INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

ADMINISTRATIVE COUNCIL
8th session
Agenda item 4

71FUND/AC.8/6
3 July 2002
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RECORD OF DECISIONS OF THE EIGHTH SESSION OF THE ADMINISTRATIVE COUNCIL

(held on 2 and 3 July 2002)

Chairman: Captain R Malik (Malaysia)

Opening of the session

1 Adoption of the Agenda

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

2 Participation

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

Algeria	Greece	Oman
Antigua and Barbuda	Ireland	Panama
Australia	Italy	Poland
Belgium	Japan	Qatar
Canada	Liberia	Republic of Korea
Colombia	Malaysia	Russian Federation
Cyprus	Malta	Spain
Denmark	Marshall Islands	Sweden
Fiji	Mexico	Tunisia
Finland	Morocco	United Arab Emirates
France	Netherlands	United Kingdom
Germany	Norway	Vanuatu

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

Argentina	Georgia	Philippines
Chile	Grenada	Singapore
Congo	Iran, Islamic Republic of	Turkey
Ecuador		

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

Intergovernmental organisations

1992 Fund
European Communities

International non-governmental organisations

Conference of Peripheral Maritime Regions (CRPM)
International Group of P & I Clubs
International Union for the Conservation of Nature and Natural Resources
Oil Companies International Marine Forum (OCIMF)

3 Incidents involving the 1971 Fund

3.1 *Aegean Sea*

3.1.1 The Administrative Council recalled that at its 5th session held in June 2001 it had decided to authorise the Director to conclude and sign on behalf of the 1971 Fund an agreement with the Spanish State, the shipowner and his insurer, the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd (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 5.1.16 of document 71FUND/AC.5/A/ES.8/10.

3.1.2 The Council further recalled that, in a letter dated 27 July 2001, the Director had made a formal offer on behalf of the 1971 Fund to the Spanish Government to conclude an agreement between the Fund, the Spanish State, the shipowner and the UK Club which contained the following elements:

1 The total amount due by the owner of the *Aegean Sea*, the UK Club and the 1971 Fund to the victims as a result of the distribution of liabilities determined by the Court of Appeal in La Coruña amounts to Pts 9 000 million (£33 million).

2 The sum payable by the 1971 Fund to the Spanish State, after deduction of certain sums, amounts to Pts 6 386 921 613 (£23 million).

3 In addition, the 1971 Fund would undertake to pay to the victims whose claims have not been included in those agreed with the Spanish State and who are listed in an Annex to the Agreement, the difference between the total agreed amount of the loss or damage and the amount paid to date, amounting to Pts 121 512 031 (£450 000).

4 As a consequence of the distribution of liabilities determined by the Court of Appeal in La Coruña, the Spanish State would undertake to compensate all the victims who may obtain a final judgement by a Spanish court in their favour, which condemns the shipowner, the UK Club or the 1971 Fund to pay compensation as a result of the incident.

3.1.3 It was recalled that the 1971 Fund would pay indemnification to the shipowner/UK Club pursuant to Article 5.1 of the 1971 Fund Convention amounting to Pts 278 197 307 (£1 million).

3.1.4 It was also recalled that in his letter the Director had made it a condition for the conclusion of the Agreement that the Spanish State presented to the 1971 Fund a copy of the withdrawals by the victims of their legal actions, in civil proceedings and in the procedure for execution in the criminal proceedings, representing at least 90% of the principal of the loss or damage claimed, except for the claim by the UK Club for preventive measures.

3.1.5 It was noted that the Director's letter and the text of the proposed Agreement had been approved by the shipowner and the UK Club.

3.1.6 The Council recalled that the 1971 Fund had undertaken to maintain the offer until 30 November 2001. It was noted that in view of the complexity of the negotiations with claimants the 1971 Fund had subsequently extended the period for acceptance of the offer on three occasions to 28 February 2002, 31 May 2002 and 31 October 2002.

