INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
40th session
Agenda item 6

FUND/EXC.40/10
18 October 1994

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RECORD OF DECISIONS OF THE FORTIETH SESSION OF THE EXECUTIVE COMMITTEE

(held from 17 to 18 October 1994)

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

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document FUND/EXC.40/1.

2 Examination of Credentials

2.1 The following members of the Executive Committee were present:

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

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.

2.2 The following Contracting States were represented as observers:

Algeria	Estonia	Liberia
Barbados	Finland	Mexico
Cameroon	Germany	Norway
Croatia	Indonesia	Russian Federation
Cyprus	Japan	Slovenia
Denmark	Kuwait	

2.3 The following non-Contracting States were represented as observers:

Australia	China	Egypt
Belgium	Colombia	Saudi Arabia
Brazil	Democratic People's Republic of Korea	United States
Chile		

2.4 The following inter-governmental organisation and international non-governmental organisations were represented as observers:

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

3 Incidents Involving the IOPC Fund

3.1 Overview

The Executive Committee took note of document FUND/EXC.40/2 which contained a summary of the situation in respect of all incidents dealt with by the IOPC Fund since the 36th session of the Executive Committee.

3.2 RIO ORINOCO Incident

3.2.1 The Director introduced document FUND/EXC.40/3 dealing, in particular, with the legal action brought by the IOPC Fund against the owner of the RIO ORINOCO, the company which managed the ship, the individual directors of these companies and the P & I insurer of the vessel (the Swedish Club). The Executive Committee took note of the Director's analysis of the legal situation as regards the various defendants against whom action had been brought and his assessment of their financial situation.

3.2.2 The Executive Committee agreed with the Director that it would not be meaningful to pursue legal action against the shipowner (Rio Number One Ltd) or the company managing the ship (Horizon Management Corp Inc) to recover sums paid by the IOPC Fund in compensation, since it was unlikely that there would be any assets against which a judgement against these companies could be enforced.

3.2.3 As for the individual directors of the management company, the Executive Committee noted that it appeared unlikely that there would be any significant assets against which judgements against them could be enforced and that therefore it would not be worthwhile pursuing action against these directors.

3.2.4 It was noted that any action against the classification society (Det Norske Veritas) had become time-barred before the IOPC Fund had obtained access to the Report of the Transport Safety Board of Canada in January 1994. It was further noted that in the Director's view there was not sufficient evidence that the classification society had in fact been negligent.

3.2.5 The Executive Committee noted that the Director had been advised that the "pay to be paid" rule in the Swedish Club's Rules would probably be upheld by the Canadian courts if a direct action were pursued against the Swedish Club in Canada under Canadian maritime law. The Committee also took note of the Director's view that it was uncertain whether in the case of the RIO ORINOCO the Swedish courts would consider the relevant provision of the Swedish Insurance Act as mandatory, thereby setting aside the "pay to be paid" rule in the Swedish Club's Rules. The Committee noted that, for that reason, the Director was not in favour of pursuing an "oblique action" in Canada against the Swedish Club, nor of taking action against the Swedish Club in Sweden.

3.2.6 It was recalled that the Executive Committee had taken the position that, except in collision cases, the IOPC Fund should only take recourse action in cases where there were very strong reasons for taking such actions and where, in addition, there was a considerable likelihood of success (document FUND/EXC.20/6, paragraph 4.2). A number of delegations made the point that it was nevertheless important as a matter of policy that the IOPC Fund should try to recover any amount paid by it in compensation if an incident were caused by the unseaworthiness of the ship involved. For this reason, it was generally considered that further consideration should be given to the possibility of the IOPC Fund taking legal action against the Swedish Club in Sweden.

3.2.7 The Director was instructed to seek further legal advice from an independent Swedish legal expert in the relevant field as to the possibility of taking successful legal action in Sweden against the Swedish Club to recover the amount paid by the Fund, and in particular, as to whether a Swedish court would consider the relevant provisions of the Swedish Insurance Act as mandatory, thereby setting aside the "pay to be paid rule" in the Swedish Club's Rules. It was decided that the IOPC Fund should not pursue its legal action against the company managing the RIO ORINOCO, nor against the individual directors of this company and that the action against the shipowner should be pursued only to the extent required to preserve the possibility of the Fund taking action against the Swedish Club in Sweden. The Director was instructed to refer the matter back to the Committee when further legal advice had been received.

3.2.8 The Executive Committee decided to postpone, to its 42nd session, its consideration of whether and, if so, to what extent the IOPC Fund was exonerated from its obligation under Article 5.1 of the Fund Convention to indemnify the shipowner and his insurer for a portion of the limitation amount prescribed in Article V.1 of the Civil Liability Convention.

3.2.9 The Japanese delegation, speaking in its capacity of observer, requested that the Director should inform the Maritime Safety Committee of IMO of the position taken by the classification society.

