



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
38th session
Agenda item 5

FUND/EXC.38/9
11 February 1994

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

(held from 9 to 11 February 1994)

Chairman: Mr C Coppolani (France)
Vice-Chairman: Ms A Ogo (Nigeria)

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document FUND/EXC.38/1.

2 Examination of Credentials

The following members of the Executive Committee were present:

Canada	Republic of Korea
France	Spain
Greece	Sweden
Italy	Tunisia
Netherlands	United Kingdom
Nigeria	Venezuela
Poland	

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:

Cyprus	Japan
Estonia	Liberia
Finland	Norway
Germany	Russian Federation
Indonesia	Slovenia

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

Belgium	Saudi Arabia
China	United States
Philippines	

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

International Maritime Organization (IMO)
 Baltic and International Maritime Council (BIMCO)
 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 Incidents Involving the IOPC Fund

3.1 PATMOS Incident

3.1.1 The Director introduced document FUND/EXC.38/2 concerning the judgement rendered in the PATMOS case by the Court of Appeal in Italy in December 1993.

3.1.2 The Executive Committee took note of the fact that the Court of Appeal had granted compensation to the State of Italy in the amount of Lit 2 100 million (£830 000) in respect of damage to the marine environment. It was noted that, as a result of the judgement, the total amount of the claims accepted in the PATMOS case (Lit 11 583 298 650, or £4.6 million) was below the limitation amount applicable to the ship (Lit 13 263 703 650, or £5.3 million).

3.1.3 The Committee noted that if the judgement of the Court of Appeal stood, the IOPC Fund would not be called upon to make any payments of compensation as a result of the PATMOS incident. It was also noted that, as the PATMOS was flying the flag of a State which was not Party to the Fund Convention at the time of the incident, the shipowner was not entitled to indemnification from the IOPC Fund under Article 5 of the Fund Convention. The Committee recognised that, consequently, the IOPC Fund was not entitled to appeal against the judgement to the Supreme Court of Cassation.

3.1.4 A representative of the P & I insurer involved, speaking in his capacity as a member of the observer delegation of the International Group of P & I Clubs, informed the Committee that the shipowner and the P & I insurer were studying the judgement for the purpose of deciding whether or not to lodge an appeal, and would bear in mind the implications that their decision would have on other cases. The Italian delegation stated that the State of Italy had not yet decided whether or not to appeal against the judgement. The Italian delegation informed the Committee that if the shipowner and the P & I insurer were to lodge an appeal, then the State of Italy would do likewise.

3.1.5 The Executive Committee noted the Court of Appeal's rejection of the claims submitted by Nettunia Srl, a port chemist and the Corporation of Pilots of the Port of Messina. In particular, the Committee took note of the fact that the Court of Appeal had rejected the claim presented by the Corporation of Pilots on the grounds that, even if some of the activities carried out by the pilots might

have served the purpose of preventing pollution, the primary purpose of those activities was salvage, and that the Court had thus applied the test of primary purpose which had been adopted by the Committee.

3.2 RIO ORINOCO Incident

3.2.1 The Executive Committee noted that the Transportation Safety Board of Canada had carried out an investigation into the cause of the incident and that the Report on this investigation, dated 25 November 1993, had been made available to the IOPC Fund in the middle of January 1994.

3.2.2 The Executive Committee held a session in private, pursuant to Rule 12 of the Rules of Procedure, to discuss the Report of the Transportation Safety Board. During this closed session, covered by paragraphs 3.2.3–3.2.6 below, only the delegations representing Fund Member States were present.

3.2.3 The Committee took note of the fact that on 15 October 1993 the IOPC Fund had taken legal action in the competent Canadian court against the owner of the RIO ORINOCO (Rio Number One Ltd), the company which managed the operations of the vessel (Horizon Management Corp Inc) and the shipowner's P & I insurer (the Swedish Club). It was noted that in the statement filed with the Court, the IOPC Fund had requested that the defendants be ordered to pay, jointly and severally, to the IOPC Fund the sum of Can\$12 831 892 (ie the aggregate of the amounts paid by the Fund to the Canadian Government and the Swedish Club), plus interest thereon. It was also noted that the IOPC Fund had maintained that the incident was due to the fault or privity of the shipowner and had argued that the owner was not entitled to limit his liability.

