



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
42nd session
Agenda item 6

FUND/EXC.42/11
11 April 1995

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RECORD OF DECISIONS OF THE FORTY-SECOND SESSION OF THE EXECUTIVE COMMITTEE

(held on 10 and 11 April 1995)

Chairman: Mr C Coppolani (France)

Vice-Chairman: Mrs C Asseng-Nguele (Cameroon)

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document FUND/EXC.42/1.

2 Examination of Credentials

2.1 The following members of the Executive Committee were present:

Algeria
Cameroon
France
Greece
Italy

Japan
Liberia
Mexico
Norway
Republic of Korea

Sweden
United Arab Emirates
United Kingdom

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

2.2 The following Contracting States were represented as observers:

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| Barbados | Netherlands |
| Belgium | Poland |
| Canada | Russian Federation |
| Cyprus | Slovenia |
| Finland | Spain |
| Germany | Syrian Arab Republic |
| Indonesia | Venezuela |
| Malaysia | |

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

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| Chile | Panama |
| China | Saudi Arabia |
| Ecuador | United States |
| Jamaica | |

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

International Maritime Organization (IMO)
 Comité Maritime International (CMI)
 CRISTAL Limited
 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 Rio Orinoco incident

3.1.1 The Director introduced document FUND/EXC.42/2 which dealt with two questions, viz whether the IOPC Fund should take legal action against the shipowner's P & I insurer (Sveriges Ångfartygs Assurans Förening, the "Swedish Club") in Sweden to recover any amounts paid by the Fund in compensation, and whether the Fund was exonerated from its obligation to indemnify the shipowner and his insurer for a portion of the limitation amount prescribed in Article V.1 of the Civil Liability Convention.

3.1.2 It was recalled that the Executive Committee had decided, at its 40th session, that the IOPC Fund should not pursue its legal action against the company managing the *Rio Orinoco*, nor against the individual directors of that company. It was further recalled that the Committee had noted that, according to legal advice, the "pay to be paid" rule (ie that the Club was under an obligation to indemnify the shipowner only for any amount actually paid to the injured party) 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, and that for this reason, the Committee had decided that the action taken in Canada against the shipowner should be pursued only to the extent required to preserve for the Fund the possibility of taking action against the Swedish Club in Sweden. It was noted that the Director had expressed the 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. It was also noted that, for that reason, the Director had not been in favour of pursuing an "oblique action" in Canada against the Swedish Club, nor of taking action against the Swedish Club in Sweden. The Committee recalled that it had nevertheless considered that further consideration should be given to the possibility of the IOPC Fund taking legal action against the Swedish Club in Sweden (document FUND/EXC.40/10, paragraphs 3.2.5 and 3.2.6).

3.1.3 The Director informed the Executive Committee that he had, as instructed by the Committee at its 40th session, sought further legal advice from a leading Swedish legal expert in this field. The Committee took note of the opinion of this expert, as set out in paragraph 8.2 of document FUND/EXC.42/2.

3.1.4 The Committee took the view that the policy of the IOPC Fund was to take recourse action whenever appropriate and that the Fund should in each case consider whether it would be possible to recover any amounts paid by it to victims from the shipowner or from other parties on the basis of the applicable national law. It was stated that if matters of principle were involved, the question of costs should not be the decisive factor for the Fund when considering whether to take legal action. The IOPC Fund's decision of whether or not to take such action should, in the Committee's view, be made on a case by case basis, in the light of the prospect of success within the legal system in question.

3.1.5 The Executive Committee agreed with the Director's conclusion that in the *Rio Orinoco* case, on the basis of the advice received, it was unlikely that the Swedish Courts would set aside the "pay to be paid" rule in the Swedish Club Rules. For this reason, the Committee decided that the IOPC Fund should not take legal action against the Swedish Club in Sweden.

3.1.6 The Executive Committee examined, on the basis of the information contained in paragraph 10 of document FUND/EXC.42/2, 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.

3.1.7 The Executive Committee took the view that, as a result of the fault or privity of the shipowner, the *Rio Orinoco* did not comply with certain requirements relating to the maintenance of ships laid down in Chapter I, Regulation 11 of the International Convention for the Safety of Life at Sea, 1974, as modified by the 1978 Protocol thereto, and that the incident and the ensuing pollution damage was wholly caused by this non-compliance. For this reason, the Committee decided that, pursuant to Article 5.3 of the Fund Convention, the IOPC Fund was wholly exonerated from its obligation to pay indemnification to the shipowner and his insurer.