3.3 HAVEN Incident

Claims for Compensation

3.3.1 The Executive Committee noted the situation in respect of the claims arising out of the HAVEN incident, as reflected in paragraphs 1 and 2 of document FUND/EXC.40/4. The Committee took note of the situation in respect of the discussions with the Italian Government.

3.3.2 The Executive Committee welcomed the agreement reached by the IOPC Fund, the shipowner and the shipowner's P & I insurer with the French Government on the admissible quantum of its claim and noted that agreements on the quantum had also been reached with the majority of the French local authorities which had presented claims. The Committee also noted that these agreements were subject to the approval of the judge in charge of the limitation proceedings.

Maximum Amount Payable by the IOPC Fund

3.3.3 The Executive Committee took note of the situation in the appeal proceedings concerning the method of conversion of the Special Drawing Right (SDR) into national currency.

Question of Time-Bar

3.3.4 The Director introduced section 7 of document FUND/EXC.40/4 which addressed the question of whether the majority of the claims arising out of the HAVEN incident were time-barred vis-à-vis the IOPC Fund. The Executive Committee took note of the fact that only a few claimants, namely the French State, the French communes, the Principality of Monaco and a few Italian claimants, had fulfilled the requirements of Article 6.1 by making a notification under Article 7.6 of the Fund Convention. The Committee noted also that, on the basis of legal advice, the Director was of the opinion that all other claims submitted in the limitation proceedings had become time-barred in respect of the IOPC Fund on or shortly after 11 April 1994.

3.3.5 The representative of the observer delegation of the International Group of P & I Clubs made the following statement:

> "The International Group of P & I Clubs has been viewing the developments in this case with increasing concern. Bearing in mind the original and the continuing objectives of the Convention system, which the Clubs have fully supported, the Clubs are concerned that the apparently inexorable continuation of legal proceedings in Italy is doing damage and will do further damage to the reputation of the system as a fair and balanced approach to providing compensation for oil pollution victims. If these legal proceedings are now to include a defence based on time-bar, the Clubs fear that the damage to the system may be irreparable.
>
> This delegation would invite the Committee to bear in mind the fundamental objective of the Convention system, namely to make rapid payment of compensation for claims which are admissible.
>
> In recognition of these concerns, the Club concerned in the HAVEN, with the agreement of the shipowner, has made a without prejudice proposal to the Fund and the Italian Government in an effort to assist in moving quickly to a position where the quantum of claims can be agreed and payment released. The Club has set certain conditions upon which it is prepared to initiate a process which, if successfully concluded, can release funds to claimants, particularly private claimants, within a reasonably short period of time. These conditions are consistent with our understanding of the intent of the Conventions. This delegation is not in a position to debate the offer which is a matter for the individual Club concerned to discuss further with the Director and the Italian State.
>
> However, this delegation can only repeat its concern for the likely adverse consequences for the system as a whole if this case is allowed to proceed on its lengthy way through the Italian judicial system without a determined attempt being made to find a practical position. The United Kingdom P & I Club has made it clear that it is willing to participate as far as it reasonably can in such an attempt."

3.3.6 The Executive Committee held a session in private, pursuant to Rule 12 of the Rules of Procedure, to discuss this issue. During the closed session, covered by paragraphs 3.3.7-3.3.16, only the representatives of IOPC Fund Member States were present.

3.3.7 The Executive Committee recognised that the Director had been obliged to raise the issue of time-bar both in the legal proceedings in Italy and in the Executive Committee.

3.3.8 The Executive Committee agreed with the Director's analysis of the legal situation and took the view that these claims met the requirements for time-bar, in the light of the provisions in Article VIII of the Civil Liability Convention and Article 6.1 of the Fund Convention.

3.3.9 A number of delegations expressed their concern that this situation had arisen, since the IOPC Fund had as its purpose to pay compensation to victims of pollution damage. Nevertheless, these delegations drew attention to the fact that this situation was due to the complex legal proceedings in Italy resulting from certain claimants maintaining that the IOPC Fund's maximum cover should be assessed on the basis of the free market value of gold instead of on the basis of the Special Drawing Right (SDR), the latter conversion method being in accordance with the internationally accepted interpretation of the Fund Convention. It was also pointed out that claims had been submitted by the Italian Government and other public bodies relating to damage to the environment which, according to Resolution N°3 adopted by the IOPC Fund Assembly, were not admissible under the Civil Liability Convention and the Fund Convention.

3.3.10 The Japanese delegation, speaking in its capacity as observer, stated that in its view it was clear that the claims in question were time-barred under Article 6.1 of the Fund Convention, which left no room for interpretation. For this reason, this delegation took the view that the IOPC Fund should not enter into negotiations concerning these claims and that no payments could be made for such claims. The Japanese delegation also stated that in its view contributors were under no obligation to pay contributions in respect of such payments.

