



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
35th session
Agenda item 6

FUND/EXC.35/10
8 June 1993

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RECORD OF DECISIONS OF THE THIRTY-FIFTH SESSION OF THE EXECUTIVE COMMITTEE

(held from 7 to 8 June 1993)

Chairman:	Dr R Renger (Germany) (paragraphs 1–3.4.19)
Acting Chairman:	Mr A H E Popp (Canada) (paragraphs 3.4.20–6)
Vice-Chairman:	Mr G B Cooper (Liberia)

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document FUND/EXC.35/1.

2 Examination of Credentials

The following members of the Executive Committee were present:

Algeria	Nigeria
Canada	Norway
Germany	Poland
Japan	Russian Federation
Kuwait	Spain
Liberia	Venezuela
Netherlands	

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	Italy
Cyprus	Monaco
Denmark	Portugal
Egypt	Slovenia
Finland	Sweden
France	Syrian Arab Republic
Greece	United Kingdom
Indonesia	

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

Australia	Ecuador
Chile	Mexico
China	Panama
Colombia	United States

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

International Maritime Organization (IMO)
Cristal Ltd
Friends of the Earth International (FOEI)
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 Three Incidents Involving the IOPC Fund

3.1 General Questions Concerning the Admissibility of Claims

3.1.1 The Director introduced document FUND/EXC.35/2 which dealt with certain general questions concerning the admissibility of claims which had arisen in the context of the HAVEN, AEGEAN SEA and BRAER incidents, in particular to what extent so-called "pure economic loss" would fall within the definition of "pollution damage" laid down in the Civil Liability Convention.

3.1.2 The Executive Committee held a general discussion concerning the admissibility of claims, on the basis of document FUND/EXC.35/2.

3.1.3 In considering the approach to be taken in respect of the claims arising out of the three above-mentioned incidents, the Executive Committee noted that the Assembly had expressed the opinion that a uniform interpretation of the definition of "pollution damage" was essential for the functioning of the regime of compensation established by the Civil Liability Convention and the Fund Convention (document FUND/A.11/20, paragraph 5.5). In the view of the Committee it was also very important that decisions taken by the Committee in respect of incidents in various Member States were consistent, recognising, however, that the jurisprudence of national courts as regards the admissibility of claims might differ from one Member State to another and that if out-of-court settlements were not reached in respect of particular claims the matter would have to be decided by national courts. The Committee stated that, when examining the claims arising out of the HAVEN, AEGEAN SEA and BRAER incidents, it would take into account its own decisions in previous cases in respect of the admissibility of claims and the interpretation of the definition of "pollution damage".

3.1.4 In the context of the general discussion, the Executive Committee recalled that the system of compensation established by the Civil Liability Convention and the Fund Convention applied to "loss or damage caused by contamination". It was emphasised by the Committee that compensation could therefore be paid to a claimant only if and to the extent that his loss or damage could be considered as caused by contamination. The Committee stated that in order to qualify for compensation the first requirement was that there must be a link of causation between the damage or loss covered by the claim and the contamination caused by the oil spill in question. The Committee reiterated the position taken by the Assembly that a claimant was entitled to compensation only if he had suffered a quantifiable economic loss (documents FUND/A.4/10, Annex, paragraph 19 and FUND/A.4/16, paragraph 13). It was underlined that each claimant would have to prove the quantum of his loss or damage in order to obtain compensation.

3.1.5 The Italian observer delegation stated that, in its view, the criterion for admissibility should be whether the damage covered by a claim was certain, and that the quantum of the damage should be established by a reasonable assessment or be decided by an equitable judgement.

3.1.6 The Executive Committee addressed one type of claim which gave rise to special difficulties, namely claims relating to so-called "pure economic loss". The Committee took note of the fact that there had been a great reluctance in most jurisdictions to recognise claims for pure economic loss, for fear of the far-reaching consequences that the acceptance of such claims would have. It was recognised that in most legal systems a claim for compensation was accepted only if it related to damage to a defined and recognised legal right (eg a right of property or a right of possession). It was noted that the IOPC Fund Secretariat was not aware of any court cases in States Parties to the Civil Liability Convention in which the definition of "pollution damage" had been interpreted in respect of claims for pure economic loss. The Committee recalled that the IOPC Fund had in previous cases agreed to compensate economic losses suffered by certain persons who depended directly on earnings from sea-related activities, namely fishermen and hoteliers, restaurateurs and shopkeepers at seaside resorts, even if the person concerned had not suffered any damage to property. It was noted that in the three incidents under consideration, some claims for compensation for pure economic loss related to activities which were less directly linked to the pollution than for example the economic loss suffered by fishermen. The question was, in the Committee's view, what parameters should be applied when deciding which claims for pure economic loss should be admitted. The Committee acknowledged that in respect of claims relating to pure economic loss it would in any event be necessary to assess for each individual claim the link between the contamination and the alleged loss. It was emphasised that there must be reasonable proximity between the contamination and the pure economic loss for the claim to be admissible.

3.1.7 The Italian observer delegation expressed the view that the decisive criterion should be whether there was a reasonable link of causation between the incident and the pure economic loss.

3.1.8 As regards claims for costs of preventive measures, the Executive Committee took note of the fact that in previous cases claims for preventive measures had related to physical operations, such as the placing of booms or the spraying of dispersants, whereas in respect of the HAVEN and BRAER incidents claims had been presented which related to measures of an abstract nature taken to prevent or minimise pure economic loss, such as tourism promotion or the marketing of fish products. It was suggested by some delegations that such costs should be admissible if they related to measures taken to prevent or minimise damage which in itself would fall within the definition of "pollution damage". Other delegations expressed hesitation as regards the admissibility of claims of this kind and stated that the drafters of the Civil Liability Convention did not foresee that such activities should fall within the definition of "preventive measures".

3.1.9 The Executive Committee recognised that although the IOPC Fund was established to pay compensation to victims of oil pollution, it was important that the Fund should exercise a certain caution in accepting claims beyond those admissible under the general principles of law in Member States.