3.1.7 The Spanish delegation expressed its gratitude to the 1971 Fund and all delegations for their support in the discussions leading to a global settlement in respect of the *Aegean Sea* incident. That delegation thanked the 1971 Fund in particular for its offer of a global settlement made a year ago and for extending the period for the acceptance of the offer on three occasions.

3.1.8 The Spanish delegation expressed its confidence that it would be possible to reach agreements between the Spanish Government and the claimants in spite of the complexity of the issues involved. That delegation informed the Council that the Spanish Government had reached agreements with claimants representing 85% of the principal of the loss or damage claimed and that it was expected that 90% would be reached within the next few weeks. The delegation stated that the Spanish Government would present to Parliament by the end of September 2002 an Act that would enable the global settlement to be concluded. The Spanish delegation stated that it was the Spanish Government's intention that the claimants would be compensated before the end of 2002.

3.2 *Sea Empress*

3.2.1 The Administrative Council took note of the information contained in document 71FUND/AC.8/2 concerning the *Sea Empress* incident.

3.2.2 The Council noted that there were five remaining claims for compensation totalling £1.4 million that were the subject of legal action, that three of these claims had been rejected by the 1971 Fund and the shipowner's insurer, Assuranceforeningen Skuld (Skuld Club), that the remaining two claims had been assessed by the 1971 Fund and the Skuld Club at £240 000 and that interim payments had been made by the 1971 Fund to the claimants.

3.2.3 The Council further noted that the 1971 Fund and the Skuld Club had prepared an application to the Admiralty Court seeking summary judgments or dismissals in respect of three of the above claims since in one case the claimant had no cause of action against them and in the other two cases there were no reasonable grounds for bringing the claims and the claimants had consistently failed to comply with court orders. The Council noted that two of these claimants had subsequently agreed to withdraw their claims.

3.2.4 The Council noted that a claim for £645 000 presented by a whelk processor based in Devon had been rejected by the 1971 Fund and the Skuld Club on the grounds of lack of reasonable proximity between the oil pollution and the alleged loss. The Council further noted that in April 2002 a hearing was held in the Admiralty Court to decide on the question of principle as to whether the claim for loss of profits constituted pollution damage within the meaning of the

United Kingdom Merchant Shipping Act 1995 (which implements the 1969 Civil Liability Convention and the 1971 Fund Convention).

3.2.5 The Council noted that on 29 May 2002 the High Court had decided the preliminary issue in favour of the 1971 Fund and had found that the claim was inadmissible for substantially the same reasons as those given in the Landcatch decision by the Scottish Inner House (Appeal Court) in connection with the *Braer* incident. The Council further noted that the High Court had granted the claimant permission to appeal to the Court of Appeal on the grounds that the case raised issues of principle of general importance in the development of substantive law and that it was expected that the appeal would be heard within 6 – 9 months.

Recourse action

3.2.6 The Administrative Council recalled that at its 62nd session, held in October 1999, the Executive Committee had instructed the Director to take recourse action on behalf of the 1971 Fund against Milford Haven Port Authority (MHPA) (document 71FUND/EXC.62/14, paragraph 3.6.23) and that on 14 February 2002 the 1971 Fund and Skuld Club had commenced proceedings against MHPA in the Admiralty Court. The Council further recalled that the action had been brought by the 1971 Fund and Skuld Club in their own names as well as on behalf of claimants to whom compensation had been paid, and on behalf of claimants who at that time were still pursuing claims against the 1971 Fund and the Skuld Club and who had expressly authorised the Fund and the Skuld Club to take such action.

3.2.7 The Council further recalled that as at 14 February 2002, the total amount paid to claimants was £34 million, whereas the total amount indicated in respect of the unsettled claims was £3.9 million (excluding interest and costs). The Council noted that since then a further £1.9 million had been paid to claimants. The Council recalled that the 1971 Fund and the Skuld Club had also claimed in respect of administrative and legal expenses incurred as a result of the incident and that these administrative and legal expenses were in the region of £2.6 million.