3.3.11 The Italian delegation stated that it was not going to address the legal question, ie whether or not the claims were time-barred. In the view of this delegation, it was against the object and spirit of the Fund Convention that the IOPC Fund invoked the provisions on time-bar. This delegation declared that it was inequitable that the Fund invoked the time-bar issue after over three years of discussions with claimants and an active participation in the court proceedings. This delegation also stated that the position taken by the IOPC Fund deeply worried the Italian Government and that, if this position were maintained, it would demonstrate that the system of compensation established by the Fund Convention did not work.

3.3.12 Being convinced of the legal validity of the IOPC Fund's position in respect of the time-bar issue, the Executive Committee, nevertheless, recognised that the on-going legal proceedings in Italy gave rise to some uncertainty as regards the final outcome of this issue. For this reason, and conscious of the desirability of victims of pollution damage being compensated, the Executive Committee instructed the Director to enter into negotiations with all the parties concerned for the purpose of arriving at a global solution of all outstanding claims and issues. The Committee emphasised that any such solution must respect the following conditions:

(i) the maximum payable under the Civil Liability Convention and the Fund Convention was 60 million SDR;
(ii) claims could only be admissible if a claimant had suffered a quantifiable economic loss and claims for damage to the marine environment per se were not admissible;
(iii) the negotiations should be without prejudice to the IOPC Fund's position in respect of the time-bar;
(iv) the negotiations should, to the extent possible, take into account the economic interests of those claimants who had respected the requirements laid down in Article 6.1 of the Fund Convention.

3.3.13 In respect of the condition set out under item (iv) of paragraph 3.3.12 above, the French delegation expressed the wish that the Director, together with the claimants whose claims appeared to have become time-barred vis-à-vis the IOPC Fund, should seek a solution which would make it possible to compensate in full the claimants who had fulfilled the requirements laid down in Article 6, on the basis of the agreements reached or to be reached between those latter claimants and the IOPC Fund. In the view of this delegation, preserving the legitimate rights of the French victims who had complied with the procedures was indeed an important factor in its position that negotiations should continue.

3.3.14 The Executive Committee decided that there should be a time limit for these negotiations, perhaps by the 42nd session of the Executive Committee.

3.3.15 The Executive Committee emphasised that the decision to enter into negotiations in the HAVEN case did not constitute a precedent but should be seen in the context of the very special circumstances of this case.

3.3.16 The Director was instructed to report on the developments of these negotiations to the Executive Committee at its 42nd session. The Committee stated that any agreement relating to a global settlement would have to be approved by the Committee.

3.4 AEGEAN SEA Incident

3.4.1 The Executive Committee took note of the situation as regards the various types of claims arising out of the AEGEAN SEA incident, as set out in document FUND/EXC.40/5 and FUND/EXC.40/5/Add.1.

Payments made by the Fisheries Council of the Region of Galicia

3.4.2 It was recalled that, as decided by the Executive Committee at its 39th session, payments received by claimants in connection with an incident which were in the nature of a gift should not be deducted from compensation payable under the Civil Liability Convention and the Fund Convention, whereas payments which could be categorised as compensation or advances towards compensation should be deducted. It was noted that the Committee had taken the view that the question of into which category a payment fell would have to be decided in the light of the circumstances of the particular payment. The Committee took note of the fact that the payments made by the Fisheries Council of the Region of Galicia to fishermen and shellfish gatherers were granted as humanitarian aid and that the Council had withdrawn its claim for reimbursement of these payments.

3.4.3 In the light of the fact that the payments made by the Fisheries Council to fishermen and shellfish gatherers (totalling Pts 438 383 000) were granted as humanitarian aid and therefore were in the nature of a gift, the Executive Committee decided that these payments should not be deducted from the compensation payable under the Civil Liability Convention and the Fund Convention.

3.4.4 The Executive Committee drew attention to the fact that the payments by the Fisheries Council referred to in paragraph 3.4.3 which were in the nature of a gift could not be reclaimed from the IOPC Fund.

Court Proceedings in La Coruña

3.4.5 The Executive Committee took note of the developments in respect of the court proceedings in La Coruña, as set out in paragraph 6 of document FUND/EXC.40/5.

Social Security Payments

3.4.6 The Executive Committee took note of claims which had been submitted by two public bodies responsible for making unemployment benefit payments in the amounts of Pts 9 505 770 (£47 060) and Pts 6 897 323 (£34 150). It was noted that these payments had been made to persons 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. It was also noted that these claims gave rise to a question of principle similar to the one relating to claims for loss of income by employees in sea-related activities having been made redundant and that the question of the admissibility of claims of this latter type would be considered by the Assembly at its 17th session (document FUND/A.17/23, paragraph 7.2.50-7.2.57). For this reason the Committee decided to postpone the consideration of these claims to its 41st session.