3.2 Haven incident

Question of time-bar

3.2.1 The Executive Committee recalled the discussions at its 40th session concerning the question of whether the majority of the claims arising out of the *Haven* incident were time-barred vis-à-vis the IOPC Fund (cf document FUND/EXC.40/10, paragraphs 3.3.4 and 3.3.7-3.3.14). It was also recalled 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. It was noted that the Committee had taken the view 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, in the light of the provisions of Article VIII of the Civil Liability Convention and Article 6.1 of the Fund Convention (document FUND/EXC.40/10, paragraphs 3.3.4 and 3.3.8).

3.2.2 The Executive Committee recalled the concerns expressed at its 40th session by a number of delegations that this situation had arisen, since the IOPC Fund had as its purpose to pay compensation to victims of pollution damage. It was also recalled that the Committee had drawn attention to the fact that the situation was due to the complex legal proceedings in Italy resulting from certain claimants maintaining that the IOPC Fund's maximum cover should be calculated 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 noted at that session 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 (document FUND/EXC.40/10, paragraph 3.3.9).

3.2.3 The Committee noted the positions expressed at its 40th session by the Japanese and Italian delegations (document FUND/EXC.40/10, paragraphs 3.3.10 and 3.3.11).

3.2.4 The Italian delegation introduced document FUND/EXC.42/3/1 in which it set out the position of the Italian Government vis-à-vis the time-bar issue. It was noted that, for the reasons set out in that document, the Italian Government took the view that the claims were not time-barred, in particular since the IOPC Fund had intervened in the limitation proceedings, that the Fund had knowledge of these proceedings and that it was therefore not necessary to inform the Fund of these proceedings since the Fund was already a party thereto. The Italian delegation also pointed out in the document that some parties had notified the IOPC Fund formally of these proceedings and that it was not necessary under Article 7.6 of the Fund Convention for each party to notify the Fund thereof. In the document this delegation expressed the view that notification made by one party was sufficient for the IOPC Fund to obtain knowledge of the proceedings.

3.2.5 The Italian delegation supported the Executive Committee's decision at its 40th session to instruct the Director to continue negotiations. In the view of that delegation, however, the mandate given to the Director was too restrictive. It was maintained that a global solution would be possible only if all parties were prepared to make mutual concessions. The Italian delegation stated that it was in favour of continuing the negotiations and took the view that the instructions to the Director should be more flexible than those given by the Executive Committee at its 40th session (document FUND/EXC.40/10, paragraph 3.3.12), so as to facilitate progress towards a global settlement.

3.2.6 The Japanese delegation introduced document FUND/EXC.42/3/2 setting out the Japanese Government's position on the issue of time-bar. This delegation stated that if the claimant did not observe the provisions in Article 6.1 of the Fund Convention to bring legal action against the IOPC Fund or to notify the Fund within three years of the date of the damage, his right to compensation was extinguished. This delegation drew attention to the difference between normal "prescription" or limitation of action of a claim, where it was for the debtor to decide whether or not to invoke the time-bar, and extinction of rights, which resulted in the right of compensation ceasing to exist. The Japanese delegation maintained that the provisions in Article 6.1 of the Fund Convention were of a special type having a strict interpretation and that if the claimant did not take the prescribed steps before the expiry of the three-year period, there was no right to compensation from the Fund. In the view of the Japanese delegation, any payment made by the IOPC Fund to such claimants could not be based on the Fund Convention. It was emphasised that since the obligation for the contributors to pay contributions was based on the Convention, there was consequently no obligation to pay contributions towards claims which were time-barred.

3.2.7 The Executive Committee took note of the positions indicated by the Italian and Japanese delegations.

Negotiations with claimants

3.2.8 It was recalled that at its 40th session, while convinced of the legal validity of the IOPC Fund's position in respect of the time-bar issue, the Executive Committee had nevertheless recognised that the on-going legal proceedings in Italy gave rise to some uncertainty as regards the final outcome of this issue. It was also recalled that, for this reason, and conscious of the desirability of victims of pollution damage being compensated, the Committee had 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. It was noted that the Committee had emphasised that any such solution must respect the following conditions (document FUND/EXC.40/10, paragraph 3.3.12):

- (i) the maximum amount 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.

3.2.9 It was noted that the Executive Committee had decided that any agreement relating to a global settlement would have to be approved by the Committee (document FUND/EXC.40/10, paragraph 3.3.16).

3.2.10 The Director reported on the developments of the negotiations with the claimants, as set out in documents FUND/EXC.42/3 and FUND/EXC.42/3/Add.1. The Committee noted that agreements had been reached between the shipowner and the P & I insurer (the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd, the UK Club) and 168 claimants on the admissible quantum of their claims, for a total amount of LIt 8 860 million (£3.3 million), and that offers had been made to a further 286 claimants for a total amount of LIt 1 940 million (£720 000). It was further noted that these agreements contained a provision to the effect that the agreements would become null and void unless the amounts agreed were paid within six months of the signing of the respective agreements (ie in August or September 1995).