3.1.10 It was emphasised by the Executive Committee that each claim, and each item of a claim, would have to be considered on its own merits. Claims which were admissible in principle in accordance with the Committee's decisions should, in the Committee's view, be examined on the basis of the general criteria referred to in paragraphs 3.1.4 and 3.1.6 above. The Committee also underlined that when the quantum of the alleged losses was assessed in respect of a particular claim, it had to be examined whether and to what extent the loss resulted from the oil pollution incident or was due to other factors.

3.1.11 In the light of the important questions in respect of the admissibility of claims which had arisen in connection with the HAVEN, AEGEAN SEA and BRAER incidents, several delegations expressed the view that the IOPC Fund should give consideration to these questions. It was recognised that there was a need for general criteria for the admissibility of claims, and it was suggested that the Assembly should consider this matter.

3.2 HAVEN Incident

3.2.1 The Director introduced documents FUND/EXC.35/3, FUND/EXC.35/3/Add.1 and FUND/EXC.35/3/Add.2 setting out a number of questions of principle relating to certain claims arising out of the HAVEN incident.

3.2.2 The Executive Committee recalled that the Committee had, at its 32nd session, authorised the Director to state in the on-going court proceedings in the Court of first instance in Genoa, when appropriate, the IOPC Fund's position as to the admissibility of individual claims and the amounts which, in the view of the Fund, were acceptable; the Director had been instructed to submit any questions of principle to the Executive Committee for consideration, if time allowed him to do so (document FUND/EXC.32/8, paragraph 3.3.8). The Committee took note of the fact that it had, at its 34th session, considered certain questions of principle, in particular concerning the extent to which "pure economic loss" should be compensated (document FUND/EXC.34/9, paragraphs 3.1.6-3.1.11).

Beach Facilities ("Bagni")

3.2.3 The Executive Committee agreed with the Director that the loss of income suffered by the operators of beach facilities ("bagni") located along the Italian coast between Genoa and the French border as a result of the reduction in tourism should be considered as "damage caused by contamination" to the extent that such a reduction was caused by the HAVEN incident. It was accepted that these operators had suffered an infringement of their recognised legal right, viz to operate the facility on the beach. For this reason, the Committee agreed with the Director that claims for loss of earnings suffered by the operators of beach facilities as a result of a reduction in the number of clients were in principle admissible.

Hotels, Restaurants, Shops

3.2.4 As regards claims for compensation submitted by the owners of hotels, restaurants and shops located along the Italian coast between Genoa and the French border, the Executive Committee recognised that it might be difficult to lay down strict criteria as to which types of claims should be admissible. It was noted that these establishments had not been directly affected by the oil spill. The Committee agreed with the Director that each claim should be considered on its own merits and that the decisive criteria should be whether there was a link of causation between the loss or damage and the contamination resulting from the HAVEN incident. It was noted that tourism in general was influenced by external factors and that there was often a considerable variation from year to year in the number of tourists visiting a given area for reasons which were normally difficult or impossible to establish.

3.2.5 The Executive Committee accepted that, if contamination of the beaches resulted in a reduction in the tourist activity in a given town or village, it would probably affect all establishments of the same kind in the locality. For this reason, the Committee endorsed the Director's position that all hotels, restaurants and shops in the same town or village should be treated equally in principle, independent

of their location. As regards shops, it was agreed that it would not be reasonable to make a distinction dependent on the types of goods sold, except in respect of shops selling goods which were not normally bought by tourists (such as furniture and cars).

3.2.6 It was also discussed whether a distinction should be made between villages and towns along the coast between Genoa and the French border whose beaches were polluted, and towns and villages along that coast whose beaches were not contaminated. The Executive Committee agreed with the Director's view that it would be appropriate to give equal treatment in principle to all claims for loss of income submitted in respect of establishments along this coast, independent of whether the particular town or village where they were located was directly affected by the oil from the HAVEN.

3.2.7 The Executive Committee considered in particular claims presented by three retailers (clothes retailer, lingerie shop, stationery/toy shop) in Savona (Italy). In view of the fact that Savona did not depend on beach tourism, its beaches being mainly used by its own citizens, and that the decisive criterion for admissibility should be whether there was a link of causation between the loss and the contamination resulting from the HAVEN incident, the Committee decided that these three retailers did not have valid claims for compensation.

3.2.8 As for the question of the period for which compensation should be granted, the Executive Committee agreed with the Director that each claim should be considered on its own merits also in this regard.

3.2.9 The Executive Committee emphasised that the link between the contamination resulting from the HAVEN incident and the losses allegedly suffered by individual hotels, restaurants and shops in respect of which compensation was claimed differed greatly from one claimant to another. For this reason, in the Committee's view, it was essential that each claim was examined in order to establish that the requirements for admissibility were fulfilled, in particular that relating to the link of causation, and in order to assess the quantum of the alleged loss which could be considered as having been caused by contamination.

Losses Suffered by Travel Agent

3.2.10 The Executive Committee considered a claim submitted by an Italian travel agent/tourist accommodation bureau which arranged bookings of holiday flats and hotel rooms at the request of foreign travel agents.

3.2.11 Some delegations took the view that the alleged losses covered by this claim were a more indirect result of the contamination than the losses suffered by owners of hotels, restaurants and shops dealt with in paragraphs 3.2.4-3.2.9 above and that this claim should therefore be rejected. It was also questioned whether the losses allegedly resulting from cancellations had actually been suffered or whether the claim was based on expectations. The Italian observer delegation argued that this claim should be accepted in principle, since there was a link of causation between the incident and the loss.

3.2.12 After a discussion on the various items of the claim, the Committee decided to postpone its final consideration of this claim to its 36th session.

Mooring Fees and Insurance Costs Incurred by Yacht Owner

3.2.13 The Executive Committee considered a claim by a yacht owner, who during the summer of 1991 had his boat moored in Arenzano (Italy), relating to reimbursement of part of the mooring fees and insurance premiums for 1991. It was recalled that, during the discussions of this claim at the Committee's 34th session, some delegations had taken the view that losses of this kind did not fall within the definition of "pollution damage" laid down in the Civil Liability Convention, as the mooring fees and insurance costs would have been incurred whether or not the HAVEN incident had taken place, and that the loss suffered by the boat owner was in fact "loss of enjoyment of use of his boat". It was also noted that at that session the Italian delegation had stated that such losses should be admissible and that the Italian courts would accept claims relating to loss of enjoyment of use of property when directly connected to the event (document FUND/EXC.35/3, paragraph 3.1.10).