3.4.7 The Committee also examined a claim presented by one of these public bodies in the amount of Pts 38 184 756 (£189 030) for the contributions paid by this body to the Social Security System that the affected employers would have paid if their business activities had not been suspended. After a discussion, the Committee decided to resume its consideration of this claim at its 42nd session, on the basis of a document prepared by the Director in consultation with the Spanish delegation.

Provisional Payments

3.4.8 It was noted that the Executive Committee had decided, at its 36th session, that in view of the high amount of the claims arising out of the AEGEAN SEA incident, caution had to be exercised when making payment to claimants at this stage, in order to ensure that the provisions of Article 4.5 of the Fund Convention relating to equal treatment of victims were respected. It was also recalled that the Committee had instructed the Director that the IOPC Fund should, at this stage, only make partial payments which should not exceed 30–40% of the amount approved (document FUND/EXC.36/10, paragraph 3.3.21). The Committee recalled that the Director had decided to limit payments by the IOPC Fund to 25% of the established damage suffered by each claimant, in view of the continuing uncertainty as to the total amount of claims.

3.4.9 The Committee noted that a document had been presented by the Director General of Fisheries and Agriculture of the Government of the Region of Galicia and the Director General of the Merchant Marine of the Central Spanish Government, in which three experts of the Spanish administrations involved in the assessment of claims had estimated the maximum amount of the claims arising out of this incident. It was also noted that these experts had stated that the total amount of the claims presented so far to the Joint Claims Office was Pts 20 338 million (£101 million) and that, on the basis of available information, they estimated that the total amount of the claims would finally be approximately Pts 24 500 million (£121 million), without prejudice to the possibility of this amount varying as a result of further claims for minor amounts being presented in connection with the legal proceedings.

3.4.10 The Spanish delegation conveyed the concerns of the Spanish authorities that only relatively small amounts had been paid to the claimants, who belonged mainly to the poorer groups of society. In the view of that delegation it was important, therefore, that the provisional payments were increased from 25% to 40% of the established damage. This delegation emphasised that the estimate of a figure of Pts 24 500 million representing the final total amount of all claims arising out of this incident had been arrived at after a very careful assessment, in consultation with a number of persons involved in this case.

3.4.11 The Director stated that he had not yet analysed the new information as to the maximum amount of the claims which had been received the previous day. He expressed the view that this information, together with the positive developments in the Technical Committee referred to in paragraph 3 of document FUND/EXC.40/5/Add.1, might justify an increase of the percentage of the provisional payments but that he wished to consider this matter further before reaching a decision. He undertook to make a statement on this issue either later at the Committee's present session or at its 41st session.

3.5 BRAER Incident

3.5.1 The Executive Committee took note of the situation as regards the various types of claims arising out of the BRAER incident, as set out in documents FUND/EXC.40/6, FUND/EXC.40/6/Add.1 and FUND/EXC.40/6/Add.2. The Committee noted developments in respect of, *inter alia*, claims for the loss of income suffered by fishermen due to a reduction in prices, claims by shell fishermen, claims by fish processors for loss of income as a result of the reduction in the supply of fish and claims for loss of income as a result of the failure of herring roe fishery.

3.5.2 The Committee noted also that claims had been submitted by the United Kingdom Government and the Shetland Islands Council in the amounts of £2 642 310 and £1 501 444, respectively.

3.5.3 The United Kingdom delegation informed the Committee that an additional claim would be presented in respect of costs incurred by the Scottish Office.

Landcatch Ltd; smolt supplier

3.5.4 It was recalled that the Executive Committee had, at its 39th session, considered a claim presented by Landcatch Ltd (hereinafter referred to as "Landcatch") for £2 601 506 plus interest relating to losses allegedly suffered as a result of the BRAER incident interrupting the normal stocking of salmon smolt in Shetland waters. It was noted that the Director had presented a document to that session containing information on the claim as well as the Director's analysis thereof (document FUND/EXC.39/4/Add.1). It was also recalled that the Committee had taken the view that the claim presented by Landcatch did not fulfil the criteria laid down by the Committee and that the Committee had decided to reject the claim, for the following reasons (document FUND/EXC.39/8, paragraph 3.3.18):

> "The Executive Committee took into account a number of considerations including the following. The Committee was of the opinion that the loss allegedly suffered by Landcatch could not be considered as damage to property rights. The Committee took the view that the loss could not be considered as caused by contamination but was due to the unwillingness of customers to conclude contracts for delivery of smolt and to Landcatch's lack of adequate alternative markets. In the Committee's view the smolt rearing activity of Landcatch was not in reasonable geographical proximity to the area affected by the oil spill from the BRAER. The Committee was of the opinion that although the smolt provided by Landcatch formed 25–30% of the smolt supplied to the Shetland salmon farmers, the smolt rearing activity of Landcatch did not form an integral part of the economic activity of the area affected by the oil spill."