3.2.4 The Executive Committee discussed what measures should be taken by the IOPC Fund, in the light of the findings set out in the Report of the Transportation Safety Board. The Committee instructed the Director to carry out an in-depth examination of the Report, with the assistance of legal and technical experts. In addition, the Committee instructed the Director to continue his investigations into the financial circumstances of the shipowner and the management company, in order to ascertain whether there would be any financial advantage in pursuing the legal action taken against them by the IOPC Fund. The Director was also instructed to consider whether the IOPC Fund should take any other legal action, including recourse action. Finally, the Director was instructed to examine whether or not, in the light of the findings in the Report, the shipowner's insurer should be entitled to indemnification under Article 5 of the Fund Convention.

3.2.5 The Executive Committee decided to reconsider the issues set out in paragraph 3.2.4 at its 39th session.

3.2.6 The United Kingdom delegation stated that, as the RIO ORINOCO was registered in the Cayman Islands, a United Kingdom dependent territory, the United Kingdom Government would be requesting comments from the Government of the Cayman Islands on the Report of the Transportation Safety Board. The delegation added that the United Kingdom Government was concerned if any ship registered in the United Kingdom, its crown dependencies or dependent territories was considered to have been unseaworthy.

3.3 AEGEAN SEA Incident

Claims Situation

3.3.1 The Executive Committee took note of the information contained in document FUND/EXC.38/4 regarding the AEGEAN SEA incident, in particular that, as at 31 January 1994, 1 077 claims totalling Pts 10 726 million (£51 million) had been received by the Joint Claims Office in La Coruña and that 585 claims had been approved wholly or partly by the Director, the shipowner and the P & I insurer for a total amount of Pts 420 million (£2 million).

3.3.2 The Committee took note of the situation in respect of the claims relating to clean-up operations and preventive measures presented by the Spanish Government, the Government of the Region of Galicia, some local authorities and private contractors, as well as in respect of the claims relating to damage to property and losses suffered by boat fishermen, shellfish gatherers and the near-shore aquaculture industry.

Damage to Property

3.3.3 It was noted that the IOPC Fund had approved claims in the AEGEAN SEA case relating to damage to property in respect of houses which had been contaminated by smoke from the burning oil on board the AEGEAN SEA. One delegation drew attention to the fact that the Civil Liability Convention and the Fund Convention did not apply to damage caused by fire or explosion. It was recalled that in the BRAER case the IOPC Fund had accepted claims in respect of damage to houses caused by dispersed droplets of oil in wind-blown spray. The Executive Committee recognised that in some cases it might be difficult to draw the line between damage caused by fire and damage by contamination caused by oily smoke resulting from a fire. The Committee took the view that in the AEGEAN SEA case the damage to the houses should be considered as "damage caused by contamination".

Claims in Respect of Social Security Payments

3.3.4 The Executive Committee considered claims which had been submitted by two public bodies in respect of unemployment benefits paid to 32 individuals who allegedly had been made redundant due to the reduction in work as a result of the restrictions placed on fishery activities following the incident. The Committee also examined a claim presented by one of these public bodies for loss of income due to a reduction in contributions made to the Social Security Fund by employers who had reduced their workforce.

3.3.5 At the request of the Spanish delegation, the Executive Committee decided to postpone its consideration of these claims to its 39th session, so as to enable the Spanish Government to submit additional information, and to enable it to consider the results of the deliberations of the Intersessional Working Group on this matter.

Payments by a Regional Authority and the Commission of the European Community

3.3.6 The Executive Committee noted that the Fisheries Council of the Region of Galicia had submitted a claim for the reimbursement of payments which it had made to fishermen and shellfish gatherers following the AEGEAN SEA incident, and that payments had also been made to some claimants by the Commission of the European Community.