3.2.14 At the present session, the Executive Committee took note of the fact that the Director, having taken further advice on the position of Italian law on this point, had come to the conclusion that the mooring fees and insurance premium covered by this claim were not recoverable under Italian law in relation to liability in torts, ie third party liability of the kind governed by the Civil Liability Convention and the Fund Convention. It was noted that these costs would have been incurred by the claimant whether or not the HAVEN incident had occurred and that there was therefore no link of causation between the contamination and these costs. In the light of these considerations, the Committee agreed with the Director that the claim for reimbursement of these costs should be rejected.

3.2.15 The Italian observer delegation stated that in its view this claim had been incorrectly presented, since it should have related to the loss of enjoyment of the use of the boat during a certain period of time. That delegation maintained that such claims were admissible under Italian law.

Losses Suffered by Public Bodies as a Result of Reduced Tourist Activity

3.2.16 The Executive Committee considered claims submitted by the City of Cannes and the Municipality of Lavandou (France) relating to losses allegedly resulting from a reduction in tourism during 1991.

3.2.17 With regard to the part of the claim submitted by the City of Cannes for loss of tax revenue from tourism, the Executive Committee took the view that the City had not shown that the alleged loss resulted from the HAVEN incident. For this reason, the Committee considered that this part of the claim should be rejected.

3.2.18 As regards the part of the claim presented by the City of Cannes relating to extra costs for publicity to counteract the negative effects on the reputation of the City as a tourist resort, the Committee shared the Director's view that it had not been shown that the HAVEN incident had caused any damage to the reputation of the City as a tourist resort. The Committee decided that, for this reason, this part of the claim should also be rejected.

3.2.19 Concerning the claim presented by the Commune of Lavandou relating to loss of tourist tax, the Committee agreed with the Director that the Commune had not shown that the alleged loss was caused by the HAVEN incident and that this claim should therefore also be rejected.

3.2.20 The French observer delegation expressed the view that the rejection of these claims could only be justified by the fact that the losses in respect of which the City of Cannes and the Commune of Lavandou claimed compensation could not be accepted, on the basis of the supporting documents, as losses caused by contamination, ie that the losses resulted from a reduction in tourism significantly greater than the normal fluctuation from one year to another. That delegation noted that, if this was not the reason for rejection, the rejection was at variance with the position taken by the IOPC Fund in previous cases. It was maintained by that delegation that communes which depended only on beach tourism and which could not offset the losses of taxes on tourism by other income would suffer an economic loss which should be compensated if there was a reasonable proximity between the contamination and the loss.

Cost of Promotion of Tourism

3.2.21 The Executive Committee took note of the information contained in documents FUND/EXC.35/3/Add.1 and FUND/EXC.35/3/Add.2 relating to the claim submitted by the Region of Liguria concerning the cost of tourism promotion in relation to the HAVEN incident, including an item relating to damage to "touristic image" which was not quantified, and the claims relating to costs for the same purpose presented by the Municipality of Diano Marina and the Province of Savona. In this context, the Committee considered the question of principle raised by these claims, namely whether costs for activities carried out for the purpose of counteracting the negative consequences for tourism of media reports on oil spills would fall within the definitions of "pollution damage" or "preventive measures".

3.2.22 Some delegations expressed their opposition to the acceptance of these claims, since in their view activities of the kind covered by the claims could not be considered as falling within the definition of "preventive measures". Other delegations stated that they were very hesitant to accept such claims. Some delegations took the view that in any event the item of the claim presented by the Region of Liguria which related to damage to "touristic image" should be rejected, since this item did not relate to a quantifiable economic loss.

3.2.23 The Italian observer delegation maintained that costs for activities of this kind fell within the scope of the Civil Liability Convention since they should be considered as costs of "preventive measures", and that these items should therefore be admissible in principle. In the view of that delegation also the item relating to damage to "touristic image" was admissible. That delegation reiterated that the Italian Government did not agree with the interpretation given by the Executive Committee to Resolution N°3 relating to the definition of "pollution damage" adopted by the IOPC Fund Assembly in 1980.

3.2.24 Following this discussion, the Committee decided to postpone further consideration of these claims to its 36th session.

Conversion of (Gold) Francs into National Currency

3.2.25 The Executive Committee recalled that the method of conversion of the maximum amount payable by the IOPC Fund in respect of one single incident, 900 million (gold) francs, into Italian lire was subject to litigation in the Court of first instance in Genoa. The Committee noted that this matter would be dealt with by the Court at a hearing to be held on 18 June 1993, and that the judgement on this issue was expected by the end of July 1993.

Italian Government's Claims Relating to Damage to the Marine Environment

3.2.26 With regard to the Italian Government's claim relating to environmental damage, the Executive Committee noted that there had been no developments since the Committee's 34th session.

Discussions with Italian Government

3.2.27 The Executive Committee recalled that it had, at its 34th session, while recognising the great complexity of the issues involved, instructed the Director to enter into discussions with the Italian and French Governments for the purpose of exploring the possibilities of out-of-court settlements in respect of the claims arising out of the HAVEN incident (document FUND/EXC.34/9, paragraph 3.1.4). The Committee took note of the fact that the Director had entered into discussions with the Italian Government, that these discussions had focused on establishing the main problems involved, and that the intention of the Italian Government and the IOPC Fund was that the discussions would continue in the near future.

3.3 AEGEAN SEA Incident

3.3.1 The Director introduced documents FUND/EXC.34/4 and FUND/EXC.34/4/Add.1 with regard to the AEGEAN SEA incident. The Committee was shown a video presentation of the incident.

3.3.2 The Executive Committee noted that, as at 4 June 1993, 97 claims arising out of this incident had been approved by the Director, the shipowner and the P & I insurer for a total amount of Pts 36 071 110 (£187 870).