3.2.8 The Council recalled that the 1971 Fund had maintained that MHPA had failed to take reasonable care to avoid the risk of a laden tanker grounding and spilling oil, had failed to give proper consideration to the risk of a laden tanker going aground and causing serious oil pollution and had failed to put in place procedures to control or reduce the risk as much as possible. The Council further recalled that the 1971 Fund had set out a detailed claim against MHPA which included allegations of negligence and/or breach of duty (document 71FUND/AC.8/2, paragraph 4.5).

3.2.9 The Council noted that on 5 June 2002 MHPA had submitted a lengthy and detailed defence pleading denying any liability for the incident and the ensuing oil pollution. It was noted that MHPA had argued that it did not owe any duty of care and/or statutory duty to claimants in respect of the economic loss suffered and had also denied owing any duty of care to the 1971 Fund. The Council further noted that MHPA had maintained that under the Pilotage Act 1987, it was not liable for any loss or damage caused by an act or omission of a pilot authorised by it by virtue solely of that authorisation and that in any event the pilot in question had not been employed by MHPA but by another (wholly owned) company for whose acts MHPA was not liable. The Council also noted that MHPA had invoked Section 22 of the Pilotage Act 1987 which, in MHPA's view, would entitle it to limit its liability to £12 000 in respect of the *Sea Empress* incident.

3.2.10 It was further noted that MHPA had in its defence also invoked the provisions in the Merchant Shipping (Oil Pollution) Act on channelling of liability and the Milford Haven Conservancy Act 1983 relating to salvage operations, and that it had maintained that by reason of these Acts MHPA was not liable for any pollution damage resulting from the *Sea Empress* incident.

3.2.11 The Council noted that the MHPA had not admitted that any of the loss or damage covered by the claims by the 1971 Fund and the Skuld Club was caused by the grounding of the *Sea Empress* and

that no admissions had been made as to the nature of the alleged loss or damage nor as to whether the alleged loss or damage (or any of it) was sufficiently proximate to be recoverable from MHPA.

3.2.12 The Council noted that the Director was examining the defence pleadings in consultation with the 1971 Fund's legal advisers and that the Fund would submit its reply in due course.

3.2.13 The Council recalled that the Skuld Club had authorised the 1971 Fund to pursue the recourse action in the Club's name and after consultation to take all decisions relating to the conduct of the proceedings. It was also recalled that an agreement had been reached between the 1971 Fund and the Skuld Club as to the distribution between them of any amount recovered as a result of the recourse action.

3.2.14 The Council noted that in April 2002 the 1971 Fund had paid the Skuld Club the amount due to it by way of indemnification of the shipowner under Article 5.1 of the 1971 Fund Convention (2 189 832 SDR or £1 835 035), less a deduction in respect of the Club's share of joint costs.

3.2.15 The Administrative Council instructed the Director to keep it informed of any future developments in respect of the recourse action.

3.3 *Nakhodka*

3.3.1 The Council took note of the developments in respect of the *Nakhodka* incident as contained in document 71FUND/AC.8/3 (cf document 92FUND/EXC.17/2).

Claims for compensation

3.3.2 The Council noted that as at 12 June 2002, claims totalling ¥30 947 million (£167 million) had been settled at ¥22 1199 million (£119 million), that the payments made by the 1971 and 1992 Funds to claimants amounted to ¥17 184 million (£93 million) and that the payments made by the shipowner and his P&I insurer, the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd (UK Club), totalled US$5 million (£4 million).

3.3.3 The Council noted that claims by 11 Japanese government agencies in respect of clean-up operations totalling ¥1 519 million (£8.2 million) had been assessed by the IOPC Funds at ¥1 488 million (£8.0 million), and that the Funds and the UK Club had offered settlements at this amount.

3.3.4 The Council recalled that the IOPC Funds' governing bodies had decided, at their April/May 2002 sessions, to approve claims totalling ¥3 354 million (£18 million) submitted by the Japanese Maritime Disaster Prevention Centre (JMDPC) in respect of the construction and removal of a causeway to facilitate the removal of oil from the bow section of the *Nakhodka* for a total of ¥2 043 million (£11 million). It was noted that JMDPC had not yet given its formal acceptance of the settlement approved by the governing bodies.