3.3.7 The Spanish delegation requested that the Executive Committee should postpone any decision on these claims to its 39th session. The delegation also stated that, subject to formal approval by the competent authorities, the Fisheries Council of the Region of Galicia would withdraw its claim for reimbursement of the amount paid by the Council to the victims.

3.3.8 It was noted that in its decision to grant aid to the victims of the AEGEAN SEA incident, the Commission of the European Community had stated that the aid would be considered as a reimbursable advance, should it be found that accident insurance covered these costs, in which case the Commission would take measures to ensure repayment.

3.3.9 A number of delegations stated that these claims gave rise to questions of principle of considerable legal importance. It was pointed out that it was necessary for the IOPC Fund to ensure that claimants were not compensated twice for the same damage by receiving payments both under the Conventions and from other sources. It was argued that any payments from other sources should be deducted from the amount of the established claims, whether or not such payments were reclaimed by the payer. It was emphasised that it would be necessary to establish whether, in the present case, the Region of Galicia and the Commission of the European Community had through their payments acquired by subrogation the rights of the persons to whom payments had been made.

3.3.10 The Executive Committee decided to postpone any decision on these claims to its 39th session and instructed the Director to examine in detail the various issues raised during the discussions. The Director was also instructed to contact the Commission of the European Community to obtain further information in respect of its payment following the AEGEAN SEA incident as well as payments following other incidents. The Committee expressed the view that it would be necessary for the Fisheries Council of the Region of Galicia to give the Director detailed information of any payments made by it to the victims, so as to enable him to present a document on the issues to be examined at the 39th session of the Committee.

3.3.11 The Executive Committee decided that, pending its decision as to whether or not the payments made by the Fisheries Council and the Commission of the European Community should be deducted from the compensation payable under the Conventions, the Director should deduct the amount of these payments from any sum approved for compensation.

Ship Agencies

3.3.12 The Executive Committee noted that it had, at its 36th session, considered claims submitted by two ship agencies for compensation in respect of losses allegedly suffered as a result of the AEGEAN SEA incident, which led to five vessels which had intended calling at the port of La Coruña being diverted because the port was closed. It was also noted that, as doubts had been expressed by several delegations as to whether the losses allegedly suffered should be considered as "damage caused by contamination", the Committee had instructed the Director to examine these claims further and submit them to the Committee for reconsideration at its 38th session.

3.3.13 The Executive Committee took note of the fact that further investigation had shown that four of these ships were scheduled to load petroleum products in the port of La Coruña, whereas the fifth ship would have called at the port to discharge a cargo of molasses. In view of this additional information, the Committee agreed with the Director that it was likely that the same or other ships would have had to call at the port of La Coruña to load the petroleum products in question, that the cargo of molasses would have been discharged in the port at some future date, and that normal agency fees would then be paid. The Committee took the view that the claimants had not shown that they had suffered any economic loss, and decided therefore to reject the claims.

Court Proceedings in La Coruña

3.3.14 The Director informed the Executive Committee of the developments concerning the court proceedings in La Coruña. The Committee instructed the Director to continue preparing the IOPC Fund's detailed defence pleadings on the merits of the claims for compensation.

3.3.15 It was recalled that the Committee had decided at its 36th session that, in view of the fact that the total amount of the claims filed with the Court of first instance by far exceeded the amount of compensation available under the Civil Liability Convention and the Fund Convention, the IOPC Fund should at this stage only make partial payments in respect of accepted claims; such partial payments should not exceed 30-40% of the amount approved. The Committee noted the Director's decision to limit any payments, at least for the time being, to 25% of the established damage suffered by the claimants concerned.

3.4 BRAER Incident

Claims Situation

3.4.1 The Executive Committee took note of the information contained in document FUND/EXC.38/5 regarding the BRAER incident, in particular that, as at 31 January 1994, over 700 claims had been approved, wholly or partly, for a total amount of approximately £22.4 million.