Clean-up Operations and Preventive Measures

3.3.3 Concerning claims in respect of clean-up operations and preventive measures incurred by the Spanish Government, the Government of the Region of Galicia, the City of La Coruña and private contractors, the Executive Committee authorised the Director to make final settlements of all claims of this kind.

Damage to Property

3.3.4 The Executive Committee authorised the Director to make final settlements of all claims in respect of costs incurred for cleaning houses which were contaminated as a result of the AEGEAN SEA incident and for cleaning contaminated boats, as well as to make final settlements of all claims relating to other damage to property.

Boat Fishermen and Shellfish Gatherers

3.3.5 With regard to claims for loss of income suffered by fishermen and shellfish gatherers referred to in paragraph 3.4 of document FUND/EXC.35/4, the Executive Committee noted that the IOPC Fund had in other cases (such as the BRAER incident) accepted claims for compensation for pure economic loss suffered by fishermen. For this reason, the Committee agreed with the Director that claims for compensation submitted by fishermen and shellfish gatherers relating to loss of income as a result of contamination caused by the AEGEAN SEA incident were in principle admissible. The Committee authorised the Director to make final settlements of all claims of this kind, provided however that this authorisation did not extend to losses which might be suffered in the future.

On-Land Fish Farms and Purification Plants

3.3.6 The Executive Committee considered the admissibility of claims relating to losses suffered by the operators of on-land fish farms cultivating salmon and turbot and by the operators of purification plants used for shellfish which were supplied with sea water pumped through sub-surface water intakes. It was noted that the contamination of the water had led to an interruption of the activities of these farms and plants. The Committee took the view that these losses should be considered as "damage caused by contamination" and that claims in respect of economic loss suffered by these operators were therefore in principle admissible. The Executive Committee authorised the Director to make final settlements of all claims of this kind.

Near-Shore Aquaculture

3.3.7 In the light of the position taken by the Executive Committee in the BRAER case in respect of claims for compensation presented with regard to salmon farms located within the Shetland exclusion zone (document FUND/EXC.34/9, paragraph 3.3.17), the Committee agreed with the Director that claims for economic loss suffered by persons carrying out aquaculture in the area affected by the AEGEAN SEA incident cultivating mussels, salmon, oysters and scallops were in principle admissible.

3.3.8 The Executive Committee was informed that the experts engaged by the IOPC Fund, the shipowner and the UK Club had held discussions with the competent authorities of the Region of Galicia concerning the situation in respect of the aquaculture products in the affected area. It was noted that a Resolution dated 12 April 1993, issued by the Fisheries Council of the Region of Galicia, provided that all cultivated produce within a specified area should be destroyed. The Committee also took note of the fact that the above-mentioned experts had advised the IOPC Fund that they were not in agreement with the Council in this regard. The Director stated that on the strength of the test results available on 16 April 1993, which showed that the mussels were still tainted, the experts acknowledged then the justification for a sufficient quantity of the largest commercially harvestable size mussels being destroyed to make space for the first of the 1993 mussel seed intake due by May/June 1993, but that they considered it premature to destroy smaller mussels and other species covered by the above-mentioned Resolution (namely salmon, oysters and scallops), in view of the possibility of taint disappearing by a process of natural purification. It was noted that no destruction of the largest mussels referred to above had taken place so far. The Director mentioned that on 4 June 1993 the IOPC Fund had been informed, however, that the total destruction of all cultivated produce would be carried out in the very near future, pursuant to the above-mentioned Resolution, and that the Fund's experts still did not consider such destruction justified. It was stated by the Director that in his discussions with the Galician authorities he had made it clear that the IOPC Fund would pay compensation for destroyed produce only if and to the extent that the decision to carry out such destruction was justified on the basis of scientific and other evidence available.

3.3.9 The Spanish delegation stated that the decision to destroy the produce referred to in paragraph 3.3.8 was based not only on the fact that both the large and small mussels were contaminated but also on the facts that mussels were falling off the ropes on which they were cultivated and that it would in any event be difficult to market the produce.

3.3.10 In the light of the situation described in paragraph 3.3.8 above, the Executive Committee considered the general question as to the position to be taken by the IOPC Fund in respect of claims for compensation based on the destruction of fish or other marine products in accordance with orders issued by public authorities or in respect of claims relating to economic loss suffered as a result of Government decisions, such as the imposing of fishing bans or exclusion zones.

3.3.11 The Executive Committee took the view that in such cases the IOPC Fund would be liable to pay compensation only if and to the extent that the destruction of the produce was reasonable on the basis of scientific and other evidence available, taking into account, inter alia, whether or not the produce in question was contaminated, whether it was likely that the contamination would disappear before the normal harvest time, whether the retention of the produce in the water would prevent further production and whether it was likely that the produce would be marketable at the time of normal harvesting.

3.3.12 As regards the AEGEAN SEA incident, the Executive Committee authorised the Director to make final settlements of claims of the kind referred to in paragraph 3.3.7 if and to the extent that he was convinced that the destruction of the produce was reasonable on the basis of the criteria laid down in paragraph 3.3.11 above.

3.3.13 The Executive Committee invited the competent authorities in the Region of Galicia and the persons who intended to submit claims of the kind dealt with in paragraph 3.3.7 to give the experts engaged by the shipowner, the P & I insurer and the IOPC Fund access to the aquaculture sites and to enable these experts to take any samples of the stock which they might find necessary, in order to facilitate the assessment of the claims for compensation.

3.3.14 The Director was instructed to endeavour to keep alive a representative portion of the mussels and other species to be destroyed for the purpose of monitoring the evolution of tainting in order to enable the IOPC Fund to assess the extent of the contamination of the produce in the future.

Shops, Café, Bar

3.3.15 The Executive Committee considered claims submitted by:

- (a) the owner of a fish shop in La Coruña relating to loss of profit resulting from an alleged reduction in the sale of fish and shellfish for the period December 1992 – February 1993;
- (b) the operator of a shop in La Coruña selling windsurfing equipment and fishing gear for loss of profit allegedly suffered as a result of the AEGEAN SEA incident during the period December 1992 – February 1993;
- (c) the operator of a beach shop, café and bar at a beach lightly polluted by the oil from the AEGEAN SEA for loss of profit due to a reduction in sales during the period December 1992 – March 1993.