Level of payments

3.3.5 The Council recalled that in accordance with a decision by the Assembly of the 1992 Fund, the total amount available under the 1971 and 1992 Fund Conventions, ie 135 million SDR, equalled ¥23 164 515 000 (£125 million).

3.3.6 It was recalled that, as authorised by the governing bodies, the Director had decided in January 2001 to increase the level of payments from 60% to 80% of the amount of the loss or damage actually suffered by the individual claimants. It was also recalled that at the April/May 2002 session, the Director had been authorised to increase the level of payments, if and to the extent that he was satisfied that there was no risk that the Funds would face an overpayment situation

(documents 71FUND/AC.7/A/ES.9/14, paragraph 8.14.12 and 92FUND/EXC.17/2, paragraph 3.1.2).

3.3.7 The Council noted that, after taking the unsettled claims by the Japanese government agencies and JMDPC into account, the total exposure of the IOPC Funds could be estimated at ¥27 021 696 000 (£146 million). It was also noted that the Director had therefore decided that he was unable to increase the level of payments over 80% at this stage.

Legal actions

3.3.8 The Council recalled that, pursuant to the governing bodies' decisions, in November 1999 the IOPC Funds had brought legal actions in the Fukui District Court against the owner of the *Nakhodka* (Prisco Traffic Limited), Prisco's parent company (Primorsk Shipping Corporation), the UK Club and the Russian Maritime Register of Shipping, to recover any amounts paid by the Funds in compensation.

3.3.9 The Administrative Council noted that at a hearing on 13 May 2002, in response to the decisions made by the Funds' governing bodies at their April/May 2002 session mentioned in paragraph 3.1.10 below, the Tokyo District Court had proposed that all parties should hold an informal meeting on 24 May 2002 in order to enable the Court to propose a settlement. The Council further noted that several informal meetings had been held before the Court to consider a proposal for settlement put forward by the shipowner and the UK Club, which had been agreed with the IOPC Funds, setting out the admissible amount of each government agency's claim and those of JMDPC (cf paragraphs 3.3.3 and 3.3.4 above). It was also noted that the Court had invited the Japanese Government and JMDPC to give positive consideration to the proposal. The Administrative Council also noted that a further informal meeting had been held on 1 July 2002, that the lawyer representing the Japanese authorities had informed the Court that it had not yet been possible to obtain the approval of the Ministries involved of the proposed settlement and that a further informal meeting before the Court was to be held on 30 July 2002.

Global solution

3.3.10 It was recalled that, at their April/May 2002 sessions, the governing bodies had approved the following global settlement proposed by the UK Club:

1 The compensation payments would be shared between the UK Club and the IOPC Funds on a 42:58 basis in respect of all settled claims.

2 The IOPC Funds would continue to make payments at a level of 80% in respect of all settled claims.

3 The UK Club would pay the 20% balance due to all claimants.

4 The UK Club would reimburse the IOPC Funds approximately ¥5 200 million (£26.7 million), this being the amount payable by the Club to the Funds after payment by the Club of the 20% balance due to claimants.

5 The joint costs incurred by the UK Club and the IOPC Funds would also be apportioned between them on a 42:58 basis.

6 All legal actions arising from the incident would cease.

7 The IOPC Funds, Prisco Traffic Limited, Primorsk Shipping Corporation and the UK Club should each bear their own legal costs.

3.3.11 The Council recalled that the proposed global settlement would result in the IOPC Funds recovering approximately ¥5 203 million (£26.7 million) and making a saving of around ¥2 500 million (£13.1 million) as a result of not having to increase their payments over 80% of the settlement amounts, and that the Funds would get a contribution to joint costs of some £3.9 million.

3.3.12 The Council further recalled that the governing bodies had authorised the Director to conclude a settlement agreement provided it contained the elements set out in paragraph 3.3.10 above and had also authorised the Director to agree with the other parties the details of such an agreement (documents 71FUND/AC.7/A/ES.9/14, paragraph 8.4.3.6 and 92FUND/EXC.16/6, paragraph 3.1.36).