Sale of Farm

3.4.2 The Executive Committee was informed that the owner of one of the largest farms on Shetland, which was located on the cliffs below which the BRAER went aground, had shortly before the BRAER incident taken steps to put the farm up for sale, that the negotiations for the sale of the farm were at an advanced stage and that, according to the seller, the proposed purchase price was less than would have been expected had the BRAER incident not occurred. It was noted that a claim had been made for the difference between the value of the property in December 1992, as assessed by the claimant, and the offer made by the prospective purchaser. It was also noted that this farm was the most contaminated property on the island, that the farmland had nevertheless been declared fit for grazing in September 1993 and that the farmer had been provided, at the IOPC Fund's expense, with equipment, materials and labour, as well as feed for livestock, in order to overcome the effects of the wind-blown oil spray on the land. The Committee was informed that the Director had requested opinions on the matter from a chartered surveyor and from the District Valuer (a chartered surveyor appointed by the United Kingdom Commission of Inland Revenue to be the primary provider of advice and assessments on property values to Government and other public bodies).

3.4.3 The Executive Committee took the view that the claimant would in principle be entitled to compensation if and to the extent that the property had suffered an on-going loss of value as a result of the BRAER incident. The Committee emphasised, however, that there were many other factors which could have influenced the selling price of the property which were not related to the incident.

3.4.4 The Executive Committee instructed the Director to obtain an opinion from the District Valuer and the chartered surveyor on the question as to whether the BRAER incident had caused any on-going diminution in the value of the property. In addition the Director was instructed to examine these opinions and submit the claim to the Committee for consideration at its 39th session.

3.4.5 The Executive Committee took the view that if operating difficulties of the farm resulting from the incident remained, the cost of overcoming these difficulties would in principle qualify for compensation.

Occasional Fishing

3.4.6 The Executive Committee considered a claim received from a man who had two fishing boats which he had been unable to use for fishing while the exclusion zone imposed by the United Kingdom Government was maintained. The Committee noted that his fishing was not a commercial activity but allegedly provided the family of four with two meals of fish per week and three cats with food every day. It was also noted that a member of the family collected whelks from the shore which generated a very small income.

3.4.7 The Executive Committee noted that the claim related to so-called pure economic loss. In the view of the Committee the claimant did not depend for his livelihood on the fishing which had allegedly been affected by the imposition of the exclusion zone. The Committee decided, therefore, to reject this claim.

Salmon Farms

3.4.8 The Executive Committee noted that agreement had been reached in December 1993 and January 1994 on the conditions for the outright slaughter of the 1992 salmon intake within the exclusion zone with all but two of the salmon farms within the zone. It was also noted that, due to bad weather, the total destruction of the 1992 intake had been delayed but that the major part of the 1992 intake in the farms for which agreements had been reached had been destroyed during the week of the present session of the Committee.

Activities to Counteract the Negative Effect of the BRAER incident on Shetland Fish Products

3.4.9 The Executive Committee took note of the situation in respect of 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. In particular, the Committee took note of the fact that, in the Director's view, it was unlikely that the industries concerned would suffer further damage resulting from the BRAER incident and that, for this reason, the Director had considered that the proposed activities did not fulfil the criteria for admissibility established by the Committee, as set out in paragraph 7.1 of document FUND/EXC.38/5. It was noted that for this reason the Director had not yet been able to approve any general marketing activities.

3.4.10 The Committee endorsed the position taken by the Director in respect of the proposed marketing activities.

Tourism

3.4.11 The Executive Committee took note of the situation in respect of a claim submitted by Shetland Islands Tourism, an organisation of tourism-related businesses, relating to the cost of a marketing campaign to counteract the negative effect of the BRAER incident on tourism. It was noted that the Executive Committee had, at its 37th session, instructed the Director to examine the claim submitted by Shetland Islands Tourism on the basis of the criteria set out in paragraph 4.2.6 of document FUND/EXC.37/3 and had authorised him to approve this claim in respect of the activities, once they had been carried out, which fulfilled these criteria. It was also recalled that, in addition, the Committee had 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.