3.3.16 In view of the Executive Committee's earlier decision at the present session that claims relating to pure economic loss suffered by owners of certain shops and restaurants as a result of the HAVEN incident should be considered as admissible in principle, the Committee endorsed the Director's proposal that the claims referred to in paragraph 3.3.15 above for losses allegedly suffered as a result of the AEGEAN SEA incident should in principle qualify for compensation to the extent that it was established that the losses were caused by the incident. The Committee authorised the Director to make final settlements of these claims.

Self-Employed Fish Porters and Net Makers

3.3.17 The following claims were examined by the Executive Committee:

- (a) claims by self-employed fish porters who normally carry boxes of fish ashore in a port in the area affected by the AEGEAN SEA incident for loss of income due to the fact that the quantity of fish landed in the port was reduced as a result of the incident;
- (b) claims for loss of income by self-employed net makers who carry out net repairs for fishermen who were prevented from fishing as a result of the fishing ban.

3.3.18 The Executive Committee agreed with the Director that the losses allegedly suffered by the two groups of self-employed claimants referred to in paragraph 3.3.17 above should be considered as damage caused by contamination, since the activities of the fish porters and the repairs carried out by the net makers were an integral part of the fishing activities in the polluted area. For this reason, the Committee decided that these claims should be accepted in principle and authorised the Director to make final settlements of these claims.

Car Repair Firm

3.3.19 With regard to a claim for compensation in respect of losses allegedly suffered by the operator of a car repair firm located in the area closed off by the authorities in the period immediately following the incident, the Executive Committee questioned whether the alleged losses could be considered as damage caused by preventive measures, since the main purpose of the closure of the area was not established, ie whether for preventing pollution or facilitating clean-up operations or for other reasons. The Director was instructed to examine this claim further and submit it to the Committee for renewed consideration at its 36th session.

Losses Suffered by Employees Made Redundant

3.3.20 The Executive Committee considered a number of claims presented by persons who had been made redundant, some of them employed at purification plants and who were laid off because the fishing ban brought their respective employer's operations to a virtual halt, others employed at offshore mussel farms which were closed as a result of the incident, and one person working as a filleter of fish who was laid off allegedly due to a reduction in work at his employer's factory as a result of the incident.

3.3.21 In relation to these claims, the Executive Committee considered the question of principle as to whether losses suffered by persons employed in sea-related activities as a result of their being made redundant in connection with an oil spill fell within the definition of "pollution damage" laid down in the Civil Liability Convention. In this context some delegations stated that in their view losses of this kind would be governed by the contractual relations between the employer and the employee.

3.3.22 The Spanish delegation took the view that losses suffered by employees having been made redundant should be accepted, since such losses were a direct result of the pollution. The Italian observer delegation stated that, in its view, claims for loss of income suffered by employees should be admissible, provided that there was a link of causation between the incident and the loss.

3.3.23 The Executive Committee considered that the losses suffered by the employees were a more indirect result of the contamination than losses suffered by companies or self-employed persons, since the losses of the employees were the result of their employers being affected by the consequences of the spill and therefore having to reduce their workforce. Reference was also made to the fact that, although the Executive Committee at its 34th session accepted claims for losses suffered by fish processing plants, the employees referred to in paragraph 3.3.20 above were one step further away from the contamination. For these reasons, the Committee took the view that the losses suffered by these employees could not be considered as damage caused by contamination and therefore did not fall within the definition of "pollution damage". The Committee decided therefore that the claims for losses suffered by these employees should be rejected.

Ship Agencies, Passenger Ferry Operator, Demurrage for Vessel Detained in La Coruña

3.3.24 The Executive Committee decided not to consider at the present session certain claims referred to in the documents presented by the Director, namely:

- (a) claims by ship agencies for losses resulting from vessels which had been booked for entry into the port of La Coruña being diverted;
- (b) a claim by an operator of a passenger ferry relating to losses suffered whilst the ferry services had to be suspended as a result of the oil pollution caused by the AEGEAN SEA incident, and to losses resulting from a reduction in the number of passengers during the period thereafter; and
- (c) a claim for demurrage suffered by the time charterers of a vessel as a result of the vessel being detained in La Coruña since the port had been closed by the authorities.

Other Claims of the Same Types as Those Dealt with by the Committee

3.3.25 The Executive Committee decided to authorise the Director to make final settlements of claims of the same type as those dealt with in paragraphs 3.3.15 – 3.3.18 above, on the basis of the decisions of principle taken by the Committee.

3.4 BRAER Incident

3.4.1 The Executive Committee took note of the information contained in documents FUND/EXC.35/5, FUND/EXC.35/5/Add.1 and FUND/EXC.35/5/Add.2 regarding the BRAER incident, the latter document showing that as at 28 May 1993 244 claims had been approved by the Director, the shipowner and the P & I insurer for a total amount of £9 722 500.

3.4.2 The United Kingdom delegation introduced document FUND/EXC.35/6 dealing with various issues of principle relating to certain claims submitted as a result of the BRAER incident.

Salmon Farms

3.4.3 The Executive Committee noted that the 1991 intake of salmon within the exclusion zone imposed by the United Kingdom Government had been slaughtered, that settlements had been reached in respect of compensation with all the salmon farms concerned and that the compensation had been paid, pursuant to the authority given by the Committee to the Director (document FUND/EXC.34/9, paragraph 3.3.17).

3.4.4 The Executive Committee recalled that it had, at its 34th session, been informed that the Director intended to submit for consideration at a later session claims for compensation in respect of damage caused to the 1992 and 1993 salmon intake, if any, as well as in respect of claims relating to the long term effects of the BRAER incident for the salmon farms, if any. It was noted that it might be necessary to take a decision in respect of the 1992 intake within the next few months. For this reason, the Committee authorised the Director to take the necessary decisions in this regard, including entering into agreements with the salmon farmers on the method of calculating the compensation in respect of that intake, if appropriate (document FUND/EXC.34/9, paragraph 3.3.18).

