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OIL POLLUTION
COMPENSATION
FUND 1971

ADMINISTRATIVE COUNCIL
5th session
ASSEMBLY
8th extraordinary session

71FUND/AC.5/A/ES.8/10
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RECORD OF DECISIONS OF THE FIFTH SESSION OF THE ADMINISTRATIVE COUNCIL

ACTING ON BEHALF OF THE 8TH EXTRAORDINARY SESSION OF THE ASSEMBLY

(held on 25, 26 and 28 June 2001)

Chairman: Captain R Malik (Malaysia)

Opening of the session

0.1 It was noted that the Director had attempted to open the 8th extraordinary session of the Assembly at 2.30 pm on Monday 25 June 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 8th extraordinary session of the Assembly (document 71FUND/A/ES.8/1). 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 five of the 15 States elected to the Executive Committee by the Assembly at the last session at which it had a quorum (its 4th extraordinary session, held in April/May 1998) 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 25 June 2001.

0.4 At 2.30 pm on Monday 25 June 2001 the Director, since the States of the delegations of the previous Chairman and both Vice-Chairmen were no longer Members of the 1971 Fund, attempted to open the 8th extraordinary session of the Assembly. Only the following five 1971 Fund Member States were present at that time:

Colombia	Malaysia	United Arab Emirates
Côte d'Ivoire	Portugal	

0.5 The Director then adjourned the session for 30 minutes and when the meeting was resumed only six 1971 Fund Member States were present, the additional State being Cameroon.

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

0.7 In accordance with Resolution N°13, the items of 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 Captain R Malik (Malaysia) in his capacity as head of the delegation from which the Vice-Chairman had been elected.

Procedural matters

1 Adoption of the Agenda

The Administrative Council adopted the Agenda as contained in document 71FUND/A/ES.8/1.

2 Election of Chairman

Since the delegation of the previous Chairman, Mr V Knyazev (Russian Federation), was no longer a delegation of a Member State, the Administrative Council elected Captain R Malik (Malaysia) as Chairman.

3 Participation

3.1 The following 1971 Fund Member States were present:

Cameroon	Côte d'Ivoire	Portugal
Colombia	Malaysia	United Arab Emirates

3.2 The following former 1971 Fund Member States were present:

Australia	Ireland	Republic of Korea
Belgium	Italy	Russian Federation
Canada	Japan	Spain
Cyprus	Kenya	Sweden
Denmark	Malta	Tunisia
Finland	Marshall Islands	United Kingdom
France	Netherlands	Vanuatu
Germany	Norway	Venezuela
Greece	Panama	
India	Poland	

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

Argentina	Iran, Islamic Republic of	Singapore
Chile	Latvia	United States
Ecuador	Philippines	

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

Intergovernmental organisations:

European Commission
International Oil Pollution Compensation Fund 1992

International non-governmental organisations:

Cristal Limited
International Group of P & I Clubs
International Salvage Union (ISU)
International Tanker Owners Pollution Federation Limited (ITOPF)
International Union for the Conservation of Nature and Natural Resources (IUCN)
Oil Companies International Marine Forum (OCIMF)

4 Winding up of the 1971 Fund

4.1 The Administrative Council took note of the information contained in document 71FUND/A/ES.8/2.

4.2 It was recalled that a Diplomatic Conference, held in September 2000 under the auspices of the International Maritime Organization (IMO), had adopted a Protocol to amend Article 43.1 of the 1971 Fund Convention which governs the termination of the Convention and that the Protocol entered into force on 27 June 2001. It was also recalled that under Article 43.1 as amended, the 1971 Fund Convention will cease to be in force on the date on which the number of 1971 Fund Member States falls below 25 **or** 12 months following the date on which the 1971 Fund Assembly (or any other body acting on its behalf) notes that the total quantity of contributing oil received in the remaining Member States falls below 100 million tonnes, whichever is the earlier.

4.3 It was noted that the United Arab Emirates deposited an instrument of denunciation of the 1971 Fund Convention on 24 May 2001. It was also noted that when that denunciation takes effect on 24 May 2002, the number of Member States will fall below 25, that the Convention will cease to be in force on that day and that the Convention will not apply to incidents occurring after that date.

4.4 The Administrative Council expressed its satisfaction with this development.

4.5 The Council recalled that the 1971 Fund had purchased insurance covering any liabilities of the Fund for compensation and indemnification up to 60 million SDR (£53 million) per incident minus the amount actually paid by the shipowner or his insurer under the 1969 Civil Liability Convention, as well as legal and other experts' fees, in respect of all incidents occurring during the period 25 October 2000 – 31 December 2001, with the option to extend the insurance cover up to 31 December 2002. The Director stated that he intended to use the option to extend the insurance cover up to the date when the 1971 Fund Convention ceased to apply.

4.6 The Director stated that he intended to pursue his study of the procedure for the winding up of the 1971 Fund and present a document on this issue for consideration at the Assembly's October 2001 session.

5 Incidents involving the 1971 Fund

5.1 *Aegean Sea*

5.1.1 The Administrative Council took note of the developments in respect of the *Aegean Sea* incident, as set out in document 71FUND/A/ES.8/3, as regards the three main outstanding issues, *viz* the quantification of the losses, the distribution of liabilities between the Spanish State and the shipowner/his insurer (the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd (UK Club))/the 1971 Fund and the question of time bar in respect of the claimants who had brought action in the civil courts.

Quantification of losses

5.1.2 The Administrative Council noted that a provisional agreement had been reached between the Spanish Government, the shipowner, the UK Club and the 1971 Fund as to the admissible quantum of all claims for compensation arising out of the incident as set out in the table below.

Claims	Claimed amount Pts (million)	Agreed amount Pts (million)
Fishermen and shellfish harvesters	14 222.17	3 220.77
Mariculture	20 048.24	5 183.61
Clean-up operations	2 679.67	560.98
Fish wholesalers, transporters and related business	2 120.80	291.62
Tourism	75.20	13.81
Financial costs	2 127.20	371.68
Spanish Government	1 154.50	460.23
Shipowner/UK Club's claim for clean-up and preventive measures	1 164.65	708.03
Amounts awarded by Criminal Courts	4 577.63	893.88
Claims paid by UK Club and 1971 Fund	480.44	252.99
Total (million Ptas)	48 650.51	11 957.60
Total (£)	£184 million	£45 million

5.1.3 It was noted that the lawyers representing the great majority of the claimants had indicated that they expected that nearly all their clients would accept the assessments summarised in the table in paragraph 5.1.2.