3.3.13 The Council recalled that the governing bodies had decided that the IOPC Funds should withdraw their actions against the Russian Register of Shipping.

3.3.14 The Council noted that the details of the global settlement were being discussed between the IOPC Funds and the UK Club, pending the acceptance by the Japanese government agencies and JMDPC of the offered settlements.

Conversion of the maximum amount payable by the 1971 Fund from SDR to Yen

3.3.15 The Council noted that the maximum amount payable by the 1971 Fund in compensation in respect of the *Nakhodka* incident under the 1971 Fund Convention was 60 million SDR minus the limitation amount applicable to the shipowner, ie 1588 000 SDR, which gave 58 412 000 SDR. It also noted that under the 1971 Fund Convention, the conversion of the SDR into national currency should be made on the basis of the rate of exchange applicable on the date when the shipowner established his limitation fund (Article 1.4 of the 1971 Fund Convention as amended by the 1976 Protocol thereto read in conjunction with Article V.9 of the 1969 Civil Liability Convention as amended by the 1976 Protocol thereto). The Council recalled that as a result of the global settlement approved by the governing bodies at their April/May 2002 sessions, the shipowner's limitation fund would not be constituted in the *Nakhodka* case and that the 1971 Fund Administrative Council would therefore have to decide on the date to be used for the conversion of the amount payable by the 1971 Fund into Japanese Yen.

3.3.16 The Administrative Council considered the Director's proposal that the conversion of the amount payable by the 1971 Fund should be made using the same rate as that used for the conversion of the maximum amount payable under the 1992 Fund Convention, resulting in the maximum amount payable by the 1971 Fund equalling ¥10 022 856 668.

3.3.17 One delegation considered that the question of the conversion of the maximum amount payable by the 1971 Fund gave rise to a conflict of interest with the 1992 Fund and disagreed with the Director's proposal. In that delegation's view the relevant provisions laid down in the 1992 Fund Convention had nothing to do with those in the 1971 Fund Convention and that the 1971 Fund could not be bound by the provisions in the 1992 Fund Convention. That delegation considered that on the basis of the transitional period provisions, under which the 1992 Fund was only required to pay compensation if and to the extent that the total claims arising out of the *Nakhodka* incident exceeded the amounts available under the 1969 Civil Liability Convention and the 1971 Fund Convention, it followed that the 1971 Fund should be regarded as discharged of its liability when it had paid compensation reaching 60 million SDR, its limit at the date of its payments.

3.3.18 The Director drew attention to the fact that the issue of the 1971 Fund limit had been raised at every session at which the governing bodies had considered contributions in respect of the *Nakhodka* incident, and that it had always been recognised that this issue could not be decided until the shipowner had constituted his limitation fund under the 1969 Civil Liability Convention. He added that since the limitation fund would not be established it was necessary to find a pragmatic solution.

3.3.19 In view of the fact that the provision on conversion laid down in the Convention could not apply, several delegations proposed that an alternative solution to the problem would be to follow the same principle as that adopted in the 1992 Fund Convention by converting the amount payable by the 1971 Fund into Japanese Yen on the date when the 1971 Fund Executive Committee decided to authorise the Director to make settlement of claims.

3.3.20 The Administrative Council decided that the conversion of the amount payable by the 1971 Fund in respect of the *Nakhodka* incident should be made using the rate of exchange between the SDR and Japanese Yen on 19 February 1997, the date on which the 1971 Fund Executive Committee adopted the Record of Decisions of the session at which the Committee took the decision to authorise the Director to make final settlements of claims (document 71FUND/EXC.59/11, paragraph 3.7.7).

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

3.3.21 The Council considered the Director's proposal that the financial benefits of the global settlement should be shared between the 1992 Fund and the 1971 Fund in proportion to their respective maximum liabilities under the 1992 Fund Convention and the 1971 Fund Convention, namely 58 412 000 SDR and 75 million SDR respectively, ie the 1971 Fund would be liable for 43.783% and the 1992 Fund for 56.217%.

