims were pending in court:

Shetland Sea Farms	£1 428 891
Personal injury claims	£297 000
Forty-three roof claims (including elements other than personal injury)	£2 600 190
Total	£4 326 081

3.1.10 The Director stated that he was considering whether in the light of the developments in the court proceedings further interim payments should be made in respect of those claims that had been approved but not paid in full.

3.1.11 The United Kingdom delegation stated that it was important for the 1971 Fund to resume payments in respect of those claims which had been settled but not paid in full as soon as possible, since these claimants would not be receiving interest on the settlement amount. That delegation further stated that it was important to note that the United Kingdom Government's claim for clean-up operations had been withdrawn so as to reduce the amount of the outstanding claims and allow for a further interim payment, and not because the claim lacked merit.

3.1.12 Several delegations endorsed the view expressed by the United Kingdom that it was important that further provisional payments were made as soon as possible.

3.1.13 Some delegations noted that even if all the opposed claims were dismissed by the Court the amount available to pay compensation would be insufficient to pay all the claimants 100% of the approved amount of their claims. It was pointed out that this would mean that all claimants would not be treated equally as required by the 1971 Fund Convention. It was noted that the Council would have to address this very important issue in the near future.

3.1.14 The Administrative Council noted that the Director had the authority to decide on the level of further payments in the light of the claims situation.

3.1.15 It was recalled that in 1995 the Executive Committee had considered a claim by a Shetland-based company, Shetland Sea Farms Ltd, in respect of a contract to purchase smolt from a related company on the mainland. It was also recalled that the smolt had eventually been sold at 50% of its purchase price to another company in the same group. It was further recalled that the Committee had accepted that the claim was admissible in principle, but had considered that account should be taken of any benefits derived by other companies in the same group. It was noted that attempts to settle the claim out of court had failed and that the company had taken legal action against the shipowner, his insurer and the 1971 Fund. It was noted that in October 2000 a hearing had taken place in order for the Court to consider whether certain of the documents relied

upon by Shetland Sea Farms Ltd were genuine and that the Court's decision was expected some time in 2001.

3.1.16 One delegation stated that, considering the length of time the1971 Fund could wait for the court to reach a decision, the 1971 Fund should consider reaching an out-of-court settlement especially since the Executive Committee had already considered the claim admissible in principle. The Director stated that since during the court proceedings the question had arisen whether the documents relied on by the claimant were genuine, the Court's decision on this point might affect the Fund's position as to the admissibility of the claim.

3.2 *Nakhodka*

3.2.1 The Administrative Council took note of developments in respect of this incident contained in document 71FUND/A/ES.7/3.

Claims situation

3.2.2 The Council noted that as at 12 March 2001 the total payments made to claimants amounted to ¥16 313 (£87 million), including the payments made by the shipowner and his P & I insurer totalling ¥66 million (£400 000) plus US$4.6 million (£3 million).

3.2.3 The Council noted that in the light of the developments the Director had decided in January 2001, as authorised by the governing bodies of the 1992 and 1971 Funds, to increase the level of payments from 70% to 80% of the amount of the damage actually suffered by the individual claimants. The Council noted that as a result of this decision the 1992 Fund had made additional payments totalling ¥1 961 million (£12 million) in February 2001.

3.2.4 The Japanese delegation reiterated its request that the Secretariat should make all efforts to speed up the assessment and payment of claims. Several delegations endorsed this request.

3.2.5 The Director pointed out that in a case of this magnitude and complexity, some delays in the claims handling were inevitable. He stated that the Secretariat, the staff at the Claims Office in Kobe and all experts engaged in the assessment would continue their efforts to settle and pay the relatively few remaining claims as soon as possible.

Legal proceedings

3.2.6 The Administrative Council noted the developments in the legal proceedings set out in paragraphs 2.1 - 2.12 of document 71FUND/A/ES.7/3.

3.2.7 The Japanese delegation expressed the view that it was now the time to pursue vigorously the recourse actions against the shipowner, the P & I insurer, the parent company of the shipowner and the Russian Maritime Register. This view was endorsed by several delegations.

3.3 *Nissos Amorgos*

3.3.1 The Administrative Council took note of developments in respect of the *Nissos Amorgos* incident contained in document 71FUND/A/ES.7/4.