5.1.4 As regards the question of whether interest should be paid on agreed claims the Council noted that the general position of Spanish law was that interest was only payable on non-contractual claims from the date when the claim had become liquid, which was normally the date when the amount of the compensation was fixed by the court. It was also noted that in the case of the *Aegean Sea* the amount of compensation had not been fixed for most of the claims. It was further noted that the 1971 Fund's Spanish lawyer had advised that in accordance with the jurisprudence of the Spanish Supreme Court the amount of the loss or damage fixed by the court could be increased to take into account the depreciation of the Spanish Peseta.

5.1.5 The Council noted that the provisional agreement as to the quantum of the claims was subject to agreement on the two other outstanding issues, namely the distribution of liabilities and the question of time bar.

Legal issues

5.1.6 The Administrative Council recalled that there existed differences of opinion between the Spanish State and the 1971 Fund on two legal issues, namely the distribution of liabilities between the State and the shipowner/UK Club/1971 Fund and the question of whether the actions brought by a number of claimants in the civil courts were time-barred.

5.1.7 The Administrative Council recalled that the position of the parties as regards the distribution of liabilities could be summarised as follows:

> The Criminal Court of first instance and the Court of Appeal held that the master of the *Aegean Sea* and the pilot were directly liable for the incident and that they were jointly and severally liable, each of them on a 50% basis, to compensate victims of the incident. It was also held that the UK Club and the 1971 Fund were directly liable for the damage caused by the incident and that this liability was joint and several. In addition, the Courts held that the owner of the *Aegean Sea* and the Spanish State were subsidiarily liable.
>
> Differences of opinion exist between the Spanish State and the 1971 Fund as to the interpretation of the judgements. The Spanish Government has maintained that the UK Club and the 1971 Fund should pay up to the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention (60 million SDR), and that the Spanish State would pay compensation only if and to the extent that the total amount of the established claims exceeded that amount. The Fund has maintained that the final distribution of the compensation payments between the various parties declared civilly liable should be: the UK Club and the 1971 Fund 50% of the total compensation for the damage (within their respective limits laid down in the Conventions), the State the remaining 50%. The shipowner and the UK Club share the 1971 Fund's interpretation of the judgement.

5.1.8 It was recalled that a number of claimants in the fishery and aquaculture sectors had filed criminal accusations against four individuals. It was also recalled that these claimants had not submitted claims for compensation in those proceedings, but only reserved their right to claim compensation in future proceedings (ie in civil proceedings to be brought at a later date after the completion of the criminal proceedings) without any indication of the amounts involved. It was further recalled that these claimants had neither brought legal action against the 1971 Fund within the prescribed time period, nor had they notified the 1971 Fund of an action for compensation against the shipowner or the UK Club. It was noted that in December 1995 the Executive Committee, recalling that it had previously decided that the strict provisions on time bar in the 1969 Civil Liability Convention and the 1971 Fund Convention should be applied in every case, had taken the view that these claims should be considered time-barred *vis-à-vis* the 1971 Fund.

5.1.9 It was recalled that the Spanish Government and the 1971 Fund had exchanged legal opinions on the questions as to whether the claims referred to in paragraph 5.1.8 were time-barred. It was also recalled that the opinions presented by the Spanish Government concluded that the claims in question were not time-barred whereas the opinions obtained by the 1971 Fund concluded that they were time-barred.

5.1.10 It was noted that at a meeting in Madrid on 18 June 2001 between representatives of the Spanish Government, the Director and representatives of the shipowner and the UK Club, it was considered that a global solution containing the following elements could be acceptable:

1. In the light of the Court of Appeal's judgements in respect of the distribution of liabilities and the assessment of the losses as set out in paragraph 5.1.2 above, the total amount payable by the shipowner, the UK Club and the 1971 Fund would be set at Pts 9 000 million (£34 million).

2. The amount payable to the Spanish State would be calculated as follows:

Total amount payable	Pts 9 000 000 000
Less amounts already paid by the shipowner, the UK Club and the 1971 Fund in respect of claims for which agreement on the admissible quantum has been agreed with the Spanish Government	Pts 1 773 559 545
Less payments made through the Joint Claims Office inLa Coruña in respect of a number of settled claims	Pts 131 486 228
Less payments to be made by the 1971 Fund to the UK Club for preventive measures	Pts 708 032 614
Payment to be made to the Spanish State by the 1971 Fund	Pts 6 386 921 613 (£24 million)

3. In addition the 1971 Fund would pay to those claimants who have received 40% of their agreed claims through the Joint Claims Office the balance of Pts 121 512 031 (£460 000).

4. The Agreement would be subject to claimants representing at least 90% of the total amount claimed in court (with the exception of the UK Club's claim) accepting the quantum of their losses as agreed between the Spanish Government, the 1971 Fund, the shipowner and the UK Club and withdrawing their claims in court.

5. On the basis of the judgement rendered by the Court of Appeal as regards the distribution of liabilities, the Spanish Government would undertake to pay the claims of the claimants who did not accept the global settlement for the amounts awarded by the courts and to hold the 1971 Fund, the shipowner and the UK Club harmless should these claims be pursued against them.

5.1.11 The Director stated that the technical details of the proposed settlement had not yet been worked out and that these matters would have to be discussed between the parties, should the Council approve the proposed global solution.

5.1.12 The Council noted the Director's opinion that the 1971 Fund's position on the issues of distribution of liabilities and time bar was well-founded but that it should nevertheless be recognised that there was always some uncertainty as to the outcome of any litigation on complex issues and that the litigation in respect of these issues would be protracted and costly.

5.1.13 In view of the fact that the purpose of the 1971 Fund was to pay compensation to victims of oil pollution, the Administrative Council considered that a global settlement containing the elements set out in paragraph 5.1.10 would be beneficial to all parties concerned.

5.1.14 The Council noted that as regards the Spanish State the proposed agreement had to be submitted to the State Council (Consejo del Estado) for a legal opinion and thereafter to the Council of Ministers for approval and that it had to be approved by the shipowner and the UK Club.