3.4.5 The Director informed the Committee that discussions concerning the 1992 salmon intake had been held between the United Kingdom Government, the IOPC Fund, the P & I insurer and the salmon farmers concerned and that the Director had so far not supported the destruction of that intake, since he had not been convinced of the necessity to take such action. It was noted that the United Kingdom authorities had recently carried out a test programme in respect of the 1992 salmon intake within the exclusion zone and that these results were not yet available. The United Kingdom observer delegation informed the Committee that the preliminary results of these tests were not encouraging.

3.4.6 As for the general question of the right to compensation if salmon or other seafood products were destroyed, the Committee had made a decision of principle in the context of the decision in respect of the AEGEAN SEA incident as set out in paragraph 3.3.11 above, namely that the IOPC Fund would be liable to pay compensation only if and to the extent that the destruction of the produce in question was reasonable on the basis of scientific and other evidence available, taking into account, inter alia, whether or not the produce was contaminated, whether it was likely that the contamination would disappear before the normal harvest time, whether the retention of the produce in the water would prevent further production and whether it was likely that the produce would be marketable at the time of normal harvesting.

3.4.7 Following the discussion on this issue, the United Kingdom observer delegation asked the Director whether, in the light of the situation in respect of the salmon farms located within the exclusion zone, he was prepared to state that if the 1992 intake cultivated within the zone were slaughtered, the IOPC Fund would compensate the salmon farms for the value of the destroyed fish. The Director replied that he was unable to give such an undertaking, at least at the present stage, in view of the decision of principle taken by the Committee set out in paragraph 3.3.11 above. He stated that he would take a position on this issue when the results of the test programme referred to in paragraph 3.4.5 above were available, on the basis of the criteria thus laid down by the Committee.

3.4.8 The United Kingdom observer delegation emphasised that if scientific evidence were to form the basis of the decisions on compensation in the AEGEAN SEA and BRAER incidents, it was essential that the scientific basis was at the same level in respect of both incidents.

Fish Processors' Claims

3.4.9 The Committee took note of the situation in respect of the claims submitted by fish processors, as set out in paragraph 3.5 of document FUND/EXC.35/5.

Activities Outside the Exclusion Zone

3.4.10 The Executive Committee considered claims submitted by salmon farms located outside the exclusion zone imposed by the United Kingdom Government for alleged loss as a result of a reduction in the sales value of their fish. It also discussed claims submitted by fish processors in respect of losses allegedly suffered as a result of a reduction in sales due to the reduced demand for fish from Shetland caused by the BRAER incident (documents FUND/EXC.35/5/Add.1, paragraph 3 and FUND/EXC.35/5/Add.2, paragraph 5). The Committee took the view that these losses were a more indirect result of contamination than the losses suffered by salmon farms located within the exclusion zone and by fish processors who were deprived of supply of fish from the zone, since the alleged losses covered by the claims under consideration resulted from the perception of third parties as to the consequences of the BRAER incident on the quality of salmon farmed and fish caught outside the exclusion zone.

3.4.11 The Japanese delegation maintained that reduction in price suffered by salmon farms located or fish caught outside the exclusion zone did not fall within the definition of "pollution damage", since losses of this kind were caused not by contamination but by the media.

3.4.12 After having considered all the aspects of these claims, the Executive Committee took the view that the decisive criteria should not be whether the alleged losses resulted from a suspension of the activities within the exclusion zone or a reduction of activities outside that zone. It was stated that there was a similarity between the losses suffered by salmon farms outside the exclusion zone in the BRAER case and losses suffered by hotels, restaurants and shops which were situated in localities which were not directly affected by the pollution from the HAVEN incident. It was noted that the oil from the BRAER had in fact also affected certain areas outside the exclusion zone. In the Committee's view, the criterion for the admissibility of a claim should be whether the loss could be considered as "damage caused by contamination". The Committee took the view that it would therefore be necessary to assess in respect of each claim whether the oil escaping from the BRAER actually caused an economic loss to the claimant. It was agreed that it would not necessarily be required that the

contamination had affected the fish of the individual claimant. The Committee also agreed that the claimant would have to show that the contamination had affected the area where he carried out his activities and that as a result of this contamination he could not sell his produce or could sell it only at a lower price than if the contamination had not taken place. It was also noted that the further away from the exclusion zone the activities in question were carried out, the more difficult it would be for the claimant to prove the link of causation between the oil spill and the alleged loss.

3.4.13 The Executive Committee authorised the Director to make final settlements of the claims falling within this category which fulfilled the requirements set out in paragraph 3.4.12 above.

Joint Marketing Claim

3.4.14 The Executive Committee considered the joint claim submitted by the Shetland Salmon Farmers' Association, the Shetland Fish Processors' Association and the Shetland Fish Producers' Organisation for costs relating to activities to be undertaken in order to counteract the negative effect of the BRAER incident on the reputation of Shetland fish products (cf document FUND/EXC.35/5, paragraph 3.8). It took note of a document submitted by the United Kingdom observer delegation (document FUND/EXC.35/6) on this issue. The Committee also noted the information given by the Director on a pilot project carried out in Japan by the organisations for the purpose of reestablishing the image of quality of Shetland seafood products in that country and eliminating any misconceptions concerning the extent of the damage caused to fish stocks as a result of the BRAER incident.

3.4.15 The Committee agreed with the Director's view that costs for activities of the kind referred to in paragraph 3.4.14 could not be considered as falling within the definition of "pollution damage", unless they were to be considered as costs of "preventive measures". In the Committee's view it was likely that the drafters of the Civil Liability Convention did not foresee that activities of the kind envisaged by these three organisations should fall within the definition of "preventive measures".

3.4.16 The Japanese delegation stated that the joint marketing claim submitted by the above-mentioned organisations should be rejected, since losses which allegedly would be prevented or minimised by the activities mentioned in the claim did not fall within the definition of "pollution damage". In that delegation's view, the link of causation between the escape of oil and these losses was vague and losses of this kind would not be accepted by Japanese courts. The Japanese delegation maintained that for this reason measures to prevent or minimise loss of this kind should not be considered as "preventive measures" provided for in the Convention, because the loss itself was not "pollution damage".