3.5.5 The Executive Committee took note of the fact that, after having been informed of the Committee's decision to reject the claim, Landcatch had requested that the claim should be re-examined, since in Landcatch's view the Committee might not have appreciated the very particular situation of the company. The Committee agreed to re-examine the claim in the light of the new information provided by the claimant.

3.5.6 The Director introduced document FUND/EXC.40/6/Add.1 which contained a presentation of Landcatch's claim, a summary of Landcatch's arguments in support of its request for reconsideration of its claim and the Director's observations.

3.5.7 The United Kingdom delegation stated that, according to information recently received from Landcatch, the claim would be reduced to a total amount of between £750 000 and £1 million, since Landcatch had sold the fish held at a site outside the exclusion zone, thereby reducing the loss suffered as a result of the incident.

3.5.8 The United Kingdom delegation declared that it would not be appropriate for that delegation to participate in the discussion of the details of Landcatch's claim.

3.5.9 The Executive Committee held a session in private, pursuant to Rule 12 of the Rules of Procedure, to discuss the legal aspects of this claim. During this closed session, covered by paragraphs 3.5.10–3.5.12 below, only the delegations representing Fund Member States and the representative of the shipowner's P & I insurer (the Skuld Club) were present.

3.5.10 During the closed session, the Executive Committee based its discussion on the above-mentioned document presented by the Director (document FUND/EXC.40/6/Add.1) setting out Landcatch's position and the Director's analysis of the claim. The Committee examined in particular the arguments presented by Landcatch in support of its request for reconsideration, as set out in a note presented by Landcatch (document FUND/EXC.40/6/Add.1, Annex II) which dealt with the two main issues involved, namely the geographic proximity and the financial inter-dependency of Landcatch and the Shetland salmon industry. The Committee also took note of the opinion which had been

presented by the claimant's Scottish Counsel, as summarised in paragraphs 6.4–6.12 of document FUND/EXC.40/6/Add.1. The Committee considered the Director's analysis of the claim which was based on legal advice from the IOPC Fund's Scottish Counsel and other legal advisers. It took note of the Director's view, based on legal advice, that it was very unlikely that a Scottish Court would accept Landcatch's claim on the basis of the Merchant Shipping (Oil Pollution) Act 1971 and the Merchant Shipping Act 1974, the United Kingdom legislation implementing the Civil Liability Convention and the Fund Convention. The IOPC Fund's Scottish solicitor presented his views on the claim.

3.5.11 The Executive Committee took into account a number of considerations including the following. The Committee was of the opinion that the loss allegedly suffered by Landcatch could not be considered as damage to property rights. The Committee noted the arguments advanced by Landcatch that the criterion of geographic proximity must be viewed in the light of the impossibility of Shetland to meet its own requirements for smolt, due to the lack of adequate freshwater on Shetland. Nevertheless, in the Committee's view, Landcatch's smolt-rearing activity was geographically more remote from the contamination than the activities of claimants who had received compensation in the BRAER case or in previous cases. The Executive Committee did not accept that Landcatch's smolt production should be seen as a joint venture with the Shetland salmon farming industry, as maintained by Landcatch's Counsel. In the view of the Committee, Landcatch should be considered as a supplier of raw material to the Shetland salmon farming industry. Although the Executive Committee noted the point made by the claimant that Landcatch and the Shetland salmon industry were financially inter-dependent, since, according to the claimant, the group of companies to which Landcatch belonged was a major employer and supporter of the Shetland economy, the Committee did not accept that a criterion of economic inter-dependency would be an appropriate test for the admissibility of claims. In addition, the Committee took the view that Landcatch's smolt-rearing activity did not form an integral part of the economic activity of the area. It was noted that Landcatch's Counsel had argued that a test should be whether the claimant's business was so inextricably linked with an operation carried out in polluted waters that the claimant must necessarily be affected by the inability to use those waters, whether this business was affected to a significant degree and whether the claimant had any opportunity to avoid the damage. The Committee did not accept that the concept of "inextricably linked" was an appropriate criterion for admissibility. In the Committee's view, the loss could not be considered as damage caused by contamination but was due to the unwillingness of customers to conclude contracts for the purchase of smolt and to Landcatch's lack of adequate alternative markets.

3.5.12 After having re-examined the issues involved and the arguments advanced by Landcatch, the Executive Committee maintained the view that the claim presented by Landcatch did not fulfil the criteria for admissibility laid down by the Executive Committee and confirmed its decision to reject the claim.