3.2.11 The Executive Committee took note of the fact that the IOPC Fund's lawyers had followed the negotiations, and that the Director had been consulted by the shipowner and the UK Club before any agreements or offers on quantum were made. The Committee noted that, in the Director's view, all claims in respect of which agreements had been reached or offers had been made fulfilled the criteria for admissibility laid down by the Executive Committee, in particular at its 35th session (document FUND/EXC.35/10, paragraphs 3.2.3-3.2.9). It was also noted that, in the Director's view, the amounts agreed or offered were reasonable and that, if the IOPC Fund had not raised the defence of time-bar, the Director would have recommended that these claims be accepted by the Executive Committee in the amounts agreed or offered.

3.2.12 The Committee expressed its satisfaction with the progress made in the negotiations.

3.2.13 The Executive Committee decided to instruct the Director to continue the negotiations with all the parties concerned for the purpose of arriving at a global solution of all outstanding claims and issues, in accordance with the mandate laid down by the Committee at its 40th session. The Committee reiterated its position that the negotiations should be without prejudice to the IOPC Fund's position in respect of the time-bar. The Committee emphasised that any global solution must respect the position taken by the IOPC Fund that the maximum amount available under the Civil Liability Convention and the Fund Convention was 60 million SDR, that claims could only be admissible if a claimant had suffered a quantifiable economic loss and that claims for damage to the marine environment *per se* were not admissible.

3.2.14 The Executive Committee decided to set up a Consultation Group to assist the Chairman in his monitoring of the Director's search for a global solution. The Committee appointed the delegations of Algeria, Japan, Norway and the United Kingdom as members of the Consultation Group.

3.2.15 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.

3.2.16 The Director was instructed to report on the developments of these negotiations to the Executive Committee at its 43rd session. The Committee emphasised the importance that substantial progress should be made by that session so as to give the Committee the possibility of assessing whether a global solution was possible.

3.2.17 The Committee confirmed the position taken at its 40th session that any agreement relating to a global settlement would have to be approved by the Committee.

3.2.18 The observer delegation of the International Group of P & I Clubs welcomed the Executive Committee's decision to pursue the negotiations with the claimants and stated that the shipowner and P & I Club concerned would seek to play their part in the search for a global settlement.

Criticism of the IOPC Fund's position in legal proceedings in Italy

3.2.19 The Director informed the Executive Committee that criticism had been expressed in the media of the position taken by the IOPC Fund in the legal proceedings in Italy. It was recalled that the IOPC Fund had lodged opposition to the decision of the Court of first instance in Genoa to open the limitation proceedings, challenging the right of the shipowner (Venha Maritime Ltd) to limit his liability, and that corresponding oppositions had been lodged by the Italian Government and some other claimants. It was also recalled that the IOPC Fund had taken legal action against three companies within the Troodos Shipping Group managing the *Haven* as well as against the individual controlling these companies, for the purpose of recovering any amount that the Fund might have to pay in compensation or indemnification as a result of this incident.

3.2.20 The Chairman stated that the Director had kept him informed of the legal actions taken by the IOPC Fund referred to in paragraph 3.2.19 above and that he had taken the view that these actions were in line with the policy adopted by the Executive Committee.

3.2.21 The Director referred to the position taken at its 40th session in relation to the *Rio Orinoco* incident that it was 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 (document FUND/EXC.40/10, paragraph 3.2.6). It was noted that the IOPC Fund had in previous cases taken recourse action against persons other than the registered owner of the ship in question to recover the amounts paid by the Fund in compensation and indemnification. It was also noted that the Civil Liability Convention governed only the liability of the registered owner, that the protection in the form of channelling given by the Civil Liability Convention covered only the registered owner (and his servants or agents), and that the liability for oil pollution damage for any other person was governed by the applicable national law.

3.2.22 The Executive Committee took note of the information given by the Director on the Fund's action to challenge the shipowner's right of limitation and of its recourse action against persons other than the registered owner. The Director was instructed to submit a document to a future session of the Executive Committee giving details of these actions in the *Haven* case.

3.2.23 The observer delegation of the International Group of P & I Clubs stated that the Club concerned saw differences between the recourse action taken in the *Haven* case and that taken in previous cases such as the *Rio Orinoco* or *Tanio*. However, this delegation did not feel it appropriate to comment in detail at this session.