General situation

3.3.2 The Council noted that claims had been approved for a total of Bs3 751 million (£3.6 million) plus US$16 million (£10.7 million).

3.3.3 The Administrative Council noted that after the withdrawal of a number of court actions the following claims for compensation were pending in the Venezuelan courts:

(a) Republic of Venezuela

(i) in the Criminal Court of Cabimas for US$60 million (£40 million);
(ii) in the Civil Court of Caracas for the same amount;

(b) two fish and shellfish processors in the Supreme Court for US$20 million (£13 million);

(c) Petroleos de Venezuela (PDVSA) in the Civil Court of Maracaibo for Bs3 314 million (£3.6 million);

(d) Instituto para el Control y la Conservación del Lago de Maracaibo (ICLAM)

(i) in the Criminal Court of Cabimas for Bs57.7 million (£54 000);
(ii) in the Civil Court of Maracaibo for the same amount;

(e) the shipowner and his insurer.

3.3.4 The Council noted that the claims for compensation pending before the courts now totalled US$140 million (£95 million), that other claims had been settled out of court at US$21.5 million (£14.4 million) and that the 1971 Fund's total exposure stood therefore at some US$160 million (£107 million). It was also noted that the total amount available for compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention was 60 million SDR (US$77.6 million or £52.9 million) and that the Director believed, therefore, that the level of the 1971 Fund's payments could be increased to 40% of the proven loss or damage suffered by the individual claimants. It was also noted that the Director expected that further developments in the pending court actions would take place in the near future and that in the light of the foregoing the Director believed that an increase of the 1971 Fund's payments from 40% to 70% would be appropriate when further claims had been settled or withdrawn so as to reduce the Fund's total exposure below US$100 million (£67 million).

3.3.5 The Venezuelan delegation stated that it was very pleased with the substantial progress which had been made in this case and that it considered that the withdrawal of the court actions was an important step towards resolving this incident. The delegation stated that a meeting had taken place in Caracas the previous day attended by the Attorney General, the Chief Prosecutor of Venezuela and representatives of other parties interested in the *Nissos Amorgos* incident and that the delegation was optimistic that there would be a positive outcome. That delegation pointed out that it would have preferred the Council to decide on an increase in the level of payments by more than 40% since this would have guaranteed prompt payment to legitimate victims. The Venezuelan delegation also pointed out that, bearing in mind the progress made and the interest that this case had in Venezuela, it would expect that a solution to this incident would be achieved very soon.

3.3.6 Several delegations expressed their gratitude to the Venezuelan delegation and the Secretariat for their efforts in making progress towards a solution of this incident.

3.3.7 Many delegations supported the proposal made by the Director to increase the level of payments to 40% and to authorise the Director to increase this level further to 70% when the 1971 Fund´s total exposure fell below US$100 million. Some delegations suggested that the Director should also be authorised to increase the level of payments to between 40% and 70% if and to the extent that the actions withdrawn from the courts would allow it. Some delegations pointed out that in reviewing the level of payments the 1971 Fund should always exercise great caution in order to avoid the Fund entering into an overpayment situation.

3.3.8 Some delegations stated that although they were very pleased with the substantial progress made recently, there were still some problems which had not been resolved, which included the possible recourse action by the 1971 Fund against the Instituto Nacional de Canalizaciones, an agency of

the Republic of Venezuela, and the issue of contributory negligence on the part of the Republic of Venezuela.

3.3.9 The Administrative Council decided to increase the level of payments to 40% of the loss or damage actually suffered by each claimant and to authorise the Director to increase the level of payments to 70% when the 1971 Fund's total exposure in respect of the *Nissos Amorgos* incident fell below US$100 million. The Council also authorised the Director to increase the Fund's payments up to a level of between 40% and 70% if and to the extent the actions withdrawn from the courts would allow it.

3.4 *Sea Prince*

3.4.1 The Administrative Council took note of the developments in respect of the *Sea Prince* incident as set out in document 71FUND/A/ES.7/5.