3.3.22 A number of delegations agreed with the Director's proposal, but expressed concern that the adoption of the proposal might set a precedent which could result in an inequitable distribution of amounts recovered in future cases. Some delegations expressed the view that the financial benefits should be shared on the basis of the actual payments made by the respective Funds rather than their maximum liabilities, although it was recognised that in the *Nakhodka* case both the 1971 Fund and the 1992 Fund would have paid up to their respective limits had it not been for the global settlement.

3.3.23 One delegation referred to the fact that the *Nakhodka* incident had occurred during the transitional period, ie between the date of the entry into force of the 1992 Fund Convention and the date on which the denunciations provided for in Article 31 of the 1992 Protocol to amend the 1971 Fund Convention took effect. That delegation drew attention to the provisions in Article 36 bis (b) and (c) of the 1992 Fund Convention whereby the 1992 Fund was only required to pay compensation to the extent that claims exceeded the maximum amounts available under the 1969 Civil Liability Convention, the 1971 Fund Convention and, if applicable, the 1992 Civil Liability Convention. In that delegation's view, as long as the relevant provisions existed in the 1992 Fund Convention, they should apply when determining the distribution between the two Funds and a natural interpretation of this provision would lead to the conclusion that any amounts recovered relating to an incident occurring during the transitional period should be reimbursed to the 1992 Fund first.

3.3.24 Another delegation made the point that Article 36 bis referred only to compensation payments as opposed to the distribution between the two Funds of any amount recovered as a result a successful recourse action. In that delegation's view, a more equitable distribution of the amounts recovered would be on the basis of the respective payments of each Fund.

3.3.25 A number of delegations expressed the view that it was premature for the Council to make a decision on this important issue and proposed that the matter should be deferred pending a detailed analysis by the Director of the various options for distributing any recovered amounts.

3.3.26 One delegation expressed the view that any analysis undertaken by the Director should include a consideration of how any such distribution would be made in cases involving the 1992 Fund and the Supplementary Fund which would be set up under the proposed Protocol introducing a third tier of compensation.

3.3.27 The Council decided to postpone its decision regarding the distribution of the amounts recovered as a result of the global settlement and instructed the Director to carry out a further study of the options available and their implications for the two Funds.

3.4 *Alambra*

3.4.1 The Administrative Council took note of the information contained in document 71FUND/AC.8/4 concerning the *Alambra* incident.

3.4.2 The Council noted that on 17 September 2000 the tanker *Alambra* (75 366 GRT), registered in Malta, was loading a cargo of heavy fuel oil in the Port of Muuga, Tallinn (Estonia), when an alleged 250 tonnes of cargo escaped from a crack in the vessel's bottom plating.

3.4.3 The Council noted that Estonia was Party to the 1969 Civil Liability Convention and the 1971 Fund Convention and that the limitation amount applicable to the *Alambra* under the 1969 Civil Liability Convention was estimated at 7.6 million SDR (£6.6 million).

Claims for compensation

3.4.4 The Council noted that claims for clean-up costs had been submitted to the shipowner and the London Club by the Tallinn Port Authority for EEK 6.5 million (£250 000) and by the Estonian State for EEK 4 million (£156 000).

3.4.5 The Council noted that a claim for EEK 45.1 million (£1.8 million) was being pursued against the shipowner by the Estonian State. The Council further noted that this amount, which had the character of a fine or charge, appeared to have been calculated on the basis of the estimated quantity of oil spilled and could not therefore be considered a claim for compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention.

3.4.6 The Council also noted that a claim for US$100 000 (£69 000) was being pursued against the shipowner and the London Club by a charterer of a vessel said to have been delayed whilst clean-up operations were undertaken. The Council further noted that the owner of the berth in the Port of Muuga at which the *Alambra* was loading cargo at the time of the incident and a company contracted by the owner of the berth to carry out oil loading activities had submitted claims to the shipowner and the London Club for EEK 29.1 million (£1.1 million) and EEK 9.7 million (£379 000) respectively for loss of income due to the unavailability of the berth whilst clean-up operations were undertaken.