3.3 *Aegean Sea incident*

General claims situation

3.3.1 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 paragraph 4 of document FUND/EXC.42/4.

3.3.2 The Spanish delegation, speaking in its capacity of observer, expressed its appreciation of the IOPC Fund's efforts to obtain supporting evidence of losses suffered and to reach settlements with the claimants. This delegation stated that the Spanish Government would continue to assist the claimants and the Fund in order to facilitate settlements. It was emphasised that it was important that priority was given to the claims relating to boat fishing and shellfish harvesting, since the claimants in this category were those most severely affected by the incident.

Social security payments

3.3.3 The Executive Committee examined claims submitted by two Spanish public bodies responsible for making unemployment benefit payments in the amounts of Pts 9 509 770 (£46 400) and Pts 6 896 323 (£33 600) to people 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.

3.3.4 It was noted that, at its 41st session, the Committee had rejected the claims referred to in paragraph 3.3.3 (document FUND/EXC.41/2, paragraphs 4.1.6-4.1.8). It was recalled that the Committee had drawn attention to the fact that it had previously rejected claims for loss of income suffered by persons who had been made redundant and that the Committee had taken the view that public bodies which pay unemployment benefits could not be given a more favourable position vis-à-vis the IOPC Fund than people who had been made redundant.

3.3.5 The Committee also considered a claim presented by one of the public bodies referred to in paragraph 3.3.3 in the amount of Pts 38 184 756 (£186 300) 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.

3.3.6 The Spanish delegation, speaking in its capacity of observer, referred to the information set out in paragraphs 5.7.1-5.7.7 of document FUND/EXC.42/4. This delegation expressed the view that the social security payments should be considered as costs of preventive measures. The delegation emphasised that the payments under consideration were not social security payments in the normal sense but payments in the context of temporary suspension of employment contracts and not for redundancies. It was also pointed out that the measures were taken to prevent or minimise pure economic loss, such as bankruptcies, redundancy of employees and payment of significant amounts of compensation to such employees.

3.3.7 As regards the claims referred to in paragraph 3.3.3, the Executive Committee maintained its previous decision to reject these claims, for the reason set out in paragraph 3.3.4.

3.3.8 With respect to the claim referred to in paragraph 3.3.5 relating to contributions to the Social Security System, the Executive Committee took the view that these payments could not be considered as preventive measures. The Committee decided, therefore, to reject the claim.

Promotion of fish products

3.3.9 The Executive Committee considered a claim submitted by the Regional Government (Xunta) of Galicia for Pts 30 million (£146 300) relating to the cost of a campaign for the promotion of Galician fish products. It was noted that the promotion had consisted of an announcement of some 20 seconds on the national and local radio, as well as the publication of an announcement in the national, regional and local press.

3.3.10 The Spanish delegation did not entirely agree with the Director's conclusions in paragraph 5.16 and 5.17 of document FUND/EXC.42/4. This delegation maintained that it was evident that the incident had resulted in negative publicity for fish products from Galicia, that the promotion was carried out to counteract this negative publicity, that the promotion was reasonable, that the costs were proportionate to the damage and that the activity had reasonable prospects of being successful. In the view of this delegation, the following observations should be taken into account:

- (a) It was obvious that had the *Aegean Sea* incident not occurred, there would not have been any need for the promotion of Galician fish products.
- (b) This incident resulted without any doubt in huge economic losses in the region, not only in the polluted areas.
- (c) The claim under consideration met the applicable requirements for admissibility:

- (i) The cost for the promotion should be considered reasonable and not disproportionate to the losses and damage caused. The promotion costs corresponded to about 0.15% of the total amount of the claim presented in court.
- (ii) The promotional activity was appropriate and had a reasonable prospect of being successful.
- (iii) The promotional activity did not relate to actual targeted markets, since it was neither a marketing campaign nor a promotion of a general nature. It was a promotional activity for the specific purpose of alleviating the damage and loss suffered in Galician fishing activity as a consequence of the incident.

3.3.11 The Executive Committee recalled the IOPC Fund's position on the question of whether costs of activities to prevent or minimise pure economic loss were admissible under the Civil Liability Convention and the Fund Convention, inter alia that the cost of marketing campaigns or similar activities was admissible only if the measures taken related to actual targeted markets. It was noted that measures of too general a nature did not qualify for compensation (document FUND/A.17/23, Annex, paragraphs 2.6.2-2.6.4).

3.3.12 The Executive Committee took the view that the promotion activities carried out by the Fisheries Council of Galicia were of too general a nature. For this reason, the Committee decided to reject this claim.