3.4.2 The Administrative Council recalled that in April 1998 the shipowner had filed two additional claims with the limitation court, one for the cost of post-spill environmental studies for Won 1 140 million (£603 000) and the other for costs totalling Won 135 million (£71 000) associated with additional clean-up undertaken by the shipowner in early 1998, and that the studies and the clean-up related to the spills from both the *Sea Prince* and the *Honam Sapphire* incidents. The Council also recalled that on the basis of the information available at the time the Director had taken the view that the post-spill environmental studies appeared to duplicate the work of sampling and analysing seawater, sediments and marine products undertaken by the experts appointed by the UK Club and 1971 Fund in 1995 to assist with the assessment of claims for alleged damage to fisheries and that the Director therefore had rejected the claim for the cost of these studies. It was further recalled that, on the basis of surveys carried out by the 1971 Fund's experts prior to and during the period of the additional clean-up, these experts had taken the view that the additional clean-up operations were not technically justified and that, in the light of the experts' opinion, the Director had informed the shipowner that the 1971 Fund considered that the cost incurred for the additional clean-up did not qualify for compensation.

3.4.3 It was recalled that in June 1998 the Court in charge of the limitation proceedings had rejected the claims filed by the shipowner for post-spill environmental studies and additional clean-up and that the shipowner had lodged opposition to this decision.

3.4.4 The Council noted that during meetings between the shipowner and the 1971 Fund in March 2001, the shipowner had provided further documentation regarding the claim in respect of the costs of environmental studies referred to in paragraph 3.4.2 above. It was noted that the documentation indicated that some of the studies, which were undertaken by the Seoul National University and the Korea Oceanographic Research and Development Institute, were aimed at providing baseline data for the restoration of the environment and included shoreline surveys to locate buried oil in beach sediments, monitoring subsequent clean-up operations and investigations into the medium and long-term impact of the spill on inshore fisheries and mariculture. It was also noted that the shoreline surveys identified a number of locations where significant deposits of buried oil remained and that, as a consequence, the decision had been taken by the authorities to order further clean-up to remove the oil. It was further noted that the studies on the impact of the spill on fisheries and mariculture, which were carried out on a number of different species of fish, shellfish and seaweeds, indicated that the spill had not resulted in any long-term damage to these resources. It was noted that other studies covered by the original claim included the laboratory toxicity testing of crude oil of the type spilled by the *Sea Prince* to different species of fish and shellfish and a review of clean-up techniques used in different countries.

3.4.5 The Administrative Council noted that, in light of this additional information, and notwithstanding the fact that the Court in charge of the limitation proceedings had rejected the claim in respect of environmental studies, the Director considered that some of the studies referred to in paragraph 3.4.4 related to damage falling within the definition of 'pollution damage'

as laid down in the 1969 Civil Liability Convention and the 1971 Fund Convention as interpreted by the 1971 Fund governing bodies and did not duplicate the work of sampling and analysing seawater, sediments and marine products undertaken by the experts appointed by the UK Club and the 1971 Fund to assist with the assessment of claims for alleged damage to fisheries. The Council also noted that the Director was therefore of the view that costs associated with some of the studies funded by the shipowner were admissible in principle.

3.4.6 As regards the additional clean-up undertaken to remove the buried oil from a number of shorelines referred to in paragraph 3.4.2 above, it was noted that the experts from ITOPF had considered that on the basis of earlier shoreline surveys further clean-up was not justified but that the Fund's Korean expert who had monitored the operations had taken the contrary view and had reported that the quantity of oil removed as a result of this clean-up was considerably greater than had been expected on the basis of the initial surveys. The Council noted that, in view of the environmental sensitivity of the polluted area, its importance as a major centre for inshore fisheries and mariculture and the quantities of buried oil subsequently found in the area, the Director had reconsidered his position and was now of the view that the claim for the costs of the additional clean-up should be considered admissible in principle.

3.4.7 Two delegations questioned the need for the 1971 Fund to settle the claims by the shipowner in view of the fact that the Court in charge of the limitation proceedings had not yet established the limitation fund in respect of the *Sea Prince*.

3.4.8 The Director reminded the Administrative Council that in view of the considerable time that it could take before the limitation amount would be determined by the Court the Council had at its 1st session authorised him to agree with the shipowner/insurer on the exchange rate between the SDR and the Korean Won to be applied to establish the limitation amount in respect of the *Sea Prince* and to determine the amount of indemnification payable under Article 5.1 of the 1971 Fund Convention.