Applicability of the Conventions

3.4.7 The Council noted that in November 2001 the owner of the berth in the Port of Muuga and the company it had contracted to carry out oil loading operations had taken legal actions against the shipowner and the London Club and had requested the Court to notify the 1971 Fund of the proceedings in accordance with Article 7.6 of the 1971 Fund Convention. The Council further noted that having been notified of the actions in February 2002, the 1971 Fund had instructed lawyers in Estonia to represent the Fund in the proceedings.

3.4.8 The Council noted that in the context of these legal actions, the question had arisen as to whether the 1969 Civil Liability Convention and the 1971 Fund Convention had been correctly implemented into Estonian national law.

3.4.9 The Council noted that on 1 December 1992 Estonia had deposited its instruments of ratification of the 1969 Civil Liability Convention and the 1971 Fund Convention with the Secretary-General of the International Maritime Organization (IMO) and that, as a result, the Conventions had entered into force for Estonia on 1 March 1993.

3.4.10 The Administrative Council noted that the lawyers acting for the shipowner and the London Club, as well as the lawyers acting for the 1971 Fund, had drawn attention to the fact that, under the Estonian Constitution, ratification of the Conventions should not have taken place before the Estonian Parliament had given its approval and adopted the necessary amendments to the national legislation, that the Conventions had not been submitted to Parliament and that the necessary amendments to national law had not been made. The Council further noted that for these reasons the 1969 Civil Liability Convention and the 1971 Fund Convention did not, in the view of these lawyers, form part of national law and could not be applied by the Estonian courts and that the shipowner and the London Club had raised this issue in their pleadings in the court. It was also noted that the 1971 Fund had also raised this issue in its submission to the court in order to protect its position, pending the Council's consideration of this matter.

3.4.11 The Administrative Council noted that in the Director's view, it appeared that the procedure for ratification of international treaties laid down in the Estonian Constitution, which had entered into force on 3 July 1992, had not been observed and that it was possible therefore that the 1969 and 1971 Conventions would be considered by the Estonian courts as not forming part of Estonian law. It was also noted that in the Director's view it could not be ruled out that the courts might find that the Conventions were nevertheless applicable.

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

3.4.13 The Council noted that the Director was pursuing discussions with the London Club for the purpose of reaching out-of-court settlements in respect of at least those claims, which, in his view, fell within the scope of application of the Conventions.

3.4.14 A number of delegations noted that the situation in Estonia gave rise to questions of constitutional law in that country and whether or not the 1971 Fund had the right to intervene as a party to any legal proceedings instituted before a competent court in the country. It was noted that notwithstanding the ambiguity of the legal situation in Estonia, the State had complied with the oil reporting requirements of the 1971 Fund Convention and that there were no arrears of contributions in respect of Estonia.

3.4.15 Some delegations expressed the view that since Estonia had ratified the 1971 Fund Convention it was not for third party States to question the validity of that ratification.

3.4.16 In the light of the importance of the issue and since the decision in this case could constitute a precedent for future cases, some delegations proposed postponing a decision on the stance to be taken by the 1971 Fund on this matter.

3.4.17 Some delegations suggested that the 1971 Fund should engage an expert to study the treaty law aspects as well as the position under domestic Estonian law. The Director stated that he doubted whether such a study would have any real value, since in his view the treaty law aspects were clear and it would not be possible for any expert to express any meaningful opinion on the legal situation under Estonian domestic law until the issue had been decided by the Estonian Courts.

3.4.18 The Administrative Council decided to postpone its consideration of this issue to its next session.

3.5 *Zeinab*

3.5.1 The Administrative Council took note of the developments in respect of the *Zeinab* incident, as contained in document 71FUND/AC.8/5 (cf document 92FUND/EXC.17/4).