Court proceedings in La Coruña

3.3.13 The Executive Committee took note of the situation in the court proceedings in La Coruña, as set out in paragraph 7 of document FUND/EXC.42/4.

3.3.14 It was noted that claims for compensation were being pursued against the IOPC Fund in criminal proceedings and that further claims were likely to be brought against the Fund in civil proceedings at a later stage. It was also noted that the claims presented in the criminal proceedings exceeded the maximum amount of compensation available under the Civil Liability Convention and the Fund Convention.

3.3.15 The Executive Committee shared the concerns expressed by the Director that, if the total amount of the claims established by the courts were to exceed the maximum amount available, it might be difficult for the respective courts to ensure that the provisions of the Civil Liability Convention and the Fund Convention relating to equal treatment of claimants would be respected.

3.4 Braer incident

General claims situation

3.4.1 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 document FUND/EXC.42/5.

Wholesale butcher

3.4.2 The Committee recalled that, at its 40th session, it had considered a claim for £392 509 submitted by a wholesale butcher whose slaughterhouse was located in the southern part of Shetland. It was recalled also that in October 1992 the butcher had entered into an agreement to supply lamb to a customer in the Faroe Islands during 1993, but that in August 1993 the customer had cancelled his order for 320 tonnes of lamb that would have been supplied during September 1993. It was noted that the Committee had taken 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 was further noted that the Committee had therefore considered that the losses allegedly suffered by the claimant could not be considered as damage caused by contamination, and that the Committee had, for this reason, rejected the claim (document FUND/EXC.40/10, paragraph 3.5.26).

3.4.3 The Committee noted that the land where the ewes and lambs in question were grazing had been contaminated by the oil emanating from the *Braer*. It was also noted that the contract between the butcher and the customer on the Faroe Islands contained a clause to the effect that "all lamb must have been born reared and grazed on the clean and unpolluted grazing in the Shetland Islands". The Committee took note of the fact that this short contract included a specific reference to "unpolluted grazing". The Committee noted that the buyer had confirmed that he cancelled the order since, in his view, the Shetland lamb had been contaminated. It was noted that the butcher could not fulfill the order by providing his customer with lamb from outside Shetland, since the contract specifically provided that the lamb should have been born, reared and grazed in the Shetland Islands. It was also noted that the quantity of the order (up to 320 tonnes) corresponds to some 20 000 lambs, and that this quantity could not be obtained from the uncontaminated part of Shetland. It was further noted that at the time of the incident the butcher did not own the lambs to be delivered to his buyer, but would have bought them from local farmers during the period of slaughter, ie late summer and autumn of 1993, and that the claim related, therefore, to pure economic loss. It was recalled that the IOPC Fund had accepted as admissible claims for losses suffered by fishermen as a result of the reduction in the price of whitefish caught outside the exclusion zone, although the fishermen did not own the fish and that in addition this fish was not contaminated.

3.4.4 The Executive Committee took note of the fact that at the time of the *Braer* incident the butcher had a customer who was prepared to buy lambs which he would have slaughtered on condition that the lambs fulfilled certain conditions, that as a result of the pollution the lambs in question did not fulfill these conditions and that for this reason the sale did not materialise. The Committee took the view that, in the light of the very particular circumstances in this case, this claim was in principle admissible. The Director was instructed to examine whether the butcher could have mitigated his loss and to examine in detail the amount of loss sustained.

Ettrick Trout Co Ltd and Shetland Sea Farms Ltd

3.4.5 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 also belonged to 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 (document FUND/EXC.39/8, paragraph 3.3.23).

3.4.6 It was further recalled that the Committee had, at its 40th session, taken note of the fact that the parent company in the group, Ettrick Trout Company Ltd, had submitted further documentation alleging that the group of companies as a whole had suffered a loss as a result of the incident amounting to £1 513 020.

3.4.7 The Committee noted that, since its 40th session, the Director had examined further the claim under consideration with the assistance of the IOPC Fund's lawyer and experts. It was recognised that the legal and factual situation was very complex, and that there were still a number of uncertainties which had to be examined in order to enable the Director to make a proper assessment of the claim.

3.4.8 The Executive Committee noted that, in the Director's view, the activities of Shetland Sea Farms Ltd formed an integral part of the economic activity of the area affected by the *Braer* incident and that economic loss suffered by that company as a result of the contamination caused by the *Braer* incident was therefore in principle admissible for compensation. The Committee emphasised that Shetland Sea Farms Ltd, as any other claimant, had an obligation to mitigate its loss. The Committee shared the Director's view that, in the particular circumstances of this case, account should also be taken of any benefits derived by other companies in the same group, consequent upon that obligation.