5.1.15 It was noted that the 1971 Fund would pay indemnification to the shipowner/UK Club pursuant to Article 5.1 of the 1971 Fund Convention amounting to Pts278 197 307 (£1 million).

5.1.16 The Administrative Council decided to authorise the Director to conclude and sign on behalf of the 1971 Fund an agreement with the Spanish State, the shipowner and the UK Club on a global solution of all outstanding issues in the *Aegean Sea* case, provided the agreement contained the elements set out in paragraph 5.1.10, and to make payments in accordance with such an agreement.

5.1.17 The Administrative Council emphasised that the 1971 Fund's offer to conclude a global settlement on the basis of the elements set out in paragraph 5.1.10 was without prejudice to the Fund's position in respect of the issues of distribution of liabilities and time bar.

5.1.18 The Spanish delegation thanked the Director, the Secretariat and the UK Club for their efforts towards reaching a global solution. That delegation expressed satisfaction with the recent developments, despite the fact that eight and a half years had passed since the incident took place, the considerable technical and legal difficulties which had arisen and the ongoing litigation in the Spanish courts. That delegation assured the Council that the Spanish Government would make its best endeavours to fulfil the conditions required under the proposed agreement, ie to obtain acceptance by claimants representing 90% of the total amount claimed in court. The Council was informed that the Spanish Government intended to commence a round of consultations with the claimants as soon as possible and would inform the Council of the results of these consultations in due course.

5.1.19 The Administrative Council urged all claimants to accept the proposed settlement as regards their respective claims and to withdraw the claims from the court proceedings.

5.2 *Keumdong N°5*

5.2.1 The Administrative Council took note of developments in respect of the *Keumdong Nº5* incident contained in document 71FUND/A/ES.8/4.

Claims for compensation

5.2.2 The Administrative Council recalled that with the exception of claims by the Yosu Fishery co-operative, which were the subject of legal proceedings, all claims for compensation had been settled for a total of Won12 175 million (£7.0 million).

Legal action by Yosu Fishery Co-operative

5.2.3 The Administrative Council recalled that following the instructions given by the Executive Committee at its 61st session, the 1971 Fund had lodged appeals against the Seoul District Court's judgement in respect of the Yosu Fishery Co-operative's claims regarding the decision to allow compensation for pain and suffering, the apparently arbitrary methods used to determine compensation and the decision to award compensation to fishermen operating without having fulfilled licensing requirements.

5.2.4 The Council noted that in May 2001 the Appellate Court rendered its judgement and overturned the judgement of the District Court in respect of losses due to pain and suffering and losses in respect of unlicensed and unregistered fishing activities.

5.2.5 The Administrative Council noted that in its consideration of whether claims for pain and suffering were admissible, the Appellate Court had examined the definition of "pollution damage" in the Korean Oil Pollution Guarantee Act and the 1969 Civil Liability Convention. The Council noted that the Court had stated that there were no concrete standards in the international conventions in relation to the definition of pollution damage and that therefore *lex fori* (the law of the State of the court seized) would apply. It was also noted that the Court had then examined the

legislation in various States and had noted that the legislation in the country accepting the broadest scope of liability, the United States (the Oil Pollution Act 1990), did not make reference to damage resulting from pain and suffering. It was further noted the Court also had mentioned that the Guidelines of Comité Maritime International (CMI) restricted compensation to proven economic loss or damage.

5.2.6 The Council noted that in referring to the fact that there were no generally accepted principles in the common law system and the continental law system as to compensation for pain and suffering and no internationally adopted standards on this point, the Court had taken the view that there should not be a difference in the application of the Conventions among Contracting States. The Council further noted that in view of this and the special international nature of the 1971 Fund, the Court had held that pollution damage under the Korean Act should include only economic and property damages and that for this reason the Court had held that claims for pain and suffering were not admissible.

5.2.7 The Administrative Council noted that as regards the claims in respect of unregistered and unlicensed fishing activities, the Appellate Court had stated that although so-called "illegal income" earned through the continued carrying out of illegal activities should not be used as a basis for the determination of compensation, certain income should not be regarded as illegal income simply because the law prohibited the activities in question. It was noted that the Appellate Court had referred to a judgement by the Korean Supreme Court, according to which the issue of whether a certain income was illegal should be determined on the basis of the original purpose of the legislation in question, the degree of blameworthiness of the activity, and in particular the degree of illegality of the activity, on a case-by-case basis. It was further noted that the Appellate Court had held that in the light of the special position of the 1971 Fund and the 1971 Fund Convention and the fact that a restrictive interpretation of the concept of 'pollution damage' would be closer to international standards, the income of the plaintiffs who did not have the licenses, permits or registrations required under the Korean Fisheries Act to carry out their activities should be regarded as illegal income which could not be included in the calculation of compensation. The Administrative Council noted that the Court therefore had rejected these claims. It was further noted that the Court had also stated that there was no evidence that the claimants who did not have licenses, permits or registrations had suffered the alleged loss of income due to the incident and that there was no evidence of any link of causation between the incident and the alleged reduction in income.

5.2.8 The Council noted that the Appellate Court had upheld the decision of the District Court in respect of loss of earnings due to business interruption caused by the clean-up of licensed common fishing grounds and intertidal culture farms. The Council further noted that in the judgement the Appellate Court ordered the Fund to pay Won 142 million (£79 000) plus interest of 5% per annum from 27 September 1993 to 8 May 2001 and 25% per annum from 9 May 2001 until the date of payment. It was also noted that in view of the fact that the 1971 Fund's position on matters of principle had been accepted, ie that compensation should not be granted for pain and suffering and for losses in respect of unlicensed and unregistered fishing activities, the Director had decided that the Fund should not appeal against the decision by the Appellate Court in respect of the claims by Yosu Fishery Co-operative.

5.2.9 The Administrative Council noted that initially all the claimants had appealed to the Korean Supreme Court but that the individual members of the co-operative had subsequently withdrawn their appeals. It was noted that the only claimants who had decided to pursue the appeals were 36 village fishery associations and that the amount claimed on appeal was Won2 756 million (£1.5 million).

5.3 *Nissos Amorgos*

5.3.1 The Administrative Council took note of developments in respect of the *Nissos Amorgos* incident contained in document 71FUND/A/ES.8/5.