Claims for compensation

3.5.2 The Administrative Council noted that the Dubai Ports Authority had submitted claims totalling US$480 000 (£343 000) in respect of costs of preventive measures and clean-up and that this claim had been settled at US$454 000 (£312 000). It was noted that the Federal Environment Agency had submitted claims for US$850 000 (£583 000) in respect of the operations to remove the remaining oil from the sunken wreck and the costs it incurred in responding to the oil pollution. It was also noted that the IOPC Funds had assessed the claims at a total of US$795 000 (£545 000). It was further noted that claims in the region of US$1.2 million (£850 000) were anticipated from the Dubai Municipality in respect of shoreline clean-up operations and that further claims were expected from local oil companies that participated in the clean-up operations.

3.5.3 The Council noted that as at 1 June 2002, the Funds had paid a total of £346 000 in compensation and legal and other experts' fees. It was also noted that on the basis of the 50:50 sharing of liabilities between the 1971 and 1992 Funds, decided by the 1971 and 1992 Funds' governing bodies, each Fund had therefore made payments of some £173 000.

Determination of the 1971 Fund's deductible under the terms of the insurance cover

3.5.4 The Council recalled that as authorised by the 1971 Fund Administrative Council at its October 2000 session, the 1971 Fund had purchased insurance covering any liabilities of the 1971 Fund for compensation and indemnification up to 60 million SDR (£55 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 between 25 October 2000 and 24 May 2002, the date when the 1971 Fund Convention ceased to be in force. The Council also recalled that under the insurance policy the 1971 Fund had to cover a deductible of 250 000 SDR for each incident.

3.5.5 The Council noted that the insurance contract stipulated that the conversion of SDR into pounds sterling should be calculated by the 1971 Fund in accordance with its normal operating procedures or by a competent court and that it did not deal with the issue of the conversion of SDR into any other national currency. The Council endorsed the Director's proposal that the 1971 Fund should follow the procedure provided for in the 1971 Fund's Internal Regulation 3.5 relating to the conversion of the maximum amount payable from the General Fund (1 million SDR) into pounds sterling, namely that the relevant date for conversion should be the date of the incident in question, which in the case of the *Zeinab* was 14 April 2001. It was noted that the insurers had agreed with this procedure.

3.5.6 The Council decided that on the basis of the SDR: pound sterling exchange rate on 12 April 2001 (1 SDR = £0.88130), (13, 14, 15 and 16 April being non-banking days), the deductible under the insurance policy would be £220 325 in respect of the *Zeinab* incident.

4 Any other business

4.1 Time for commencing the 1971 Fund meetings

The Administrative Council endorsed the Director's proposal that future meetings of the Council should commence at 9.30 am on the first day of the session.

4.2 Late submission of documents

4.2.1 One delegation referred to the late submission of the document relating to the *Nakhodka* incident, which had given that delegation insufficient time to consider the issues that were raised in that document.

4.2.2 The Director stated that as only two months had elapsed since the Council's last session, it was inevitable that in order to reflect developments the documents would be issued shortly before the present session. He acknowledged that this caused difficulties for delegations in their preparations for the meeting, but suggested that the policy of posting documents on the web site on the day of printing went some way to alleviating the difficulties.

4.3 Audit Body

4.3.1 The Chairman of the 1992 Fund Assembly reminded the Administrative Council that the Council and the Assembly of the 1992 Fund had decided at their October 2001 sessions to establish a joint Audit Body, which would be composed of seven members elected by the Council: one named Chairman and five named individuals nominated by Member States and one individual with specialist expertise nominated by the Chairman of the Administrative Council.

4.3.2 He further reminded the Council that elections to the Audit Body would take place at the governing bodies sessions in October 2002 and that nominations of candidates, accompanied by their curriculum vitae, should be submitted to the Director by 2 September 2002 at the latest.

4.3.3 In order to ensure the independence of the members of the Audit Body the Chairman of the 1992 Fund Assembly suggested that States might wish to consider nominating candidates from outside their own countries and that candidates could be suggested by groups of States.

4.3.4 The Director stated that he would be issuing a circular to States drawing their attention to the fact that nominations of candidates for the Audit Body should be submitted by 2 September 2002.

5 Adoption of the Record of Decisions

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