3.4.9 The Executive Committee endorsed the Director's proposal that he be authorised to enter into negotiations with Shetland Sea Farms Ltd and to settle this claim on the basis of the criteria set out in paragraph 3.4.8.

Constitution of limitation fund

3.4.10 The Executive Committee noted that neither the shipowner nor the P & I insurer had yet constituted a limitation fund. It was also noted that, under Article V.3 of the 1969 Civil Liability Convention, the establishment of the limitation fund was a condition for the shipowner's right to limit his liability.

3.4.11 The Director stated that in his discussions with the P & I insurer it had been considered that it would be beneficial to all parties involved if the limitation fund were not set up at an early stage, since there was a considerable risk that once the limitation fund had been established claimants would bring legal action against the shipowner/P & I Club and the IOPC Fund. He emphasised that there was no question of the shipowner being exempt from his obligation in this respect and that it was only a matter of when the fund would be constituted. The Director also mentioned that if neither the shipowner nor the P & I insurer were to establish a limitation fund, the shipowner would have unlimited liability.

3.5 Seki incident

3.5.1 The Executive Committee took note of the information concerning the *Seki* incident, set out in document FUND/EXC.42/6 presented by the Director.

3.5.2 The delegation of the United Arab Emirates presented the position of its Government, as contained in document FUND/EXC.42/6/1. This delegation stated that the clean-up operations had been carried out far too slowly and too late. It was maintained that fishing gear of considerable value was destroyed or lost and that the fishing industry, fishermen and fish traders had suffered substantial losses. It was maintained also that attempts to sell even small quantities of fish caught on the east coast of the United Arab Emirates had been unsuccessful because of buyer resistance. It was stated that the claims submitted by fishermen, totalling US\$13.5 million (£8.6 million), had been carefully examined by an independent assessment committee appointed by the Government, composed of representatives of the Ministries of fishery, health and environment, the Coast Guard, municipalities and fishery co-operatives, and that this committee had, after careful consideration, assessed the claims at a little over US\$10 million (£6.4 million). This delegation maintained that the Britannia P & I Club and the IOPC Fund had nevertheless decided on a payment of less than US\$1.8 million (£1.2 million), based on certain irrelevant, unrealistic arbitrary assumptions which were not valid and which were contrary to the specific circumstances of the region.

3.5.3 It was maintained by the delegation of the United Arab Emirates that the present claim settlement procedure was inconsistent with the objectives of the Conventions, ie to ensure compensation to victims of oil pollution incidents, and that the victims had to wait and struggle bitterly with the insurers and the IOPC Fund to recover their losses. This delegation was of the view that the Conventions should be applied constructively, bearing in mind the interests of claimants, that the IOPC Fund should ensure payment of compensation and not resist such payment, and that the IOPC Fund should establish an appropriate prompt mechanism for the assessment and settlement of claims.

3.5.4 The Chairman stated that he had been continually kept informed by the Director of the developments of this case and was in agreement with the approach taken by the Director in respect of the claims handling.

3.5.5 The Executive Committee noted the procedures used by the Government of Fujairah for the presentation of claims. It also took note of the difficulties encountered by the IOPC Fund in the assessment of the claims.

3.5.6 The Committee recalled the position taken by the 7th Intersessional Working Group in respect of the establishment of the quantum of losses sustained by a claimant, which had been endorsed by the Assembly at its 17th session (document FUND/A.17.23, paragraph 7.2.33) which reads:

The Working Group endorsed the policy followed by the IOPC Fund that a claimant had to substantiate his loss. It was recognised, however, that in many countries, in particular in developing countries, it would be very difficult and sometimes impossible for claimants to *present appropriate documentation to substantiate their claims*. The Working Group took the view that the requirements as to supporting documentation would have to be adapted to what could reasonably be expected of a claimant in the country concerned.

3.5.7 The Executive Committee noted that the claims had been assessed by a fisheries sub-committee, composed of representatives of the UAE Ministry of Agriculture and Fisheries, the UAE Federal Environmental Agency, the UAE Coast and Border Guard, the Fujairah, Dibba and Sharjah Municipalities and representatives of the fishery co-operatives of Fujairah and Dibba. It was also noted that the fisheries sub-committee had explained briefly, in its report, how the amount assessed, viz Dhs 36.9 million (£6.3 million), had been calculated. It was further noted that, at a meeting with the IOPC Fund's fishery experts held in February 1995, the fisheries sub-committee had given further explanation on the method of assessment used and that some further explanations on the method used for assessing the period of fishing interruption had been given by the Government's lawyer in a recent letter to the Director. It was also noted that no formal records had been produced in respect of damage to or loss of fishing gear. The Committee took note of the fact that the amount assessed by the sub-committee and the assessment made by the experts appointed by the IOPC Fund and the Britannia P & I Club differed greatly and that the analysis of the experts took as a basis the most likely level of losses actually suffered according to the data available to them.