Court proceedings

5.3.2 The Council noted that after the withdrawal of a number of court actions the following claims were pending in the courts:

(a) Republic of Venezuela;

(i) in the Criminal Court of Cabimas for US$60 million (£42 million);
(ii) in the Civil Court of Caracas for the same amount;

(b) three fish and shellfish processing companies in the Supreme Court for US$27 million (£19 million);

(c) four experts engaged by FETRAPESCA in the Supreme Court for fees for Bs100 million (£100 000);

(d) three lawyers against the Republic of Venezuela for fees for Bs440 million (£435 000);

(e) Petroleos de Venezuela (PDVSA) in the Civil Court of Maracaibo for Bs3 314 million (£3.3 million);

(f) Instituto para el Control y la Conservacion de la Cuenca del Lago de Maracaibo (ICLAM);

(i) in the Criminal Court of Cabimas for Bs57.7 million (£57 000);
(ii) in the Civil Court of Maracaibo for the same amount;

(g) the shipowner and his insurer for Bs1 219 million (£1.2 million) and Bs3 473 million (£3.4 million).

Director's visit to Venezuela

5.3.3 The Administrative Council noted that the Director and the Claims Manager responsible for the *Nissos Amorgos* incident had visited Venezuela in April 2001 in order to make progress in the claims settlements. It was further noted that during the visit meetings had been held with the Minister of Foreign Affairs, the Minister of the Environment and Natural Resources, the Attorney General, the Republic of Venezuela Public Prosecutor, the Commandant of the Venezuelan Navy and the Instituto Nacional de Canalizaciones (INC). It was further noted that at these meetings the Director had suggested that, since the two claims presented by the Republic of Venezuela (both for US$60 million) were duplications, one of these claims should be withdrawn so as to enable the 1971 Fund to increase the level of payments. It also noted that the Director had made the point that the claims by the Republic of Venezuela in the 1971 Fund's view were not admissible in principle since they related to damage to the environment *per se*.

5.3.4 The Council noted that discussions had also been held concerning the cause of the incident. It was recalled that the shipowner and his insurer had taken the position that the incident and the resulting pollution were due to the fact that the Maracaibo Channel had been in a dangerous condition due to poor maintenance and that this had been known to the Venezuelan authorities but that its full extent was concealed and that the arrangements for alerting mariners to the dangers which existed were unreliable. The Council also recalled that in October 1999, the Executive Committee had instructed the Director to investigate these issues further in co-operation with the shipowner and his insurer to the extent that there was no conflict of interest between them and the Fund. It was further noted that during the meetings the Venezuelan authorities had indicated that they had significant documentary evidence, which showed that the Maracaibo Channel was in good condition and that there was no contributory negligence on the part of INC. It was further noted that the Director had invited the Venezuelan authorities to make these documents available

so as to enable the 1971 Fund's experts to examine them and the 1971 Fund to take a position on the basis of all relevant facts. It was also noted that so far no such documents had been received.

5.3.5 The Venezuelan delegation expressed its appreciation of the efforts made by the Director and the Secretariat to make progress in respect of the *Nissos* Amorgo case. A representative of INC stated that after the *Nissos Amorgos* incident INC had carried out a survey of the channel, which showed that the conditions were favourable for navigation. It was mentioned that the Republic of Venezuela had also investigated the circumstances of the incident and that the results of this investigation confirmed the conclusions of the study carried out by INC that the channel was in perfect condition for navigation. The representative of INC emphasised that INC was not a defendant as to the question of the condition of the channel for navigation but would make available to the 1971 Fund technical documentation on the conditions of the channel which had been presented to the Supreme Court, in order to enable the Fund to take a decision based on the facts of the case.

Level of payments

5.3.6 The Administrative Council recalled that at its 4th session, held in March 2001, the Council had decided to increase the level of payments to 40% of the loss or damage actually suffered by each claimant and had authorised 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 further recalled that it had 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 (document 71FUND/AC.4/ES.7/6, paragraph 3.3.9).

5.3.7 The Council noted that since its 4th session there had been no further withdrawal of claims and that two additional claims against the 1971 Fund had been filed in court. It was also noted that several pending actions were duplicated, since claims relating to what appeared to be the same damage had been presented before two or three courts.

5.3.8 The Administrative Council noted that the claims for compensation pending before the courts totalled US$147 million (£104 million) plus Bs3 529 million (US$4.9 million or £3.5 million). It was further noted that other claims had been settled out of court at US$21.5 million (£15.2 million). It was also noted that the 1971 Fund's total exposure stood therefore at some US$180 million (£129 million) and that the total amount available for compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention was 60 million SDR (US$74.3 million or £52.9 million).

5.3.9 The Venezuelan delegation stated that the Republic of Venezuela had decided to withdraw one of the Republic's claims, that presented by the Republic in the Civil Court of Caracas for an amount of $60 million, and that the withdrawal would take place as soon as the necessary documents had been signed by the shipowner and his insurer. It was stated that the withdrawal of that claim 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. That delegation stated that the Republic of Venezuela hoped that with the withdrawal of this claim, the level of payments would be increased substantially, in accordance with the Council's decision of March 2001, as another show of the goodwill that existed in the effort to conclude the case. The Venezuelan delegation stated that for these reasons it considered it appropriate to ask for an increase in the level of payments.

5.3.10 In view of the continuing uncertainty as to the level of claims arising out of the *Nissos Amorgos* incident the Administrative Council decided to retain the decision as to the level of payments taken at its 4th session. It was agreed that the level of payments should be reviewed at the Council's next session.

5.3.11 The Director stated that if the claim of the Republic of Venezuela referred to in paragraph 5.3.9 was withdrawn, he intended to use the authority given to him by the Council to increase the level of payments to between 50% and 60%.

5.4 *Nakhodka*

5.4.1 The Administrative Council took note of developments in respect of the *Nakhodka* incident contained in document 71FUND/A/ES.8/6.

Claims for compensation

5.4.2 The Council noted that claims totalling ¥25 445 million (£149 million) had been settled for a total amount of ¥17 914 million (£105 million). It was noted that total payments made to claimants amounted to ¥16 495 million (£88 million), including the payments made by the shipowner and his insurer. The Committee also noted the situation as regards the assessment of the remaining claims, totalling ¥9 695 million (£57 million), in particular that it was expected that the assessments of most of the remaining claims would be completed by October 2001.