Kinloch Damph Ltd; smolt supplier

3.5.13 It was recalled that the Committee had, at its 39th session, rejected a claim for £195 011 from Kinloch Damph Ltd, a company supplying smolt from its hatchery on mainland Scotland, for losses allegedly suffered through not being able to implement a salmon-rearing contract with a salmon farmer within the exclusion zone. It was noted that the claimant had indicated that it wished its claim to be reconsidered but that it was not yet ready to submit further information in support of its claim.

3.5.14 The Executive Committee decided that, if new information presented by the claimant were to justify it, this claim should be reconsidered at a future session.

Ettrick Trout Company Ltd

3.5.15 It was recalled that the Executive Committee had, at its 39th session, examined a claim for £2 004 867 presented by Shetland Sea Farms Ltd, a company farming salmon within the exclusion zone. It was noted that Shetland Sea Farms Ltd had contracted to purchase smolt from a smolt-producing company on mainland Scotland and that both these companies were members of a group of aquaculture companies with a common majority share holding; the smolt had eventually been sold at 50% of the purchase price to another company which was also part of the same group. It was also

noted that the group was controlled by a single individual who was a director of all the companies within the group. It was recalled that the Executive Committee had considered that, in view of the close link between the companies involved in the activity covered by the claim, it had not been shown that the group of companies had suffered any economic loss in relation to the smolt in question, and that the Committee had decided, for this reason, to reject this claim.

3.5.16 The Committee took note of the fact that the parent company in the group, Ettrick Trout Company Ltd, had submitted further documentation alleging that the group as a whole had suffered a loss as a result of the incident amounting to £1 513 020.

3.5.17 In view of the complexity of the legal and factual situation, the Executive Committee instructed the Director to investigate the various aspects of this claim and report to the Committee at a later session.

Wadbister Salmon Ltd

3.5.18 The Executive Committee considered a claim for £1 332 034 presented by Wadbister Salmon Ltd, which operates salmon farm sites on the east coast of Shetland, outside the exclusion zone, relating to loss of profit allegedly suffered as a result of not introducing salmon smolt into its farm in 1993 as planned. It was noted that the claimant had maintained that it was in the process of expanding its salmon-rearing activity at the time of the incident; an order for new equipment had to be placed in January 1993 for completion of the expansion work by the end of March 1993 in order to comply with the conditions of various grants made to the company and to ensure that space was available for the smolt intake in April/May. The Committee took note of the claimant's statement that uncertainty within the Shetland salmon industry in the aftermath of the BRAER incident and the depression in the price of salmon had led to a loss of confidence on the company's part and the decision not to confirm orders for the equipment needed, which allegedly led to this company not rearing any 1993 smolt.

3.5.19 The Executive Committee took the view that the alleged losses could not be considered as damage caused by contamination but were a result of the claimant's decision not to order the equipment as planned. The Committee decided, therefore, to reject the claim.

Shetland Marine Salmon Fisheries Ltd

3.5.20 The Executive Committee examined a claim for £25 437 presented by Shetland Marine Salmon Fisheries Ltd, a company operating a salmon farm outside the exclusion zone. It was noted that the company had alleged that it had delayed the harvest of its 1991 stock from the period of January-March 1993 to the period of May-July 1993, due to depressed prices as a result of the BRAER incident, and that it had had to purchase new cages in order to take in its 1993 smolt as normal in April/May. It was also noted that the company had claimed compensation for the costs incurred for this purchase and for additional costs associated with holding the fish for longer than planned.

3.5.21 The Executive Committee took the view that the alleged damage could not be considered as caused by contamination but was a result of the claimant's decision to delay harvesting, and decided to reject the claim.

McConnell Salmon Ltd

3.5.22 The Executive Committee considered a claim for £5 380 from McConnell Salmon Ltd, a company involved in salmon farming in western Scotland, for the cost of mobilising personnel and equipment from western Scotland to Shetland, to be available for preventive measures if the oil from the BRAER were to threaten a site located just outside the exclusion zone where the claimant's salmon were reared under contract with a Shetland based company.

3.5.23 The Executive Committee considered that under contractual arrangements of this type, the care of the fish was the primary responsibility of the company contracted to rear the fish. It was noted that the latter company (Hoganess Salmon Ltd) took reasonable measures to prevent damage and was compensated. The Committee took the view that although McConnell Salmon Ltd was the owner of the fish, the mobilisation cost could not be considered as preventive measures since the activities at least partly duplicated the efforts of Hoganess Salmon Ltd and therefore were not justified. For this reason, the Executive Committee decided that this claim should be rejected.

Wholesale Butcher

3.5.24 The Executive Committee considered a claim for £392 509 submitted by a wholesale butcher whose slaughterhouse was located in the southern part of Shetland. It was noted that in October 1992 the butcher had entered into an agreement to supply lamb to a customer in the Faroe Islands during 1993. It was also noted that in August 1993 the customer had cancelled his order for 320 tonnes of lamb that would have been supplied during September 1993.

