INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
30th session
Agenda item 6

FUND/EXC.30/5
17 December 1991

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RECORD OF DECISIONS OF THE THIRTIETH SESSION OF THE EXECUTIVE COMMITTEE

(held on 16 and 17 December 1991)

Chairman:	Dr R Renger (Germany)
Vice-Chairman:	Mr E H Benabouba (Algeria)

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document FUND/EXC.30/1.

2 Examination of Credentials

The following members of the Executive Committee were present:

Algeria
France
Germany
Ghana
Greece
India
Indonesia
Italy
Japan
Kuwait
Liberia
Norway
Sri Lanka
Union of Soviet Socialist Republics
United Kingdom

The Executive Committee took note of the information given by the Director that all the above-mentioned members of the Committee had submitted credentials which were in order.

The following Contracting States were represented as observers:

Bahamas	Monaco
Cameroon	Netherlands
Canada	Nigeria
Cyprus	Poland
Denmark	Spain
Finland	Sweden
Gabon	Tunisia

In addition, the following non-Contracting States were represented as observers:

Malta	China
Australia	Jamaica
Brazil	Mexico
Chile	Venezuela

The following inter-governmental and international non-governmental organisations participated as observers:

International Maritime Organization (IMO)
Cristal Ltd
International Chamber of Shipping (ICS)
International Group of P & I Clubs
International Tanker Owners Pollution Federation Ltd (ITOPF)
Oil Companies International Marine Forum (OCIMF)

3 HAVEN Incident

3.1 Claims Relating to Damage to the Marine Environment

3.1.1 It was noted that at its 28th session, the Executive Committee had discussed certain claims relating to damage to the marine environment. In particular, the Committee had addressed a question which had been raised at the first hearing in the Court of first instance in Genoa, viz whether claims relating to such damage which, in the view of the IOPC Fund, were not admissible under the Civil Liability Convention and the Fund Convention, could be pursued against the shipowner outside the Conventions (document FUND/EXC.28/9, paragraphs 3.5.10-3.5.13).

3.1.2 The Director introduced a study of this issue contained in document FUND/EXC.30/2, prepared in accordance with the instructions given by the Executive Committee. In this study he recapitulated the relevant provisions of the Civil Liability Convention and the Fund Convention and described how the question of the admissibility of claims relating to damage to the marine environment had been dealt with by the IOPC Fund in previous cases. In the study he drew the Committee's attention to the fact that the Civil Liability Convention and the Fund Convention had been implemented into Italian legislation by the Act of 27 May 1978 (N°506) and thus formed part of Italian law. It was emphasised that if a conflict arose between the Conventions and any other Italian statute, the Conventions would prevail, since they were "special laws". The study also contained a short presentation of the Italian legislation relating to protection of the marine environment, in particular the Act of 31 December 1982 (N°979) which contained provisions for the protection of the sea (the "1982 Act") and the Act of 8 July 1986 (N°349) which established the Ministry of the Environment (the "1986 Act"). In the study, reference was also made to Italian jurisprudence and doctrine.

3.1.3 The Director expressed the view that certain elements of damage to the marine environment were non-quantifiable. It was pointed out in the study that the IOPC Fund had consistently taken the position that claims relating to non-quantifiable elements of damage to the environment could not be admitted. In its interpretation of the Civil Liability Convention and the Fund Convention, the IOPC Fund

Assembly had excluded the assessment of compensation for damage to the marine environment on the basis of an abstract quantification of damage calculated in accordance with theoretical models (Resolution N°3 adopted by the Assembly in 1980). The Intersessional Working Group set up by the Assembly in 1980 to examine whether and, if so, to what extent claims for environmental damage were admissible under the Conventions, had used similar language, viz that compensation could only be granted if a claimant had suffered quantifiable economic loss. It was mentioned that the conclusions of the Working Group had been endorsed by the Assembly.

3.1.4 Attention was drawn in the study to the fact that the Civil Liability Convention and the Fund Convention were Conventions in the field of civil law adopted for the purpose of providing compensation to victims of pollution damage. For this reason, it was maintained that claims which did not relate to compensation did not fall within the scope of the Conventions, for example, damages awarded under the 1986 Act relating to non-quantifiable elements of damage to the environment which were of a punitive character. Since claims of this kind did not relate to compensation, such claims could be pursued, in the Director's view, outside the Conventions on the basis of national law. In the Director's opinion, it could not have been the intention of the drafters of the Fund Convention that the IOPC Fund should pay damages of a punitive character, calculated on the basis of the seriousness of the fault of the wrong-doer or the profit earned by the wrong-doer. He maintained that if such damages were to fall within the scope of the Conventions, the results would be unacceptable.