Claims relating to the causeway

5.4.3 The Council took note of the information concerning the claims relating to the construction and removal of a causeway which had been built from the shore to the grounded bow section of the *Nakhodka*, which had been intended to allow road tankers to be brought close to the wreck, thereby facilitating the removal of the oil (cf document 71FUND/A/ES.8/6, paragraph 3). It was noted that these claims were under consideration against the criteria for admissibility laid down by the 1971 and 1992 Fund Assemblies, ie that the operations were reasonable from an objective technical point of view.

5.4.4 The Japanese delegation stated that the claims relating to the causeway were being discussed between the IOPC Funds, the shipowner's insurer and the Japanese Government, and that whilst not wishing to go into any detail, pointed out that the Japanese Coast Guard had made the decision to construct the causeway after taking into consideration the unpredictable and severe weather conditions in the Sea of Japan in winter and other difficulties which were encountered at the time.

5.4.5 Several delegations stated that the shipowner's insurer and the IOPC Funds should make every effort to settle these claims and emphasised the importance of the IOPC Funds keeping an open mind about claims of this type. Some delegations also made the point that the high amount of the claims should not influence the way in which they were treated by the IOPC Funds, although the Funds should exercise great care in the assessment of such big claims.

5.4.6 Some delegations stated that it was important for the IOPC Funds not to consider the building of the causeway as unreasonable with the benefit of hindsight, since this could discourage national authorities from taking innovative preventive measures in future cases.

Legal actions

5.4.7 The Council noted the developments in the legal proceedings set out in paragraphs 4.1 – 4.13 of document 71FUND/A/ES.8/6.

5.4.8 Some delegations expressed the view that the IOPC Fund should pursue vigorously the recourse action against the shipowner, the P & I insurer, the parent company of the shipowner and the Russian Maritime Register of Shipping. It was also suggested that the Funds should consider the possibilities of recourse action in countries other than Japan and should also consider problems relating to 'piercing the corporate veil' and the practical problems of arresting a ship of the parent company in Japan.

Global solution

5.4.9 The Administrative Council instructed the Director to pursue discussions with the Japanese Government, the shipowner and his insurer on outstanding claims and issues and to explore the possibilities of reaching a global settlement of all outstanding issues.

5.4.10 The Japanese delegation stated that if the outstanding issues could be resolved to the satisfaction of all parties concerned this could lead to an early global settlement.

5.5 *Pontoon 300*

5.5.1 The Administrative Council took note of developments in respect of the *Pontoon 300* incident contained in document 71FUND/A/ES.8/7.

Claims for compensation

5.5.2 The Council noted that claims totalling Dhs 7.4 million (£1.4 million) in respect of clean-up operations had been settled for a total of Dhs 6.3 million (£1.2 million). It was further noted that the 1971 Fund had paid a total of Dhs 4.8 million (£900 000), corresponding to 75% of the settlement amounts.

5.5.3 The Administrative Council noted that in May 2000 the Municipality of Umm al Quwain had presented claims against the 1971 Fund totalling Dhs 199 million (£39 million) on behalf of fishermen, tourist hotel owners, private property owners, a marine research centre and the municipality itself.

Legal actions

5.5.4 The Council recalled that under Article 6 of the 1971 Fund Convention, rights to compensation from the 1971 Fund are extinguished unless an action is brought under the Convention against the Fund, or a notification has been made to the Fund under Article 7.6 of the Convention of an action against the shipowner or his insurer under the 1969 Civil Liability Convention, within three years of the date when the damage occurred.

5.5.5 The Administrative Council noted that in September 2000, ie well before the expiry of the three-year time bar period, the Umm al Quwain Municipality had brought legal action in the Umm al Quwain Court against the tug owner of the tug *Falcon 1* 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 further noted that the total amount claimed in the legal action was Dhs199 million (£39 million) and that the claims corresponded to those referred to in paragraph 5.5.3 above. The Council noted that the 1971 Fund had not been joined as a defendant in the proceedings, nor had the Fund been formally notified of the proceedings. It was further noted that the plaintiffs had requested the Court to notify the 1971 Fund through diplomatic channels in accordance with Article 7.6 of the 1971 Fund Convention and through the Undersecretary of the Ministry of Justice according to Article 9, paragraph 7 of the United Arab Emirates law of Civil Procedure. It was recalled however, that notification under Article 7.6 could be made only in respect of actions against the shipowner liable under the 1969 Civil Liability Convention or his insurer. It was noted that actions against any other parties would fall outside that Convention. It was further noted that since none of the defendants listed in the Municipality's writ was the shipowner or his insurer, the action could not be based on the 1969 Civil Liability Convention and Article 7.6 of the 1971 Fund Convention was not applicable.

5.5.6 The Council noted that in December 2000 the Ministry of Agriculture and Fisheries had joined in the Umm al Quwain Municipality's action as a co-plaintiff claiming Dhs 6.4 million (£1.2 million), which corresponded to the claim by the marine resources research centre referred

to in paragraph 5.5.3 above. It was also noted that the Ministry had joined the 1971 Fund as a co-defendant in its action.

5.5.7 The Administrative Council noted that claims against the 1971 Fund had become time-barred on or around 8 January 2001. The Council noted that the question had arisen as to whether the claims that were the subject of the legal action by the Umm al Quwain Municipality were time-barred. The Council noted that the Umm al Quwain Municipality had not taken the measures laid down in the 1971 Fund Convention to prevent the claims becoming time-barred since the action which the Municipality had taken was not against the registered owner of the *Pontoon 300* or his insurer and the Municipality had not taken legal action against the 1971 Fund.

5.5.8 The Council noted however that the 1971 Fund's UAE lawyers had drawn attention to the fact that in the procedural law of the UAE there was no legal distinction between an actual defendant and a notified party and that the Court might identify and confirm the 1971 Fund as a defendant rather than a notified party to get around the problem. It was further noted that, since the writ was filed in court before the expiry of the three-year time bar period, the Fund's lawyers believed that it might be considered by the courts as sufficient for preventing the Municipality's claims becoming time-barred.

5.5.9 One delegation stated that Article 7.6 of the Fund Convention specifically referred to actions against the shipowner and that since the owner of the *Pontoon 300* was not joined in the Municipality's action, the 1971 Fund had not been properly notified. That delegation made the point, however, that the question of who was a party had to be decided in accordance with national law and that the plaintiff might be allowed to rectify its pleadings on this point.