3.5.25 The United Kingdom delegation stated that, in its view, there was a similarity between the claim under consideration and other claims for pure economic loss which had previously been accepted by the Committee.

3.5.26 The Executive Committee took the view that the order from the Faroe Islands was cancelled as a result of adverse media coverage and not because the lamb was contaminated. It considered, therefore, that the losses allegedly suffered by the claimant could not be considered as damage caused by contamination. For this reason, the Committee rejected the claim.

Farming Claim

3.5.27 The Executive Committee considered a claim for £13 500 submitted by a farmer for a contribution towards the purchase of machinery to sort, wash, dry and bag potatoes. It was noted that this farm had been contaminated as a result of the incident and that the farmer's 1992 crop of potatoes had already been harvested and was in store at the time of the incident. It was also noted that experts from the Scottish Office Agriculture and Fisheries Department had advised all farmers in the area in early 1993 to plant their crops as normal in the spring of 1993 and that in July 1993 all produce from the previously contaminated area was declared fit for human consumption.

3.5.28 The Committee noted that the claimant had stated that for 20 years prior to the incident he was the sole provider of potatoes to the only supermarket on Shetland. It was also noted that the claimant had maintained that customer resistance aggravated by adverse publicity generated by one of the farmer's neighbours in respect of produce grown in once contaminated soil had caused the supermarket to purchase potatoes from the United Kingdom mainland which were prewashed and prepacked in plastic bags to offer alternative supplies to customers. It was finally noted that the claimant had maintained that he had suffered a reduction in his income as a result of being unable to compete with the produce from the mainland and that he was confident that with the necessary machinery he would be able to regain his market share on Shetland.

3.5.29 The Executive Committee noted that this claim related to the cost of upgrading the operation of the claimant's farm in order to compete with produce from the mainland first brought to Shetland after the BRAER incident and that the supermarket had continued to buy potatoes from the mainland even after the 1993/94 years crop had been declared fit for consumption. The Committee took the view that the losses allegedly suffered by the claimant in 1994 could not be considered as damage caused by contamination. For this reason, the Executive Committee rejected the claim.

Tourism

3.5.30 The Executive Committee considered 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.

3.5.31 The Executive Committee took note of the Director's view, based on expert advice, that the Shetland tourism industry as a whole had not suffered as a result of the BRAER incident to the extent alleged by Shetland Islands Tourism and that it was unlikely that there would be any significant losses in the future caused by the BRAER incident. For this reason, the Executive Committee considered that the marketing activity proposed by Shetland Islands Tourism did not fulfil the requirements for admissibility laid down by the Executive Committee and that the IOPC Fund could therefore not make any payments in respect of these activities.

Mitigation of Loss

3.5.32 The Executive Committee considered whether income earned by a claimant as a result of an incident (such as payments for participating in clean-up operations or for assisting IOPC Fund experts) should be deducted from compensation payable to the claimant for loss of income suffered as a result of the incident.

3.5.33 The Executive Committee endorsed the Director's view that in principle income which a claimant earned in connection with an oil spill should be deducted from any compensation for loss of income to which he might be entitled. It was noted, however, that it was in the IOPC Fund's interest that individuals in the affected area assisted in the clean-up operations and other activities related to the spill. For this reason, the Executive Committee decided that the IOPC Fund should take a flexible approach and should not insist on a deduction of small amounts paid to individuals who, without acting to protect their own property or trade, take part in clean-up operations or assist the IOPC Fund in connection with an incident.

Losses Allegedly Caused As a Result of Failed Attempts at Mitigation

3.5.34 The Executive Committee was informed that a fish processing company on Shetland had indicated its intention to claim compensation for loss of income as a result of failed attempts to mitigate a loss. It was noted that the company normally sold large quantities of smoked salmon to France, the market for which collapsed in early 1993. It was also noted that the company had maintained that this collapse was due to the BRAER incident, although research carried out by the IOPC Fund's experts showed that there were other significant factors that had caused the reduced demand for smoked salmon in France at that time. The Committee took note of the fact that the company had found buyers in another European country but that they had failed to pay for the smoked salmon supplied.

3.5.35 The Executive Committee considered that the loss allegedly suffered by this potential claimant could not be considered as damage caused by contamination but was a result of normal business risks. For this reason, the Committee rejected the claim.

Professional Fees

3.5.36 The Executive Committee took note of the information concerning professional fees set out in paragraphs 12.1-12.3 of document FUND/EXC.40/6/Add.2. The Committee noted that firms giving professional advice to claimants had no contractual relationship with the IOPC Fund and that their right to fees from their clients was governed by the contractual arrangements which these firms might have with the respective clients. The Committee endorsed the Director's view that the IOPC Fund could pay compensation in respect of professional fees only to claimants who were entitled to compensation for pollution damage.