3.1.5 The Italian delegation stated that it did not agree with the basis of the Director's analysis of the problem nor with his conclusions. This delegation noted that Italy had ratified the Civil Liability Convention and the Fund Convention and that these Conventions were part of the Italian legal system constituting special laws. However, in the view of this delegation, the Conventions did not contain any provisions excluding or limiting the right of compensation for environmental damage. It was pointed out that pollution damage was defined in the Civil Liability Convention as any "loss or damage .... caused by contamination resulting from the escape or discharge of oil". The Italian delegation agreed with the Director that the Conventions did not exclude the admissibility of claims for damage to the marine environment but it could not agree with the Director's interpretation of the Conventions under which only quantifiable elements of such damage were admissible.

3.1.6 The Italian delegation therefore maintained that it was necessary to resort to national law. In the view of the Italian delegation, the impairment of the environment caused an economic loss and the impaired environment had to be reinstated; if this were not possible, compensation had to be granted. As the State was the custodian of the national interests concerning the preservation of the environment, the State had the legal right to compensation for expenses incurred for the preservation of the environment; if the pollution caused irreversible consequences for the environment, the State had a right to compensation for the damage suffered.

3.1.7 The Italian delegation pointed out that the first Italian legislation regarding compensation for damage to the marine environment was adopted in 1965, and that at present such compensation was governed by the 1982 Act and the 1986 Act mentioned in document FUND/EXC.30/2. Actually, in the view of the Italian delegation, compensation was mainly governed by the 1982 Act which envisages the possibility of compensation for damage to the marine environment both for quantifiable and non-quantifiable elements. Attention was also drawn to Article 1226 of the Civil Code which provided for the possibility to determine the amount of the damage in an equitable manner if it was not possible to achieve a precise quantification.

3.1.8 In the view of the Italian delegation the Conventions did not exclude compensation for environmental damage, nor did they limit the type of damage which could be compensated. For this reason, the Italian delegation maintained that under Italian national law damage to the marine environment would always be compensable even if it was not possible or easy to assess the damage in terms of a market value. The delegation also pointed out that the 1982 Act explicitly mentioned compensation for damage to marine resources.

3.1.9 The Italian delegation stated that, under the 1982 Act, compensation should be quantified without reference to the seriousness of fault of the wrong-doer or the profit obtained by him. Anyway,

even supposing that the 1986 Act were to apply, the Italian delegation did not share the Director's opinion that compensation under the 1986 Act should be considered as a sanction against the wrong-doer. The aspect of compensation was predominant under that Act, although there was also a punitive element; the intention of the legislator was only to identify a few elements that could be used to assess the quantum of the damage.

3.1.10 The Italian delegation stressed that the Italian Government's claim would only be finalised when the results of the study of the environmental consequences of the HAVEN incident were available; the claim as finally presented would not take into account abstract or theoretical methods for the assessment of the quantum but would be based as much as possible on the economic loss actually sustained.

3.1.11 In the view of the Italian delegation, the Vienna Convention on the Law of Treaties could not be invoked against the interpretation stated by the Italian delegation because this interpretation was not contrary to the object and purpose of the Civil Liability Convention.

3.1.12 The full text of the statement made by the Italian delegation was made available to delegations as document FUND/EXC.30/WP.1.

3.1.13 The French delegation stressed the French Government's support for international co-operation for the protection of the environment as well as for a system of adequate compensation for oil pollution damage, especially damage to the environment. In the view of the French delegation, claims for compensation relating to damage to the environment should be treated in the same way as other claims. This delegation pointed out that the right to compensation was based on the Civil Liability Convention and that the interpretation of the relevant provisions on compensation had been adopted by all States Parties to the Fund Convention within the framework of Resolution N°3.

3.1.14 In the view of the French delegation, for the Member States of the IOPC Fund the international system of compensation based on the Civil Liability Convention and the Fund Convention constituted a whole, which should be applied taking into account the necessity of uniformity within the system. The French delegation considered that the present state of law was that compensation for impairment of the environment, other than loss of profit resulting from such impairment, was limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken. The French delegation maintained that Resolution N°3 should not be interpreted as excluding compensation for ecological damage but only excluding compensation for non-quantifiable ecological damage. If the IOPC Fund were to compensate a State, or any other claimant, for damage to the environment assessed on the basis of a theoretical model without any economic loss, the whole system would, in the view of the French delegation, be in jeopardy. This delegation considered that payments of this kind were a real penalty which would not be compatible with a system of strict liability of the shipowner nor with a mutual system of covering such damage within the framework of the Fund Convention. The repression of acts causing pollution damage should, in the view of this delegation, be made in other ways, as had been done in France and many other countries. For these reasons, the French delegation agreed with the analysis made by the Director.