3.4.12 It was noted that the Shetland Island Council had commissioned a detailed survey of the Shetland tourist industry and that this study had not yet been made available to the IOPC Fund, and that the Director had not been able to assess whether and, if so, to what extent the marketing activities proposed by Shetland Islands Tourism fulfilled the criteria established by the Committee. The Director stated that he had therefore not been able to make any advance payment in respect of such activities.

3.4.13 The Executive Committee endorsed the position taken by the Director in respect of the proposed marketing activities.

Claims for Economic Loss by Fish Processors

3.4.14 The Executive Committee noted that a number of claims had been received from businesses (in particular fish processors) for loss of profit caused by cancelled or reduced orders from specific customers as a result of the BRAER incident. It was noted that loss adjusters acting on behalf of the fish processors had argued that compensation should be paid in respect of reduced or cancelled orders from specific customers until this specific business was regained, independent of the development of the claimant's business as a whole.

3.4.15 The Executive Committee strongly endorsed the position taken by the Director that the criteria for the assessment of compensation should be whether the claimant's business as a whole had suffered losses as a result of the BRAER incident and that, consequently, a claimant was not entitled to compensation unless the results of his business as a whole had deteriorated because of the incident.

Loss of Income Suffered by Fish Producers Due to Reduction in Prices

3.4.16 The Executive Committee noted that whitefish producers on Shetland had maintained that following the BRAER incident there was a loss of confidence on the part of whitefish buyers which had caused a drop in the first sale price and a reduced demand, and that the producers had indicated their

intention to claim compensation for the losses incurred as a result thereof. The Director was instructed by the Committee to continue his analysis of the price information and the statistical models referred to in paragraph 10.2 of document FUND/EXC.38/5 so as to enable him to establish any "BRAER effect" on whitefish prices.

3.4.17 It was also noted that the Shetland Salmon Farmers' Association had maintained that the price of Shetland farmed salmon sold from outside the exclusion zone, both in the domestic and export market, was still depressed as a result of the BRAER incident. The Executive Committee instructed the Director to continue his analysis of the depression in the price of salmon following the BRAER incident, so as to establish the quantum and the duration of the price depression.

Fish Feed Manufacturer

3.4.18 The Executive Committee considered a claim submitted by a feed manufacturer in Denmark for loss of profit during 1993 due to reduced sales of fish feed to salmon farms located within the exclusion zone. It was noted that, according to the claimant, there was a contract between the manufacturer and the salmon farm under which the farm would on a monthly basis buy certain quantities of salmon feed from the manufacturer, and that the salmon farm did not require as much feed as it would normally have done due to the earlier removal of the 1991 stock and the long periods of reduced feeding of the 1991 and 1992 stocks.

3.4.19 During the discussion of this claim the view was expressed that the claimant's alleged loss was a result of the buyer not fulfilling his contractual obligations and that this loss could not be considered as "damage caused by contamination". It was also pointed out that the activities of this claimant were not an integral part of the economy of the area affected by the oil spill. For these reasons the Committee decided to reject this claim.

Smolt Suppliers

3.4.20 The Executive Committee noted that claims had been submitted by three companies alleging that they had suffered losses as a result of the BRAER incident interrupting the normal stocking of salmon smolt in Shetland waters. It was also noted that one of the claimants had requested that the Committee should not take any decision at the present session, so as to enable the claimant to present further documentation in support of his claim.

3.4.21 The Executive Committee decided to postpone its decision on these claims to its 39th session.

Investigations into the Cause of the Incident

3.4.22 The Executive Committee took note of the fact that reports on investigations into the cause of the BRAER incident carried out by the United Kingdom and Liberian authorities had been published. The Committee instructed the Director to examine the reports and submit his findings to the Executive Committee at its 39th session, in order to enable the Committee to decide whether the IOPC Fund should take any legal action.

3.5 TAIKO MARU Incident

The Director introduced document FUND/EXC.38/6 which gave details of the developments in the TAIKO MARU case since the 37th session of the Executive Committee. The Committee noted that the examination of the claims in respect of clean-up operations, preventive measures, damage to property and loss of income suffered by members of fishery co-operative associations was in its final stages and that the Director hoped to be able to settle all of these claims in the near future.