5.5.10 A number of delegations stated that the question of time bar was an important one and that the 1971 Fund should maintain its policy that the provisions on time bar in the 1971 Fund Convention should be strictly observed.

5.5.11 The delegation of the United Arab Emirates stated that under the law of the Emirates, international treaties took precedence over domestic law and that the issue of time bar should be decided in accordance with the Conventions.

5.5.12 The Administrative Council noted that although the action by the Ministry of Agriculture and Fisheries had not yet been served on the 1971 Fund, the Director took the view that this claim was not time-barred, since the 1971 Fund had been brought in as defendant in this action before the expiry of the three-year time bar period. The Council agreed with the Director's view in respect of this claim.

5.5.13 The Council noted that the question had also arisen as to the Ministry of Agriculture and Fisheries' and Umm al Quwain Municipality's standing to sue in respect of the alleged damages covered by the claims, since neither of them had any right to claim against the 1971 Fund or anyone else on behalf of any other parties unless a power of attorney or other legal authority was provided by the individual or entity who had suffered the alleged loss. It was noted that the Ministry and the Municipality could still present documents showing that they had the power to represent the victims in question.

Level of the 1971 Fund's payments

5.5.14 The Administrative Council recalled that in view of the uncertainty as to whether the total amount of the claims might exceed the total amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention (60 million SDR, corresponding to approximately £52.5 million), the Executive Committee decided at its 57th session to limit the 1971 Fund's payments to 50% of the loss or damage actually suffered by each claimant as assessed by the 1971 Fund's experts at the time the payment was made (document 71FUND/EXC.57/15, paragraph 3.11.9). It was also recalled that at its 58th session, the Committee increased the level of payments to 75% (document

71FUND/EXC.58/15, paragraph 3.9.5). The Administrative Council further recalled that it had decided at its 1st and 2nd sessions to maintain the payment level at 75% (documents 71FUND/AC.1/EXC.63/11, paragraph 3.7.4 and 71FUND/AC.2/A.23/22, paragraph 17.11.5).

5.5.15 It was noted that the total amount claimed against the 1971 Fund in the court proceedings as at 31 May 2001 was Dhs 206 million (£40 million), although Dhs 6.4 million (£1.2 million) was claimed both by the Municipality and the Ministry for the same alleged damage. It was recalled that although the Director had taken the view that the claims by the Umm al Quwain municipality, which represented Dhs 195 million (£39 million), were time-barred, the 1971 Funds' UAE lawyers had drawn attention to the fact that the UAE courts might not agree with the Director on this point. It was noted that the Fund's lawyers had indicated that UAE law was unclear as to whether or not claimants could increase the amount of their claims in court, but that in any event if the claimants were to be successful in pursuing their claims, they would be entitled to interest at 9% per annum on the amounts awarded, either from the date of the filing of the respective claim in court or from the date of the judgement. Therefore, in view of the continuing risk that the total amount of the admissible claims will exceed the maximum amount available for compensation, the Council decided to maintain the level of the 1971 Fund's payments at 75% of the total loss or damage suffered by each claimant.

Investigation into the cause of the incident

5.5.16 The Administrative Council noted that the 1971 Fund's legal advisers in the UAE who had investigated the cause of the incident had reported that the failure of the Sharjah and Ajman police to collect evidence from the master and crew at the time of the incident and the absence of any direct right of the 1971 Fund to collect evidence had resulted in only very limited evidence on the cause of the incident being available to the 1971 Fund. It was further noted that the presumption of the cause of the incident was the unseaworthiness of the tow *Pontoon 300* and that pursuant to the principles of towage, there was a failure on the part of the owner and the master of the tug *Falcon 1* to check and maintain the seaworthiness of the tow.

Criminal proceedings

5.5.17 The Council recalled that in November 1999, the Ajman Criminal Court had found the master of the tug *Falcon 1*, the tug owner and the alleged cargo owner and their respective general managers guilty of misuse of the barge *Pontoon 300*, which had not been in a seaworthy condition and thus had been in violation of UAE law, and causing harm to the people and the environment by use of the unseaworthy barge. It was also recalled that the master of the *Falcon 1*, the tug owner and his general manager had appealed against the judgement, but the alleged cargo owner and his general manager had not.

5.5.18 The Council further recalled that in February 2000, the Ajman Criminal Court of Appeal had found the tug owner and his general manager not guilty, but had confirmed the guilty verdict against the master of the *Falcon 1*, the alleged cargo owner and his general manger, on the grounds of their being liable for misuse of the *Pontoon 300*, which had not been in a seaworthy condition, and for causing damage to people and the environment by the use of an unseaworthy barge.

5.5.19 The Council noted that the master of the tug *Falcon 1* had lodged an appeal in the Federal Court of Cassation, which had sent the case back to the Ajman Criminal Court of Appeal to consider the issues of seaworthiness of the *Pontoon 300* and the master's defence that the incident was due to 'force majeure'. It was also noted that the Fund's lawyers were monitoring these proceedings.

Recourse action by the 1971 Fund

5.5.20 The Administrative Council recalled that 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. It was further recalled that the Fund had claimed Dhs 4.5 million (£840 000), corresponding to the major part of the compensation it had paid for clean-up operations and preventive measures (cf paragraph 5.5.2).

5.5.21 The Council noted that in December 2000, the Dubai Court had rendered a judgement in which it had rejected the 1971 Fund's claim against the owner of the tug *Falcon 1*, but ordered the owner of the cargo on board the *Pontoon 300*, who had allegedly chartered the tug *Falcon 1*, to pay the Fund Dhs 4.5 million (£840 000). The Council further noted 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 was under the control of the charterer. The Council noted that the 1971 Fund had appealed against this 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 further noted that an application had been made to stay the appeal proceedings pending the decision in the hearing at the Ajman Criminal Court of Appeal.

5.5.22 The Council noted that the 1971 Fund's lawyers had mentioned that the tug owner might be entitled to limit his liability under the Maritime Code unless the incident was a result of the personal fault of the owner. The Council noted that it appeared that the *Falcon 1* was of 254 GRT and therefore under the domestic law of the Emirates the tonnage limitation figure would be some Dhs 75 000 (£20 436).

5.6 *Zeinab*

5.6.1 The Administrative Council took note of developments in respect of this incident contained in document 71FUND/A/ES.8/8.