3.6 KEUMDONG N°5 Incident

3.6.1 The Executive Committee took note of the information concerning the KEUMDONG N°5 incident, set out in document FUND/EXC.40/7.

3.6.2 The Committee noted that all claims in respect of clean-up costs had been settled at an aggregate amount of Won 5 587 815 812 (£4.5 million) and had been paid by the shipowner's P & I insurer.

3.6.3 It was noted that claims had been submitted by 11 fishery co-operatives in respect of some 6 000 fishermen for a total amount of Won 93 132 million (£75 million), and that further claims would be presented, the amount of which had been indicated in the region of Won 90 000 million (£73 million). The Director informed the Committee that discussions had been held with representatives of the claimants but that so far there had been very little progress, since the assessment of the claims made by the IOPC Fund's experts differed greatly from the assessment made by the experts employed by the claimants.

3.6.4 The delegation of the Republic of Korea expressed its concern in respect of the claims relating to losses suffered by persons involved in fishing and aquaculture. The Korean delegation stated that it was difficult for these victims to argue their case since the IOPC Fund did not have a Local Claims Office in Korea.

3.6.5 The Director stated that he shared the Korean delegation's concerns as regards the limited progress in respect of the fishery claims. He explained that these claims were very complicated. He suggested that discussions should be held between the Korean delegation and himself in order to find ways to improve the claims handling procedure, both in the KEUMDONG N°5 case and in any future Korean cases. He also stated that in the KEUMDONG N°5 case a local surveyor firm fulfilled to a large extent a role corresponding to that of a Local Claims Office and that, in any event, any decisions as to the approval of claims were taken by the Director.

3.6.6 It was recalled that the Director had informed the Executive Committee at its 38th session 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. It was noted that the Committee had endorsed the Director's position and instructed him to consider whether this percentage should be adjusted, in the light of developments (document FUND/EXC.38/9, paragraph 3.6.5). The Director stated that, when the IOPC Fund would be called upon to make payments, he would reconsider whether this percentage should be adjusted.

3.7 Certain Incidents of Particular Interest

3.7.1 The Executive Committee took note of the information regarding the PATMOS, VISTABELLA, AGIP ABRUZZO, TAIKO MARU, ILIAD and SEKI incidents contained in document FUND/EXC.40/8.

3.7.2 With regard to the AGIP ABRUZZO incident, the Executive Committee noted that the shipowner's P & I insurer (the Skuld Club) had requested that the IOPC Fund should waive the requirement to establish the limitation fund. It was also noted that the IOPC Fund's involvement in the case was limited to the payment of indemnification. For this reason, and in view of the legal problems encountered by the P & I insurer in its attempt to establish the limitation fund, the Committee decided, as an exception, to waive the requirement to establish the limitation fund and endorsed the Director's proposal that the point of the IOPC Fund's intervention under Article 5.1(a) of the Fund Convention should be calculated on the basis of the rate of the Italian Lira vis-à-vis the SDR on 18 October 1994.

3.7.3 It was recalled that the Executive Committee had, at its 32nd session, authorised the Director to take recourse action against the owner of the other ship involved in the collision (the MOBY PRINCE) to recover any amount paid by the IOPC Fund as a result of the incident. It was noted that the Director had been instructed to submit to the Committee for consideration the question of whether recourse actions should be pursued, even if he were to find that the amount which the IOPC Fund might recover would be comparatively low (document FUND/EXC.32/8, paragraph 3.2.4).

3.7.4 It was noted that the Skuld Club had started recourse action against the owner of the MOBY PRINCE and that the IOPC Fund had intervened in these proceedings to protect its interests. The Executive Committee decided that, since the IOPC Fund might recover only a low amount, the Fund should not pursue its action in the recourse proceedings.

3.7.5 The Executive Committee noted that all claims arising out of the TAIKO MARU incident had been settled and paid within just over ten months of the incident for a total of ¥1 122 390 175 (£7.6 million).

3.8 Incidents with Developments of Lesser Importance

The Executive Committee decided to postpone its consideration of these incidents to its 41st session.

3.9 TOYOTAKA MARU Incident

The Director informed the Executive Committee of the TOYOTAKA MARU incident which had occurred in Japan on 17 October 1994 and which was likely to give rise to significant claims for compensation.

4 Date of Next Session

The Executive Committee decided to hold its 41st session on Friday 21 October 1994, the exact time to be announced later.

5 Any Other Business

No matters were raised under this agenda item.

6 Adoption of the Report to the Assembly

The draft report of the Executive Committee to the Assembly, as contained in documents FUND/EXC.40/WP.1 and FUND/EXC.40/WP.1/Add.1, was adopted, subject to certain amendments.