3.6 KEUMDONG 5 Incident

3.6.1 The Executive Committee took note of the claims situation, as set out in document FUND/EXC.38/7. It was noted, in particular, that most of the claims relating to clean-up operations had been settled and paid.

3.6.2 It was recalled that at its 37th session the Executive Committee had 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. It was also noted that the Committee had instructed the Director that, if claims gave rise to questions of principle which had not previously been decided by the Committee, he should refer them to the Committee for a decision.

3.6.3 The delegation of the Republic of Korea stated that the Korean Government was very concerned about the extensive pollution damage caused by this incident, especially as regards the losses suffered by fishermen and by those involved in aquaculture. The delegation expressed the hope that the claims arising out of this incident would be settled in the near future.

3.6.4 The Committee took note of the fact that claims for very high amounts had been presented for losses suffered by the fishing and aquaculture industries in the affected area. The Committee endorsed the Director's position that any payment of compensation should be based on an objective assessment of the damage carried out by experts in the field.

3.6.5 The Director informed the Executive Committee that, as the total amount of the claims submitted exceeded the maximum amount available under the Civil Liability Convention and the Fund Convention, he had decided that the IOPC Fund's payments would, at least for the time being, be limited to 50% of the established damage suffered by each claimant. The Committee endorsed the Director's decision and instructed him to consider whether this percentage should be adjusted, in the light of developments.

3.7 ILIAD Incident

3.7.1 The Executive Committee took note of the information set out in document FUND/EXC.38/8 in respect of the ILIAD incident.

3.7.2 The Executive Committee authorised the Director to make final settlements of all claims arising out of this incident. The Committee instructed the Director that, if claims gave rise to questions of principle which had not previously been decided by the Committee, he should refer them to the Committee for decision.

4 Any Other Business

4.1 Payment of Contributions

4.1.1 It was recalled that the Assembly had, at its 16th session, decided to levy contributions to the General Fund and four Major Claims Funds for a total amount of £78 million, payable by 1 February 1994. The Director informed the Executive Committee that, as at 9 February 1994, £71.3 million had been received.

4.1.2 The Executive Committee noted with satisfaction the situation in respect of the payment of contributions.

4.2 1992 Protocols to the Civil Liability Convention and the Fund Convention

4.2.1 A number of delegations informed the Executive Committee of the situation in their respective States as regards the preparations for the ratification of the 1992 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention.

4.2.2 The delegations of Germany and the United Kingdom stated that bills implementing the 1992 Protocols had been submitted to parliament and that they hoped that ratification would take place during the summer or autumn of 1994. The delegation of France declared that a bill would be presented to parliament in the very near future and that ratification could take place during the summer of 1994. The Japanese delegation informed the Committee that a bill would be presented to Parliament very shortly. The delegations of Finland and Sweden stated that the preparation of the necessary legislation was under way and that they hoped that ratification of the 1992 Protocols would take place by the end of 1994. They added that the legislation was elaborated in co-operation with the other Nordic countries. The delegations of Canada, the Netherlands, Poland and Spain notified the Committee that preparations for the drafting of the implementing legislation or the process of ratification were under way. The Greek delegation stated that, since Greece was at present holding the presidency of the European Council, the Greek Government intended to encourage a collective action by the States members of the European Union towards ratification of the 1992 Protocols.

4.2.3 The Director reported that the Parliament of Australia had approved accession to the 1971 Fund Convention, the 1976 Protocol thereto and the 1992 Protocols to the Civil Liability Convention and the Fund Convention.

4.3 Date of Next Session

The Executive Committee decided to hold its 39th session on 5 and 6 May 1994.

5 Adoption of the Report to the Assembly

The draft report of the Executive Committee to the Assembly, as contained in documents FUND/EXC.38/WP.1 and FUND/EXC.38/WP.1/Add.1, was adopted, subject to certain amendments.
