



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
37th session
Agenda item 7

FUND/EXC.37/3
8 October 1993

Original: ENGLISH

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

(held on 8 October 1993)

Chairman: Mr C Coppolani (France)

Vice-Chairman: Ms A Ogo (Nigeria)

Opening of the Session

The 37th session of the Executive Committee was opened by Director, in accordance with Rule (v) of the Rules of Procedure of the Committee, as neither the delegation of the former Chairman (Germany) nor that of the former Vice-Chairman (Liberia) was a member of the Committee.

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document FUND/EXC.37/1.

2 Election of the Chairman and Vice-Chairman

2.1 The Executive Committee elected the following delegates to hold office until the next regular session of the Assembly:

Chairman: Mr C Coppolani (France)

Vice-Chairman: Ms A Ogo (Nigeria)

2.2 The Chairman thanked the Executive Committee for the confidence shown in him and in the Vice-Chairman.

3 Examination of Credentials

The following members of the Executive Committee were present:

| | |
|---------------|-------------------|
| Canada | Republic of Korea |
| Côte d'Ivoire | Spain |
| France | Sri Lanka |
| Greece | Sweden |
| Italy | Tunisia |
| Netherlands | Venezuela |
| Nigeria | United Kingdom |
| Poland | |

The Executive Committee agreed that the credentials submitted by these delegations to the 16th session of the Assembly should be understood as also covering the 37th session of the Executive Committee.

The Executive Committee was informed that all members participating had submitted credentials and that these were in order.

The following Contracting States were represented as observers:

| | |
|-----------|--------------------|
| Algeria | Ireland |
| Cameroon | Japan |
| Croatia | Kuwait |
| Denmark | Liberia |
| Finland | Monaco |
| Germany | Norway |
| India | Russian Federation |
| Indonesia | |

The following non-Contracting States were represented as observers:

| | |
|----------|---------------|
| Belgium | Egypt |
| Brazil | Mexico |
| Chile | Saudi Arabia |
| China | United States |
| Colombia | |

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

International Maritime Organization (IMO)
International Group of P & I Clubs

4 Incidents Involving the IOPC Fund

4.1 Procedural Issues

The Chairman proposed that, in order to ensure a balanced discussion, the delegation of a Member State which had a direct interest in an incident should, during the Executive Committee's consideration of a claim arising out of that incident, be allowed to make only one intervention, after the

Director's introduction, whereafter the Committee would consider the claim; should questions be put to that delegation during the discussions, however, it would be allowed to respond. The Chairman's proposal was accepted by the Committee.

4.2 BRAER Incident

Employees Kept in Employment

4.2.1 It was noted that some employers within the salmon farming industry, namely some salmon farmers and fish processing plants, had maintained their workforce, although there was either insufficient work to keep the employees fully occupied or no work at all until the commencement of the harvest of the 1993 salmon intake.

4.2.2 As regards the salmon farmers, the Executive Committee noted that the damage suffered by them consisted of damage to property (ie the salmon) and that the compensation related to the value of the destroyed property. In the view of the Committee, it would be for the salmon farmer concerned to decide whether or not to retain the staff, without this having any impact on the amount of compensation payable.

4.2.3 With regard to the fish processors, the Executive Committee noted that their claims related to loss of profit resulting from the reduction in the supply of fish due to the destruction of the salmon or the imposition of the exclusion zone. The Committee considered whether, in the assessment of compensation, deductions should be made for salaries paid to employees who were retained although there was not sufficient work to keep them occupied.

4.2.4 The Executive Committee decided that each claim by a fish processor would have to be considered on its own merits in the light of the situation of the individual claimant. In the view of the Committee, account should be taken of whether a claimant who had retained his workforce had acted reasonably in the circumstances, considering inter alia the cost of making the employees redundant, the cost of re-employment, the time period during which there would be insufficient work and the difficulties which the claimant might have in re-employing a suitable workforce, as well as factors of a non-economic nature, such as the damage to the claimant's reputation as a responsible employer if employees were made redundant, and the difficulties for those made redundant of finding new employment. The Director was instructed to examine each claim in the light of these criteria. The Committee authorised him to take decisions in respect of the individual claims on this point, and to indicate, if requested, to the individual claimant how his particular case would be considered.