3.4.9 One delegation expressed concern that the Fund was being inconsistent in respect of the admissibility of claims for environmental studies and that by doing so there was a danger of being inconsistent as regards its treatment of claims for environmental studies and that previously the 1971 Fund Executive Committee had rejected similar claims on the grounds that they were too general in nature. That delegation felt that the 1971 Fund had previously expressed the view that the Fund needed to be in agreement with the studies in advance.

3.4.10 The Director stated that the criteria for the admissibility of such claims were the same under the 1969/1971 Conventions and under the 1992 Conventions and that the text dealing with such claims was the same in the Claims Manuals for both Funds. He also stated that his reason for bringing the claim to the Administrative Council's attention was that it had been rejected not only by the 1971 Fund but also by the Court. He further stated that although he was now of the view that some elements of the claim were admissible, he felt it was important for the Council to consider the matter.

3.4.11 A number of delegations expressed the view that whilst they were not averse to the 1971 Fund changing its position on claims in the light of new evidence, they had concerns about the 1971 Fund appearing to pre-empt the appeal Court's decision.

3.4.12 The Director pointed out that it would be difficult for the Fund to continue to oppose a claim or elements of a claim in court if, in the light of new evidence, it believed that it was no longer inadmissible.

3.4.13 Several delegations supported the Director's proposal to reach an out-of-court settlement with the shipowner on the grounds that the objective of the Fund was to pay admissible claims and that to continue opposing the claim would send the wrong message to claimants.

3.4.14 Other delegations also supported the Director's proposal whilst drawing attention to the need to ensure that all claimants were treated equally. These delegations stated that it would be appropriate to lay down clearer criteria regarding the admissibility of claims for environmental studies.

3.4.15 The Administrative Council decided therefore, notwithstanding the fact that the claims relating to the post-spill environmental studies and additional clean-up referred to in paragraphs 3.4.4 and 3.4.6 had been rejected by the Court in charge of the limitation proceedings, to authorise the Director to settle these claims. The Council endorsed the Director's view that parts of the claim relating to the studies referred to in paragraph 3.4.4 were not admissible.

3.5 *Aegean Sea*

3.5.1 It was recalled that at its 2nd session the Administrative Council had instructed the Director to continue the discussions with the Spanish Government for the purpose of reaching an agreement with the Government on a global settlement of all outstanding issues to be submitted for consideration to the Assembly (or Administrative Council) at its next session (document 71FUND/AC.2/A.23/22, paragraph 17.2.12).

3.5.2 The Director informed the Administrative Council that discussions had been held recently with the Spanish Government, that considerable progress had been made and that he hoped that a proposal for a global settlement could be presented at the next session of the Assembly or Administrative Council.

4 Any other business

Election of Chairman

4.1 The Administrative Council noted that since the Russian Federation would cease to be a Member on 20 March 2001, the present Chairman would not be able to continue as Chairman.

4.2 The Administrative Council decided that it should elect its new Chairman at its next session.

Next session

4.3 The Administrative Council decided that the next session of the Assembly or the Administrative Council should be held during the week commencing 25 June 2001.

4.4 It was recalled that at the Council's 3rd session the Director had stated that subject to any instructions the Administrative Council might give him, and provided the 2000 Protocol to the 1971 Fund Convention would enter into force on 27 June 2001, and unless by mid-May 2001 two more States had denounced the 1971 Fund Convention, he intended to convene an extraordinary Assembly of the 1971 Fund to be held on Friday 22 June 2001 at which the Assembly would be invited to note that the total quantity of contributing oil had fallen below 100 million tonnes and that as a consequence the 1971 Fund Convention would cease to be in force on 22 June 2002. It was also recalled that the Council had agreed that the Director should convene an extraordinary session of the Assembly on 22 June 2001 in that situation (document 71FUND/AC.3/A/ES.6/7, paragraphs 4.3.5 and 4.3.8).

5 Adoption of the Record of Decisions

The draft Record of Decisions of the Administrative Council, as contained in document 71FUND/AC.4/A/ES.7/WP.1, was adopted, subject to certain amendments.