5.6.2 The Council noted that on 14 April 2001, the Georgian-registered vessel *Zeinab*, suspected of smuggling oil from Iraq, had been arrested by the multi-national Interception Forces. The Council further noted that the vessel was being escorted to a holding area in international waters when the vessel lost its stability about 16 miles from the Dubai coastline and sank in 25 metres of water. It was further noted that the vessel was reported to have been carrying a cargo of 1 500 tonnes of fuel oil, of which it is estimated that some 400 tonnes was spilled at the time of the incident. It was also noted that some 1100 tonnes of cargo remained in the unbreached tanks and that this cargo was successfully removed from the sunken vessel without further significant spillage of oil. The Council noted that it appeared that the *Zeinab* was not entered with any classification society and was not covered by any liability insurance.

5.6.3 The Council noted that oil had affected a number of amenity beaches in Dubai and Sharjah and also impacted the Ajman coastline and that some beachside villas had their sea defence walls stained. The Council further noted that oil also had affected desalination plants in Sharjah and Ajman, and that the desalination plant in Sharjah had to be closed down temporarily on a number of occasions, which had led to a shortage of water supply to the city. It was further noted that a number of amenity beaches had been oiled and that oil had entered the port area in Port Rashid causing staining of sea defences and of vessels. The Council further noted that the pollution might have affected Dubai's tourist industry, although the prompt cleaning of amenity shorelines might have helped to limit losses. The Council further noted that fishing activities and fish markets had reportedly not been affected.

Definition of 'ship'

5.6.4 The Administrative Council noted that the *Zeinab* appeared to have been built in 1967 in Italy as a two-hatch general cargo vessel of some 4 354 dwt. The Council further noted that at some stage around 1998, the vessel had been converted to carry oil by installing 12 tanks within the cargo holds, although when the conversion had been undertaken the hatch coamings had been left in

place and the tanks covered by a tarpaulin so that the *Zeinab* maintained the outward appearance of a general cargo vessel.

5.6.5 The Council recalled the definitions of 'ship' set out in Article I.1 of the 1969 Civil Liability Convention and of the 1992 Civil Liability Convention, and which are incorporated in the 1971 and 1992 Fund Conventions, which read:

> *1969 Civil Liability Convention*
>
> 'Ship' means any sea-going vessel and seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo.
>
> *1992 Civil Liability Convention*
>
> 'Ship' means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.

5.6.6 The Council noted that since the *Zeinab* was actually carrying oil in bulk as cargo at the time of the incident, it should therefore be considered a ship for the purpose of the 1969 Civil Liability Convention and the 1971 Fund Convention. It was further noted that the *Zeinab* was clearly capable of carrying oil in bulk as cargo, and had been frequently used for carrying oil in the region. The Council considered that it would be difficult to argue that it was not a ship for the purpose of the 1992 Civil Liability Convention and the 1992 Fund Convention. The Council therefore took the view that the *Zeinab* fell within the definitions of 'ship' laid down in the 1969 Civil Liability Convention and the 1992 Civil Liability Convention.

Applicability of Conventions

5.6.7 The Administrative Council recalled that at the time of the incident the United Arab Emirates was a Party to both the 1971 Fund Convention and the 1992 Fund Convention, having not denounced the former when acceding to the latter. The Council also recalled that it had considered the applicability of the two Conventions at its 2nd session in the context of the *Al Jaziah 1* incident which occurred in the United Arab Emirates on 27 January 2000 (document 71FUND/A.23/14/11, paragraphs 3.1 – 3.10). The Council recalled that the 1992 Fund Executive Committee had also considered the matter at its 8th session (document 92FUND/EXC.8/4, paragraphs 3.1 - 3.10). It was recalled that the Administrative Council and the 1992 Fund Executive Committee had decided that both the 1971 Fund Convention and the 1992 Fund Convention applied to that incident (documents 71FUND/AC.2/A.23/22, paragraph 17.12 and 92FUND/EXC.8/8, paragraph 4.2.11).

5.6.8 The Council decided that since the United Arab Emirates was at the time of the *Zeinab* incident a Party to both the 1969/1971 Conventions and the 1992 Conventions, which had been implemented into national law, both sets of Conventions applied to the incident.

5.6.9 It was noted that the *Zeinab* was reportedly registered in Georgia, which at the time of the incident was a Party to the 1969 Civil Liability Convention but not to the 1992 Civil Liability Convention and that the United Arab Emirates was also a Party to the 1969 Civil Liability Convention. It was noted that therefore the United Arab Emirates would be under a treaty obligation to apply the 1969 Civil Liability Convention in respect of the shipowner's liability (cf Article 30.4(b) of the 1969 Vienna Convention on the Law of Treaties).

Distribution of liabilities between the 1971 Fund and the 1992 Fund

5.6.10 The Administrative Council recalled that the question of the distribution of liabilities between the 1971 and 1992 Funds had in a corresponding situation also been considered by the Council at its 2nd session (document 71FUND/A.23/14/11, paragraphs 4.10 - 4.6) and by the 1992 Fund Executive Committee at its 9th session (document 92FUND/EXC.9/11, paragraphs 4.1 - 4.6) in the context of the *Al Jaziah 1* incident. The Council recalled that both bodies had concluded that, since there were neither provisions in the Fund Conventions nor any rules under general treaty law governing the simultaneous application of the two sets of Conventions, a practical and equitable solution should be agreed between the two Funds. It was further recalled that both bodies therefore had decided to distribute the liabilities between the 1971 Fund and the 1992 Fund on a 50:50 basis (documents 71FUND/AC.2/A.23/22, paragraphs 17.12.7 - 17.12.15 and 92FUND/EXC.9/12, paragraphs 3.8.7 - 3.8.15).

5.6.11 The Council decided that liabilities arising out of the *Zeinab* incident should be distributed between the 1971 Fund and the 1992 Fund on a 50:50 basis.

5.6.12 It was noted that each claimant had the right to pursue its claim against either the 1971 Fund or the 1992 Fund, that the Fund against which the claim was pursued was liable for the total amount of the damage up to the limit of its liability under the respective Convention and that the distribution of liabilities between the two Funds would have to be negotiated between them.

Claims for compensation

5.6.13 The Administrative Council noted that it appeared that the *Zeinab* was not covered by any liability insurance and that it was unlikely that the shipowner would be able to pay compensation.