Tourist Industry

4.2.5 The Executive Committee considered a claim submitted by Shetland Islands Tourism relating to the cost of a marketing campaign to counteract the negative effect of the BRAER incident on tourism. It was noted that Shetland Islands Tourism had not provided any details of the losses allegedly suffered during the 1993 tourist season.

4.2.6 It was recalled that the Executive Committee had, at its 35th session, 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.

4.2.7 It was also noted that the Executive Committee had decided, at its 35th session, that the IOPC Fund should, in principle, consider claims of this kind only after the activities had been carried out.

It was recalled that the Committee had recognised, 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.

4.2.8 The Executive Committee took the view that the IOPC Fund should generally take a restrictive approach to claims of this kind. In particular, the Committee reiterated its concern as regards the IOPC Fund considering such claims before the activities had been carried out, and cautioned that the Fund should not take on the role of the claimant's bankers. It was nevertheless acknowledged that in many cases the claimant would not be able to carry out preventive measures of this kind unless advance payments were made by the IOPC Fund.

4.2.9 The Executive Committee instructed the Director to examine the claim under consideration on the basis of the criteria set out in paragraph 4.2.6 above and authorised him to approve this claim in respect of the activities, once they had been carried out, which fulfilled these criteria. In addition, the Committee authorised the Director to approve activities which were intended to mitigate damage during the 1994 tourist season and which fulfilled these criteria, and to make advance payments in respect of the cost of such activities. The Committee decided that the total amount of advance payments in respect of all activities relating to measures to prevent or minimise pure economic loss to be carried out in relation to the BRAER incident should fall within the maximum amount of £1.5 million fixed by the Committee at its 35th session (document FUND/EXC.36/10, paragraph 3.4.20).

Personal Injury Claims

4.2.10 The Executive Committee considered claims submitted by three individuals who had maintained that their health had suffered as a result of the BRAER incident, describing the alleged damage as sickness, nausea, symptoms of gastritis, nervous distress, chest pains and aggravated asthma, as well as unspecified health problems due to the inhalation of oil.

4.2.11 The Committee took note of the Director's view that, in the light of the discussions at the 1969 International Conference which adopted the Civil Liability Convention, the Convention in principle covered personal injury, provided that such injury was caused by contamination. It was noted that it would be for the claimant to prove that the alleged damage was actually caused by contamination by the oil escaping from the ship in question and the amount of the loss or damage sustained. It was also noted that, in the view of the Director, the above-mentioned claimants had not shown that they had actually suffered personal injury caused by contamination by oil from the BRAER and that, therefore, these claims could not be accepted.

4.2.12 The Executive Committee decided that these claims should be examined at a later session.

Public Authorities

4.2.13 The Executive Committee took note of the situation in respect of claims by the United Kingdom Government, the Shetland Islands Council and the Civil Aviation Authority as set out in paragraphs 3.15.1-3.15.4 of document FUND/EXC.36/5.

Transport Company

4.2.14 The Executive Committee considered a claim by a haulage company based on Shetland which transported salmon from three farms located within the exclusion zone. It was noted that the company maintained that as a result of the imposition of the exclusion zone and the destruction of the 1991 salmon intake, its vehicles had not been fully loaded on the outward journey from Shetland. The Committee also took note of the fact that the company, which made wooden pallets on which goods were transported, maintained that there had been a reduction in the number of pallets required.

4.2.15 The Executive Committee decided that the losses allegedly suffered by this claimant as a result of a reduction in the demand for transport services could not be considered as "damage caused by contamination" and that this part of the claim should therefore be rejected.

4.2.16 As regards the part of the claim relating to losses allegedly suffered as a result of a reduction in the number of pallets required, the Executive Committee instructed the Director to examine whether the losses allegedly suffered could be considered as "damage caused by contamination" on the basis that this reduction was due to the destruction of the 1991 salmon intake or the imposition of the exclusion zone which had prevented the harvest of the 1992 salmon intake. The Committee authorised the Director to settle this part of the claim, if and to the extent that this question were to be answered in the affirmative.