3.1.15 The United Kingdom delegation stated that it had understood the Italian delegation's intervention to mean that, although being Party to the Civil Liability Convention and the Fund Convention, Italy did not consider itself bound by Resolution N°3. The United Kingdom delegation was also concerned that there may be confusion over the respective primacy of the Conventions and Italian national law in this difficult area. In the view of the United Kingdom delegation, any weakening of the primacy of the Conventions in this way could have serious implications in the field of international treaty law. The delegation agreed with the analysis made by the Director in document FUND/EXC.30/2. In the view of this delegation, a distinction had to be made between payments of compensation and payments constituting punishment. The United Kingdom delegation maintained that it could not be the purpose of the international compensation system to pay the fines of offending parties.

3.1.16 The Japanese delegation considered that, in view of the Italian Government's position, it would be necessary for the IOPC Fund to give clear indications to the Court on how the Fund considered

that the Civil Liability Convention should be interpreted in respect of the admissibility of claims relating to environmental damage. This delegation supported the analysis of the problem set out in document FUND/EXC.30/2. It pointed out that the Italian delegation had neither opposed the adoption of Resolution N°3, nor opposed the position taken by the IOPC Fund, based upon this Resolution, in the second ANTONIO GRAMSCI case.

3.1.17 The observer delegation of the International Group of P & I Clubs stated that it was not possible to give a clear yes or no answer to the question raised at the Court hearing. If all claims for damage to the marine environment were to be paid by the shipowner and the IOPC Fund, irrespective of the basis on which the damages were quantified, this would in the view of this delegation be at variance with Resolution N°3 and the position taken by the Fund in previous cases. The observer delegation stated that such an interpretation would have serious consequences for the IOPC Fund and would be detrimental to other claimants whose compensation might have to be reduced. On the other hand, the delegation was of the view that it could not be correct to conclude that claims for damage to the environment fell outside the scope of the Conventions or the definition of "pollution damage" contained therein. The proviso to the definition of "pollution damage" in the 1984 Protocol to the Civil Liability Convention was only understandable if environmental damage fell within the scope of the Convention. In the view of this delegation, the question had to be re-phrased so as to be linked to the issues of compensation payable under the Convention and the quantification of the damage to the marine environment. On that basis, it was clear to this delegation that some methods of assessing compensation were not acceptable, such as an abstract quantification of damage based on theoretical methods. The delegation also agreed with the Director that another unacceptable method would be the assessment of compensation based on "equitable" quantification of damage or by reference to the seriousness of the fault of the wrongdoer. The delegation stated that it accepted that penalties or fines could be imposed on shipowners by individual States based on the seriousness of the fault of the shipowner and the degree of the resulting damage, but in the view of the delegation this issue was independent of the issue of compensation. The observer delegation also pointed out the serious implications for shipowners if claims for compensation for environmental damage were not admissible under the Civil Liability Convention because the method of quantification included the concept of punishment, whilst the same claims could be brought against the shipowner under national law simply because that national law provided for the concept of punishment being included in the method of quantification of the damage.

3.1.18 *The Executive Committee agreed in general with the Director's analysis of the problem.* The Committee instructed the Director to submit pleadings on behalf of the IOPC Fund to the Court in Genoa along the lines set out in paragraphs 8.1 - 8.13 of document FUND/EXC.30/2. The Director was also instructed to examine the intervention made by the Italian delegation and to make such modifications to the IOPC Fund's pleadings as would be appropriate in the light of that intervention. The Committee noted that since the claimants had not yet given any details as to the basis of their claims, the content of the IOPC Fund's pleadings could only be decided when the claimants had presented their arguments.

3.1.19 The Executive Committee decided to re-examine the issue at its next session in the light of the position taken by the claimants in the Court proceedings.

3.1.20 In the context of the discussion concerning the HAVEN incident, the Indonesian delegation referred to the problems that had arisen in the EL HANI incident, which occurred in Indonesia in 1987, in which the Indonesian Government had encountered difficulties in respect of the presentation of claims. In the view of this delegation, Member States and, in particular, developing countries would need guidance from the IOPC Fund as to the presentation of claims, especially claims relating to damage to the marine environment. The Indonesian delegation also emphasised the importance of national laws being in conformity with the international Conventions and of there being a uniform application of the Conventions in all Member States.

3.1.21 The Director agreed that it was important that the IOPC Fund Secretariat provided information to Member States on the presentation of claims. In this context, he referred to the IOPC Fund's Claims Manual which was a guide for the filing of claims against the IOPC Fund.

3.2 **Conversion of (gold) francs**

3.2.1 At its 28th session, the Executive Committee considered the question raised at the first hearing in the Court of first instance in Genoa as to the method of conversion into national currency of the maximum amount payable under Article 4.4 of the Fund Convention, which is expressed in (gold) francs (document FUND/EXC.28/9, paragraphs 3.5.5–3.5.9).