5.6.14 It was noted that the Director had requested the Council to consider whether it was prepared to authorise the Director to make final settlements on behalf of the 1971 Fund of all claims arising out of the *Zeinab* incident to the extent that the claims did not give rise to questions of principle which had not previously been decided by any of the governing bodies of the 1971 Fund or the 1992 Fund.

5.6.15 One delegation raised concerns that the *Zeinab* appeared to have been engaged in oil smuggling and had not been properly classified and certified to carry oil. In that delegation's view if the 1971 Fund were to entertain claims for compensation arising from the incident, the Fund might be seen to be encouraging the operation of sub-standard ships at a time when concerted efforts were being made to improve the quality of shipping. In addition, attention was drawn to the obligations of Contracting States under Article VII.10 of the 1992 Civil Liability Convention.

5.6.16 Another delegation referred to Article 4.2(a) under which the Fund was exonerated from paying compensation for pollution damage resulting from *inter alia* an act of war or hostilities. In that delegation's view it would be worth exploring this defence more closely.

5.6.17 Some delegations considered that the multi-national interception forces were merely carrying out policing duties to ensure that sanctions imposed by the United Nations Security Council were respected. Those delegations considered that even if the sinking of the *Zeinab* had been due to a deliberate act, this would be a matter for a possible recourse action by the Fund rather than constituting a defence under Article 4.2(a).

5.6.18 The United Arab Emirates delegation stated that the area in question was no longer under war and that observation of United Nations Resolutions had no bearing on the right to compensation for oil pollution damage.

5.6.19 A number of delegations expressed concerns about authorising the Director to settle claims until the exact circumstances surrounding the sinking of the *Zeinab* were known.

5.6.20 The Administrative Council decided that in view of the reservations expressed by a number of delegations it was premature to authorise the Director to settle claims for compensation arising from the incident and that the matter should be given further consideration at the Council's next session.

5.7 *Singapura Timur*

5.7.1 The Administrative Council took note of developments in respect of the *Singapura Timur* incident contained in document 71FUND/A/ES.8/9.

5.7.2 The Council noted that on 28 May 2001 the chemical tanker *Singapura Timur* (1 369 GT), registered in Panama, carrying some 1 550 tonnes of asphalt, had collided with the unladen Bahama-registered tanker *Rowan* (24 731 GT) near Undan Island, in the Strait of Malacca (Malaysia). The Council also noted that the vessel had sunk in some 47 metres of water later the same day. The Administrative Council further noted that the *Singapura Timur* was entered in the Japan Ship Owners' Mutual Protection and Indemnity Association (Japan P & I Club).

5.7.3 The Administrative Council noted that since asphalt is a persistent oil, the *Singapura Timur* was actually carrying oil in bulk as cargo and the vessel therefore fell within the definition of 'ship' in Article I.1 of the 1969 Civil Liability Convention. The Council noted that Malaysia was a Party to the 1969 Civil Liability Convention and the 1971 Fund Convention and that the limitation amount applicable to the *Singapura Timur* was estimated at 102 000 SDR (£90 000).

5.7.4 The Administrative Council noted that it was not yet possible to make an evaluation of the total amount of the claims for compensation, but that it was anticipated that clean-up costs would exceed the limitation amount applicable to the ship under the 1969 Civil Liability Convention.

5.7.5 The Administrative Council authorised the Director to make final settlements on behalf of the 1971 Fund of all claims arising out of the *Singapura Timur* incident to the extent that the claims did not give rise to any questions of principle which had not previously been decided by any of the governing bodies of the 1971 Fund or the 1992 Fund.

5.7.6 The Malaysian delegation stated that the Malaysian Government had requested the shipowner to remove the cargo and the wreck, since they were considered a threat to the environment and navigation respectively.

5.8 *Braer*

5.8.1 The United Kingdom delegation referred to the claims situation in the *Braer* case and pointed out that the 1971 Fund's exposure had recently been reduced considerably. That delegation drew attention to the fact that many claimants who had settled their claims more than five years ago had still not been fully compensated and could not expect to receive any interest. The delegation referred to a judgement rendered in February 2001 by the Court of Session in Edinburgh which had rejected the claims against the shipowner, his insurer and the 1971 Fund in six test cases in respect of alleged damage to the asbestos roofs of various properties in the south of the Shetland Islands. The United Kingdom delegation stated that 43 other claims concerning damage to asbestos roofs which had not been heard in the Court of Session had not yet been withdrawn from the proceedings. That delegation understood that one of the obstacles to these claimants withdrawing their actions was that the shipowner's insurer and the 1971 Fund were requesting each claimant to contribute to the insurer's and the 1971 Fund's legal costs. That delegation noted that although it was usual practice for the IOPC Funds to pursue such costs he pointed out that these claimants were not companies but were all individuals, some of whom were pensioners, and that many considered themselves badly treated. The United Kingdom delegation requested the Council to allow the Director the flexibility not to pursue the Fund's legal costs in this particular instance with a view to reaching a settlement of the *Braer* incident on a global basis.

5.8.2 The Director informed the Council that the 1971 Fund and the insurer had in early April 2001 made an offer in writing relating to the claimants' contributions to the Funds' and the insurer's legal costs, that the claimants' solicitors had not replied to this offer and that the 1971 Fund had through its lawyers been trying repeatedly but unsuccessfully to contact the claimants' solicitors with a view to discussing this issue.

5.8.3 Several delegations expressed concern that the IOPC Funds could be setting a precedent by not seeking to recover its legal costs, but stated that in circumstances such as those described by the United Kingdom delegation the 1971 Fund should show some flexibility when trying to settle the issue of legal costs with claimants.

5.8.4 The Administrative Council instructed the Director to take a flexible approach on this issue in order to reach agreement with the claimants on the amount they should contribute towards the 1971 Fund's legal costs and urged the claimants or their representatives to contact the 1971 Fund Secretariat to facilitate a resolution of this matter.

6 Any other business

6.1 No matter was raised under this agenda item.

6.2 Next session

The Administrative Council noted that the governing bodies would hold their next sessions in the week commencing 15 October 2001.

7 Adoption of the Record of Decisions

The draft Record of Decisions of the Administrative Council, as contained in document 71FUND/AC.5/A/ES.8/WP.1, was adopted, subject to certain amendments.