3.4.17 The Italian observer delegation maintained that it was necessary to take into account any direct or indirect effects of contamination on the economy of a region when considering claims for compensation. It would therefore, in the view of that delegation, be unreasonable not to accept claims relating to costs incurred to mitigate economic damage suffered by the local economy.

3.4.18 Several delegations expressed their concern as to the consequences of accepting claims of this kind. Other delegations maintained, however, that since the IOPC Fund accepted that pure economic loss under certain conditions fell within the definition of "pollution damage", it should also accept costs of measures to prevent or minimise pure economic loss. These delegations emphasised that "preventive measures" were defined as "any reasonable measures taken by any person to prevent or minimise pollution damage" and that this definition did not distinguish between various types of pollution damage. It was stated that in order to qualify for compensation, the measures must have the purpose of preventing or minimising a quantifiable economic loss.

3.4.19 After discussing the problem, the Executive Committee agreed with the latter approach referred to in paragraph 3.4.18 and decided that measures to prevent or minimise pure economic loss should be considered as preventive measures, provided that they fulfilled the following requirements:

- (a) the costs of the proposed measures were reasonable;

- (b) the costs of the measures were not disproportionate to the further damage or loss which they were intended to mitigate;
- (c) the measures were appropriate and offered a reasonable prospect of being successful; and
- (d) in the case of a marketing campaign, the measures related to actual targeted markets.

3.4.20 The Executive Committee also discussed whether the IOPC Fund should only accept claims of this type once the activities had been carried out and the results could be assessed, or whether the Fund should accept to pay for a proposed programme of such activities. It was decided that the IOPC Fund should, in principle, only consider such claims once the activities had been carried out. The Committee noted, however, that the claimant in many cases did not have sufficient economic resources to carry out such activities unless the IOPC Fund made funds available. For this reason, the Committee authorised the Director to make advance payments up to a maximum amount of £1.5 million in respect of activities to be undertaken by the Associations, provided that he was satisfied that the planned activities fulfilled the requirements set out in paragraph 3.4.19 above.

3.4.21 In view of the position taken by the Committee in respect of the claim under consideration, the Director stated that he intended to review, with the assistance of outside experts, the project originally submitted by the Associations in the light of the results of the pilot project carried out in Japan and taking into account the time which had passed since the original project was presented by the Associations.

Claims by the Shetland Salmon Farmers' Association for Damage Limitation Measures

3.4.22 With regard to the claims submitted by the Shetland Salmon Farmers' Association in respect of measures taken during the period January – March 1993, ie the period immediately following the BRAER incident, to limit the damage caused by the incident to the reputation of Shetland salmon (document FUND/EXC.35/5, paragraph 3.9), the Executive Committee agreed that the activities covered by the claims should be considered as falling within the definition of "preventive measures" to the extent that the activities fulfilled the criteria set out in paragraph 3.4.19 above. For this reason, the Committee authorised the Director to make final settlements of these claims.

Small Businesses

3.4.23 The Executive Committee decided not to consider at the present session certain claims submitted by operators of small businesses referred to in the documents presented by the Director, namely:

- (a) a company repairing equipment used in the fishing industry, such as trawls, nets, gear and lobster pots, relating to loss of income due to the suspension of fishing activities within the exclusion zone;
- (b) a diver who carried out underwater maintenance work on nets and cages of salmon farms, including farms located within the exclusion zone, for loss of income during the period that the cages were not cleared of fish and therefore not available for maintenance work;
- (c) a person who collected and disposed of offal from one of the fish processing plants on Shetland which processes fish from only two farms within the exclusion zone and which had therefore not operated since the exclusion zone was imposed; the claim related to loss allegedly suffered by the claimant due to not having been able to collect and sell offal from this processing plant, since the 1991 salmon intake was slaughtered and disposed of elsewhere;
- (d) the owner of a motel at Yell (an island off the north coast of Shetland) relating to losses as a result of a reduction in regular clients' bookings and cancellations from weekend and holiday visitors.

Employees Put on Part-time Work or Made Redundant

3.4.24 The Executive Committee considered claims relating to loss of income submitted by employees on Shetland who had suffered reduction in working hours or who had been made redundant from fish processing plants which receive most of their supply from salmon farms located within the exclusion zone. As regards these claims, the Executive Committee referred to its decision in respect of similar claims arising out of the AEGEAN SEA incident (paragraph 3.3.23 above) that losses suffered by employees as a result of having been made redundant could not be considered as "damage caused by contamination" and therefore did not fall within the definition of "pollution damage", and that such claims should therefore be rejected.

South Mainland Action Group

3.4.25 As regards a request made by the South Mainland Action Group for humanitarian payments, the Executive Committee agreed with the Director that the IOPC Fund could not make humanitarian payments since under the Civil Liability Convention and the Fund Convention compensation could be made only to claimants who had demonstrated a quantifiable economic loss. The Committee stated that it was not possible for the IOPC Fund to "widen its mandate", as requested by the Group. The Committee endorsed the Director's view that claims relating to exposure to health risks, anxiety and loss of environmental amenities would not fall within the definition of "pollution damage" and could therefore not be accepted.

3.4.26 The Italian observer delegation stated that the humanitarian payments requested by the South Mainland Action Group might not fall within the definition of "pollution damage" as interpreted by the IOPC Fund and that the request might therefore be rejected. In the view of the Italian delegation, the real issue was how to respond to the growing expectations in environmental matters. That delegation expressed the view that the aim should be to reinstate the contaminated environment and to compensate those who had suffered damage.

3.4.27 The Executive Committee supported the Director's view that, as regards the reference by the South Mainland Action Group to the possibility of pursuing claims through courts in the United States, these courts would not be competent to entertain legal actions against the IOPC Fund.

Cash Flow Problems

3.4.28 As for cash flow problems encountered by some businesses, the Executive Committee agreed with the Director that the fact that banks were unwilling to give loans or extend overdrafts to businesses affected by the BRAER incident did not in itself constitute grounds for compensation under the Civil Liability Convention and the Fund Convention, since cash flow problems could not be considered as falling within the notion of "pollution damage". The Committee took the view that the IOPC Fund could not provide the necessary funds to solve cash flow problems.