Sale of Farm

4.2.17 The Executive Committee noted that the largest farm on Shetland, which was located on the cliffs below which the BRAER had grounded, was being sold. The Committee noted that the owner maintained that the final selling price might be less than would have been expected had the BRAER incident not occurred, and that he would submit a claim in respect of the price difference.

4.2.18 The Executive Committee decided that it was premature to consider any question relating to the sale of this farm until a claim for compensation had been submitted.

General Claims from the Fishing Fleet for Depressed Prices

4.2.19 The Executive Committee took note of information given by the Director that claims would be presented by the owners of a number of fishing boats relating to losses allegedly suffered as a result of the reduction in fish prices due to adverse media and market reaction.

Fees

4.2.20 The United Kingdom delegation referred to the problem of claimants' advisers seeking fees on a contingency basis and on a percentage of the compensation recovered.

4.2.21 The Executive Committee decided that reasonable fees for work done would be considered, but that fees would not be paid on a contingency or percentage basis. The Committee took the view that the question of whether and to what extent fees were payable should be assessed in connection with the examination of a particular claim, taking into account the necessity for the claimant to use expert advice, the usefulness of the work carried out by the expert, the quality of that work, the time needed and the normal rate for work of that kind.

4.3 AEGEAN SEA Incident

4.3.1 The Director informed the Executive Committee of a telefax received from the P & I insurer of the AEGEAN SEA, the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd (UK Club), that the shipowner and the UK Club reserved their position regarding three claims arising out of the AEGEAN SEA incident which the Committee had decided, at its 36th session, were admissible in principle, namely claims submitted by:

- (a) the operator of a car repair firm located in the area closed off by the authorities in the period immediately following the incident, who had claimed compensation in respect of losses allegedly suffered as a result of eight days' loss of business;
- (b) the time charterer of a vessel for the recovery of hire payments made to the shipowner, although the vessel could not be used since it was detained in La Coruña from 3 to 5 December 1993 as the port had been closed by the authorities; and
- (c) a shipowner relating to six days' loss of hire, due to the fact that the closure of the port of La Coruña prevented his ship, which was to be launched from a repair slip, from sailing.

4.3.2 The representative of the UK Club, who was a member of the observer delegation of the International Group of P & I Clubs, stated that, although the shipowner and the UK Club appreciated the reasoning behind the Committee's decision, they had some doubts as to whether the losses covered by these claims could be considered as "damage caused by contamination".

4.3.3 The Executive Committee took note of the position of the shipowner and the UK Club in respect of these claims.

4.4 KEUMDONG N°5 Incident

4.4.1 The Director informed the Executive Committee of the recent developments relating to the KEUMDONG N°5 incident. In particular, he mentioned that claims for compensation would be submitted very shortly and that these claims would have to be paid promptly in order to mitigate financial hardship to victims.

4.4.2 The Executive Committee authorised the Director to make final settlements of all claims relating to clean-up operations and preventive measures as well as all claims in respect of losses suffered by fishermen, except to the extent that the latter claims related to future losses. The Committee instructed the Director that, if claims gave rise to questions of principle which had not previously been decided by the Committee, however, he should refer such questions to the Committee for decision.

4.5 PACIFIC DIAMOND Incident

The Director informed the Executive Committee of the developments relating to the PACIFIC DIAMOND incident which took place in the Republic of Korea on 3 October 1993, stating that it was not possible to make any prediction at that stage as to the extent of pollution damage resulting from this incident.

5 Date of Next Session

5.1 The Executive Committee decided to hold its 38th session during the week of 7-11 February 1994.

5.2 The Executive Committee decided to retain the dates of 3-6 May 1994 for an extra session of the Executive Committee.

5.3 It was decided that the Committee would hold its normal autumn session during the week of 17 to 21 October 1994.

6 Any Other Business

No matters were raised under this agenda item.

7 Adoption of the Report to the Assembly

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