3.2.2 As indicated at that session, the Director had engaged a consultant, Dr T Mensah, former Assistant Secretary-General and Director of Legal Affairs and External Relations Division of the International Maritime Organization, to make a study of the problems involved. This study, contained in document FUND/EXC.30/2/1, was introduced by the Director.

3.2.3 The Executive Committee expressed its appreciation of the extremely thorough study which Dr Mensah had prepared.

3.2.4 The Executive Committee noted that the IOPC Fund had submitted pleadings to the Court on the basis of Dr Mensah's study, in accordance with the Committee's instructions. The Director informed the Committee that the pleadings on this issue presented by other parties were being examined by the IOPC Fund's lawyers for the purpose of presenting counter-pleadings.

3.2.5 The Italian delegation stated that the Italian Government had not yet taken any position to the method of conversion.

3.3 **Other Issues**

The Director informed the Executive Committee of the developments in the court proceedings in Genoa and of the situation in respect of the examination of the claims.

4 Information on Other Incidents

4.1 RIO ORINOCO

The Executive Committee took note of the Settlement Agreement between the IOPC Fund and the Canadian Government in respect of the RIO ORINOCO incident, as contained in the Annex to document FUND/EXC.30/3.

4.2 AGIP ABRUZZO

4.2.1 The Executive Committee took note of the information relating to the AGIP ABRUZZO incident, contained in document FUND/EXC.30/4.

4.2.2 The Executive Committee noted that the Neri claim gave rise to the question of the relationship between "preventive measures" and salvage operations (including other activities not related to pollution prevention). It was noted that this question had been considered within the IOPC Fund in connection with several previous incidents. The Committee reiterated the position taken that only operations which had as their primary purpose to prevent or minimise pollution should be considered as falling within the definitions of "pollution damage" and "preventive measures" laid down in the Civil Liability Convention; if the operations primarily had another purpose, eg that of salving ship and cargo, the operations fell outside that scope even if they had as a result the prevention of pollution.

4.2.3 In the context of the Neri claim, the Executive Committee discussed the assessment of claims relating to operations which had been undertaken both for the purpose of preventing pollution and for another purpose (eg to salvage ship and cargo), but in respect of which it was not possible to establish with any certainty the primary purpose of these operations. The Committee agreed with the Director that the costs of such operations should be apportioned between pollution prevention and other activities, in view of the particular circumstances in which the operations were carried out.

4.2.4 With regard to the claims submitted by Labromare and Neri, the Executive Committee approved the settlements proposed by the Director in respect of the operations falling within the scope of application of the Civil Liability Convention and the Fund Convention in the amounts of Lit4 799 million and Lit2 500 million, respectively.

4.2.5 As for the claims submitted by Castalia and the Municipality of Livorno, referred to in paragraphs 4.17 and 4.25 of document FUND/EXC.30/4, the Executive Committee authorised the Director, pursuant to Internal Regulation 8.4.2, to make final settlements in respect of these claims.

4.2.6 At the proposal of the Chairman, the Executive Committee also authorised the Director to settle the claim submitted by SNAM referred to in paragraph 4.22 of document FUND/EXC.30/4 and to settle the additional claim which would be presented by Labromare in respect of costs incurred for the disposal of oily waste referred to in paragraph 4.24 of that document.

4.3 **Other Incidents**

4.3.1 With regard to the TOLMIROS case, the Swedish delegation informed the Executive Committee that the Swedish Government had withdrawn its action against the shipowner and his P & I insurer and that, consequently, the IOPC Fund would not be called upon to pay any compensation in respect of this incident.

4.3.2 Concerning the AMAZZONE incident, the Director informed the Executive Committee that the French Government's claim had been paid by the shipowner's P & I insurer and that only a few claims for small amounts presented by local authorities in the Department of Calvados were pending.

4.3.3 As for the VOLGONEFT 263 incident, the Executive Committee noted that the Swedish Government had submitted a claim in October 1991 amounting to SKr17 668 153 (£1.7 million) and that this claim was being examined by the IOPC Fund's experts.

4.3.4 The Executive Committee was informed of the developments in respect of the AKARI, PORTFIELD and VISTABELLA incidents.

5 Any Other Business

5.1 It was recalled that at its 28th session the Executive Committee had decided to retain the dates of 12 and 13 March 1992 for an extra session of the Committee, should the need for such a session arise (document FUND/EXC.28/9, paragraph 4.2).

5.2 The Executive Committee decided to leave it to the Director to decide at a later stage, in consultation with the Chairman, whether there was any need for a meeting of the Committee in the spring of 1992, to be held either on 12 and 13 March 1992 or on 28 and 29 May 1992.

5.3 No other matters were raised under this agenda item.

6 Adoption of the Report to the Assembly

The draft report of the Executive Committee to the Assembly, as contained in document FUND/EXC.30/WP.2, was adopted, subject to some amendments.