3.4.29 The Executive Committee noted, however, that extra costs for financing overdrafts or other loans necessitated by the BRAER incident would in principle form the basis of valid claims for compensation.

Assessment of Quantum of Economic Loss

3.4.30 The Executive Committee noted that, in respect of economic loss suffered by hoteliers, restaurateurs, shopkeepers and fishermen, the IOPC Fund had in previous cases based its assessment of the quantum of the losses on the actual economic results of the individual claimant for comparable periods in the years prior to the relevant incident, normally the two preceding years. The Committee agreed with the Director that the IOPC Fund should maintain its policy of using as a basis for the assessment of compensation the actual results of the individual claimant for appropriate periods during the years preceding the incident and not accept assessments based on budgeted figures. It was agreed, however, that the IOPC Fund should be prepared to take into account the particular circumstances of the individual case and consider any evidence presented by the claimant in respect of the quantum of his loss.

Expenses in Connection with Lord Donaldson's Inquiry

3.4.31 The Executive Committee considered claims for compensation for costs relating to the submission of evidence to the enquiry referred to in paragraph 5.2 of document FUND/EXC.35/5 (Lord Donaldson's Inquiry). The Committee noted that, although the inquiry was set up as result of the BRAER incident, its mandate was to investigate whether any further measures were appropriate and feasible to protect the United Kingdom coastline from pollution from merchant shipping. The Executive Committee took the view that costs of this kind could not be considered as damage caused by contamination and that these claims should therefore be rejected.

Salmon Group: Loss of Sales Commission

3.4.32 The Executive Committee examined a claim presented by Shetland Salmon Group Ltd, a sales and marketing confederation of 20 salmon farms on Shetland (two of them located within the exclusion zone). It was noted that the Group had an exclusive sales agreement with a company in Aberdeen, that the members of the Group were obliged to sell their entire production through the Group to the sales company, and that the Group maintained that certain charges and commissions were still payable to the Group and the sales company in the event that the members sold their fish through other channels. It was also noted that the claim related to losses allegedly suffered as a result of the Group being unable to sell, and therefore to earn commission in respect of the 1991 intake of salmon from the two above-mentioned farms within the exclusion zone, since this salmon intake was destroyed.

3.4.33 The Executive Committee took note of the fact that the price agreed with the salmon farms located within the exclusion zone for the purpose of assessing compensation for the slaughter of the 1991 salmon intake had been determined on the basis of the market price of salmon, and that the price thus covered any fees, charges or commissions which the salmon farms would have had to pay in the normal course of their business, including charges and commissions payable to the Shetland Salmon Group or the above-mentioned sales company. In the view of the Executive Committee the losses allegedly suffered by the Group or by the sales company could not be considered as damage by contamination. The Committee decided that the claim should therefore be rejected.

Other Claims of the Same Types as Those Dealt with by the Committee

3.4.34 The Executive Committee decided to authorise the Director to make final settlements of claims of the same type as those dealt with in paragraphs 3.3.15-3.3.18 above, on the basis of the decisions of principle taken by the Committee.

4 Information on Other Incidents

4.1 Oil Spill in Portugal and the Applicability of the Fund Convention to Spills from Unidentified Sources

4.1.1 The Executive Committee took note of the information contained in document FUND/EXC.35/7 concerning an oil spill which occurred in Portugal in December 1992. It was noted that the Portuguese Government which had claimed compensation from the IOPC Fund for the costs of clean-up operations had maintained that the oil originated from a ship and that this ship was a laden tanker, although the Government had not been able to identify the vessel.

4.1.2 The Executive Committee noted that the claim submitted by the Portuguese Government gave rise to an important question of principle, viz to what extent the IOPC Fund was liable to pay compensation in respect of an oil spill, the source of which had not been identified, and took note of a study by the Director of the background to the relevant provisions of the Fund Convention, as set out in documents FUND/EXC.35/7 and FUND/EXC.35/7/Add.1.

4.1.3 The Executive Committee decided not to consider the Portuguese Government's claim at its present session.

4.2 Other Incidents

The Director informed the Executive Committee of two recent incidents involving the IOPC Fund, namely the SAMBO N°11 incident (Republic of Korea, 12 April 1993) and the TAIKO MARU incident (Japan, 31 May 1993).

5 Any Other Business

5.1 Establishment of Post of Clerk-Secretary

In view of the great increase in workload on the IOPC Fund Secretariat resulting from recent incidents and the increase in the number of Member States, the Executive Committee decided to establish a post of Clerk-Secretary at grade G4, the post to be filled as soon as possible. The Committee approved that the cost of this post for 1993 should be financed from the Major Claims Funds to be constituted for the AEGEAN SEA and BRAER incidents (cf document FUND/EXC.35/8).

5.2 Payment of Claims Arising out of the AEGEAN SEA and BRAER Incidents

5.2.1 The Executive Committee recalled that, at its 34th session, it had authorised the Director to make available the liquid funds necessary for rapid payments of claims arising out of the AEGEAN SEA and BRAER incidents by taking loans from the General Fund (£3 million) and the HAVEN Major Claims Fund (£15 million) (document FUND/EXC.34/9 paragraph 5.1.1).

5.2.2 The Executive Committee took note of the information contained in document FUND/EXC.35/9 concerning further requirements in this regard, and authorised the Director to make available the liquid funds necessary to pay claims arising out of these incidents as follows, including the amounts referred to in paragraph 5.2.1 above:

Loans from the General Fund	£4 000 000
Loans from the HAVEN Major Claims Fund (including an amount of £1.6 million already borrowed for this purpose)	<u>£23 000 000</u>
	<u>£27 000 000</u>

5.2.3 The Committee agreed to leave it to the Director to decide how the funds referred to above should be distributed between the two incidents provided, however, that he should endeavour to ensure a fair distribution between the two incidents. The Director was instructed to refer the matter back to the Assembly for decision at its 16th session, if these liquid funds were to be insufficient to ensure rapid payments.

6 Adoption of the Report to the Assembly

The Executive Committee decided to authorise the Director to prepare, in consultation with the Chairman and Acting Chairman, the final report to the Assembly of the present session.