3.5.8 The Committee noted that the individual fishermen concerned did not have accounts or tax returns to support their claims. The Committee also accepted that the published fishery statistics were not entirely accurate and that the sales records available did not give a correct picture of the normal income of the fishermen in the area. It was noted that the experts employed by the Britannia P & I Club and the IOPC Fund had nevertheless expressed the opinion that the amount assessed by the sub-committee was not supported by the facts, neither as regards the catches nor as regards the affected area, and that the experts had taken the view that the sub-committee's assessment of the alleged damage to fishing gear was unrealistically high.

3.5.9 In the discussion, a number of delegations expressed their sympathy for the victims of the *Seki* incident. Many delegations stated that the IOPC Fund should maintain its policy of compensating victims of oil pollution damage for the loss or damage actually suffered as promptly as possible. A number of delegations emphasised that compensation was only payable under the Civil Liability Convention and the Fund Convention in respect of damage or loss actually suffered by the individual claimant and that the claimant had an obligation to prove the quantum of his loss or damage. It was stated that it was also necessary that the IOPC Fund took a flexible approach in its application of the requirement that the claimant *would have to substantiate his loss* and that account should be taken of the local situation and the possibilities for the claimant to produce evidence. It was emphasised, however, that the loss or damage had to be proven. One delegation stated that the requirement for accepting claims should be "no evidence, no pay".

3.5.10 The Executive Committee took note of the fact that the Government of Fujairah had claimed compensation for fees totalling Dhs 1 363 386 (£233 000) incurred for professional advice given by various law firms in the United Arab Emirates, the United Kingdom and the United States. The Committee noted that, in his discussions with the Government, the Director had referred to the decision concerning professional fees taken by the Committee, at its 37th session, that reasonable fees for work done would be considered, but that fees would not be paid on a contingency or percentage basis. The Committee recalled its position 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 (document FUND/EXC.37/3, paragraph 4.2.21).

3.5.11 In conclusion, the Executive Committee reiterated the IOPC Fund's position that a claim was admissible only to the extent that the quantum of the loss actually suffered was demonstrated. The Committee accepted, however, that a certain flexibility would have to be exercised as regards the

application of the requirement of proof to be submitted by a claimant in order to demonstrate the quantum of his loss, taking into account the particular situation of the country concerned and in accordance with the conclusions of the 7th Intersessional Working Group. In the view of the Committee, it was necessary to investigate all possible elements of proof available, which would not be limited to accounts or taxation documents. The Committee took the view that the findings of a government committee or similar body could not be considered as proof in itself, but was an element which should be taken into consideration for the assessment of the loss suffered. The Committee stated that other elements should be taken into account, including statistics relating to the level of catches in previous years and to the income of fishermen during previous years in the area under consideration. It was emphasised that it was necessary that the IOPC Fund's experts were given the possibility of forming an independent opinion of the quantum of the losses actually suffered.

3.5.12 The Executive Committee took the view that the same considerations as those set out in paragraph 3.5.11 should be applied in respect of damage to or loss of property, and that the losses suffered should be established taking into account elements of proof other than the findings of the government sub-committee.

3.5.13 As regards the claim for professional fees, the Executive Committee took the view that it was necessary that such claims were accompanied by a detailed description of the work carried out, so as to give the Director the possibility of examining whether the fees were admissible, ie whether the work was useful and necessary for the presentation of claims which fell within the scope of the application of the Conventions, whether the lawyers used had the necessary expertise and whether there was any duplication of work.

3.5.14 In the light of the discussions, the Executive Committee decided to instruct the IOPC Fund's experts to search, in co-operation with the authorities of Fujairah, for all evidence and elements of proof available, whether statistics, regional studies or declarations of various kinds made in previous years. It was emphasised that it was particularly important to establish by all possible means the existence and duration of any interruption of fishing, as well as the reaction of the market for locally caught fish following the incident. The experts were also instructed to establish whether, in the light of these elements, it would be possible to make an individual evaluation of the damage actually suffered by individual claimants other than on the basis of a simple declaration made by the claimants or by other organisations; if such an individual assessment was not possible, the experts should examine whether or not it would be possible to make an assessment of the losses suffered by groups of fishermen.

3.5.15 The Executive Committee stated that it was necessary that the IOPC Fund's experts and the representatives of the Government fisheries sub-committee met in order to try to reduce the differences between their positions and to give the Fund's experts sufficient documents to enable them to explain to the Director and the Executive Committee the reasons for the remaining difference between these positions.

3.5.16 The Executive Committee instructed the Director to report to the Committee at its 43rd session whether progress had been made which would permit a total or partial settlement of the fishery claims. The Committee noted that, if sufficient progress had been made, it would at that session be called upon to approve the claims wholly or partially and authorise payment. It was also decided that if sufficient progress had not been reached by the 43rd session, the matter would have to be referred to the 44th session, to be held in October 1995.

3.5.17 The delegation of the United Arab Emirates stated that the authorities of Fujairah were prepared to continue to co-operate with the IOPC Fund and its experts for the purpose of reaching an equitable settlement of the claims and to provide the Fund with all documents available, to the extent that these documents had not already been submitted.

3.5.18 The Director stated that he would consider whether the IOPC Fund's team of experts could be strengthened so as to facilitate the examination of the claims.

3.6 Toyotaka Maru incident

The Executive Committee took note of the information concerning the *Toyotaka Maru* incident, set out in document FUND/EXC.42/7.

3.7 Other incidents

3.7.1 The Director informed the Executive Committee of the *Hoyo Maru* incident, which had taken place in Japan on 31 October 1995, and of the *Sung Il N°1* incident which had occurred in the Republic of Korea on 8 November 1994.

3.7.2 The Director mentioned that the IOPC Fund had been notified of an oil spill which had occurred in Morocco on 1 December 1994 but that it had not been established that the oil emanated from a laden tanker.

4 Revision of Claims Manual

4.1 The Director introduced document FUND/EXC.42/8 which contained in the Annex a text of the draft Claims Manual prepared by him, as instructed by the Assembly at its 17th session. It was noted that this draft text had been expanded in comparison with previous editions of the Manual to include a section on the admissibility of claims and that this section was based on the report of the 7th Intersessional Working Group.

4.2 The Executive Committee postponed its consideration of the text of the draft Claims Manual to a future session.

4.3 The Committee invited Member States to submit comments in writing on the draft Claims Manual, to reach the Secretariat by 15 May 1995.

5 Any other business

5.1 Investment with Baring Brothers & Co Ltd

5.1.1 The Director introduced document FUND/EXC.42/9 concerning the IOPC Fund's fixed-term deposit held with Baring Brothers and Co Ltd in February 1995 when that merchant bank had ceased trading.

5.1.2 The Executive Committee noted with satisfaction that it was anticipated that the IOPC Fund would recover the total amount of the principal of the deposit (£2 million), maturing on 21 June 1995, together with interest.

5.2 Prospects for the entry into force of the 1992 Protocols amending the 1969 Civil Liability Convention and the 1971 Fund Convention

5.2.1 The Executive Committee took note of the information contained in document FUND/EXC.42/10 concerning the prospects for the entry into force of the 1992 Protocols Amending the 1969 Civil Liability Convention and the 1971 Fund Convention. It was noted that, on the basis of the information available, the Director envisaged that the requirements for the entry into force of the 1992 Protocols would be fulfilled by the end of June 1995 and that the Protocols would therefore enter into force towards the end of June 1996.

5.2.2 The Spanish delegation informed the Committee that it was expected that Spain would ratify the 1992 Protocols within a few weeks. The Greek delegation stated that the procedures for ratification were very advanced and that these procedures would be completed within a few months. The Liberian delegation declared that Liberia was expected to ratify the 1992 Protocols very shortly.

5.2.3 The Director informed the Committee that he was studying the various issues involved in the preparations for the entry into force of the 1992 Protocols, as instructed by the Assembly at its 17th session.

5.3 Date of next session

The Executive Committee decided to hold its 43rd session on Friday 9 June 1995.

5.4 Recent ratifications of the 1971 Fund Convention

The Director informed the Executive Committee that, since its 41st session, the 1971 Fund Convention had entered into force for Australia, Belgium, Malaysia, the Marshall Islands and Saint Kitts and Nevis. He also mentioned that the Convention would enter into force for Mauritius on 5 July 1995, bringing the number of Fund Member States to 66.

6 Adoption of the report to the Assembly

The Executive Committee adopted the parts of the Record of Decisions contained in documents FUND/EXC.42/WP.1 and FUND/EXC.42/WP.1/Add.1 (viz paragraphs 1, 2, 3.1-3.3 and 3.5), subject to certain amendments. The Committee authorised the Director to prepare the remaining parts of the Record of Decisions (viz paragraphs 3.4, 3.6, 3.7 and 4-6), in consultation with the Chairman.
