INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
44th session
Agenda item 6

FUND/EXC.44/17
19 October 1995

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

(held from 16 to 19 October 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.44/1.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

Algeria	Japan	Republic of Korea
France	Liberia	Sweden
Greece	Mexico	United Arab Emirates
Italy	Norway	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:

Australia	Germany	Poland
Belgium	Ghana	Portugal
Canada	Indonesia	Russian Federation
Côte d'Ivoire	*Malaysia*	*Spain*
Cyprus	Monaco	Tunisia
Denmark	Netherlands	Venezuela
Finland	Nigeria	

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

Brazil	Ecuador	Panama
Chile	Egypt	Peru
China	Islamic Republic of Iran	Saudi Arabia
Democratic People's Republic of Korea	Latvia	United States

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

International Maritime Organization (IMO)

Cristal Limited
International Chamber of Shipping (ICS)
International Group of P & I Clubs
International Tanker Owners Pollution Federation Ltd (ITOPF)
International Union for the Conservation of Nature and Natural Resources (IUCN)
Oil Companies International Marine Forum (OCIMF)

3 Incidents involving the IOPC Fund

3.1 Overview

The Executive Committee took note of document FUND/EXC.44/2 which contained a summary of the situation in respect of all incidents dealt with by the IOPC Fund since the 40th session of the Executive Committee.

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).

Negotiations with claimants - General

3.2.3 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.

3.2.4 It was recalled that, having considered all the issues involved, the Executive Committee had, at its 43rd session, instructed the Director to continue negotiations with the claimants and had authorised the Director to agree, on behalf of the IOPC Fund, to a global settlement within the framework of an amount of some Llt 137 000 million (£53 million) being made available to victims in the context of a global settlement. It was noted that the amount of Llt 137 000 million would be made up as follows: the shipowner and the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd (UK Club) would contribute the shipowner's limitation fund under the Civil Liability Convention (Llt 23 950 million) plus a without prejudice offer of interest on this amount (Llt 10 000 million) and an additional ex-gratia payment (Llt 25 000 million); the IOPC Fund would contribute the difference between the shipowner's limitation fund and the maximum 60 million SDRs payable under the Fund Convention (Llt 78 694 million).

3.2.5 It was noted that the Executive Committee had laid down the following terms and conditions for the global settlement:

(a) Except as regards the shipowner's/UK Club's ex-gratia payment of Llt 25 000 million, payments would be made only to the extent that a claimant had suffered a quantifiable economic loss and no payment would be made in respect of claims for damage to the marine environment per se.

(b) All parties to the on-going legal proceedings in Italy would withdraw their actions for compensation, irrespective of the grounds upon which the claims might be based, and irrespective of the identity of the defendant, including the claims submitted in the limitation proceedings and the claims for compensation presented in the criminal proceedings.

(c) The IOPC Fund, the State of Italy and other claimants would terminate all proceedings in respect of the decision of the Court of first instance opening the limitation proceedings, in which they challenged the right of the shipowner (Venha Maritime Ltd) to limit his liability. All parties would also terminate their cases of oppositions to the "stato attivo", ie whether interest accrued on the shipowner's limitation fund and the method for the determination of the maximum amount available under the Fund Convention.

(d) The IOPC Fund would withdraw its legal actions against all other parties for the purpose of recovering any amount that the IOPC Fund might have to pay as a result of the incident.

(e) The State of Italy would give an undertaking to hold harmless the shipowner, the UK Club and the IOPC Fund against any claims by the enterprises forming ATI and their sub-contractors, Castalia and LOGECO, and the Italian territorial public entities to the extent that any of these parties did not formally withdraw their actions in accordance with sub-paragraphs (b) and (c) above.

3.2.6 It was noted that the shipowner/UK Club had emphasised, at the Committee's 43rd session, that the offer to make an ex-gratia payment of Llt 25 000 million was entirely without prejudice and without any admission of liability of any parties in any proceedings, and was subject to certain conditions, designed to bring an end to all litigation in the *Haven* case.

3.2.7 It was recalled that the Executive Committee had taken the position that the negotiations with the claimants were without prejudice to the IOPC Fund's position in respect of the question of time-bar, pending a global solution of all outstanding issues.

3.2.8 The Director reported the developments in the negotiations with the claimants, as set out in documents FUND/EXC.44/3, and FUND/EXC.44/3/Add.1.

Negotiations with Italian private claimants

3.2.9 The Committee noted that agreements had been reached between the shipowner/UK Club and 667 Italian claimants in the categories of individuals or small businesses on the admissible quantum of their claims, for a total amount of Llt 13 046 million (£5.0 million), and that offers had been made to a further 84 claimants in these categories for a total amount of Llt 389 million (£149 000).

3.2.10 The Committee also took note of the fact that agreements on the quantum had been reached between the shipowner/UK Club and 12 of the 16 Italian contractors who operated outside the so-called ATI consortium for a total of Llt 8 450 (£3.2 million) and that negotiations with three contractors were not completed. It was noted that the claims of the remaining contractors (including those who operated inside the ATI consortium) would be included in the compensation payable to the State of Italy under the offer of a global settlement.

Negotiations with Italian municipalities

3.2.11 It was noted by the Executive Committee that the shipowner/UK Club had agreed with the Region of Liguria, the Province of Savona and seven municipalities on the amount of their claims for clean-up costs and promotional expenses at a total of Llt 780 million (£299 200). The Committee drew attention to the fact that it had at its 36th session considered the items relating to promotional expenses as inadmissible and that they would have to be met from the ex-gratia payment (document FUND/EXC.36/10, paragraphs 3.2.13-3.2.17).

3.2.12 The representative of the UK Club stated that the Club accepted the IOPC Fund's position in respect of the promotional expenses referred to in paragraph 3.2.11 for the purpose of a global settlement, but reserved its position as regards the admissibility of these claims.

Negotiations with claimants in France and Monaco

3.2.13 The Executive Committee noted that agreements on the quantum had been reached with the French Government, the Direction Départementale des Services d'incendie et de secours du Var, 31 municipalities in France and Parc National de Port Cros for a total amount of FFr23.2 million (£3.0 million). The Committee also took note of the agreement in the amount of FFr270 035 (£34 700) which had been reached on the quantum of the claim submitted by the Principality of Monaco.

Consideration by the Italian Government of the offer of a global settlement

3.2.14 It was noted that the Executive Committee had decided, at its 43rd session, that the offer of a global settlement would be open until 31 July 1995 and that this time period could be extended by the Chairman if he considered such an extension justified in view of the progress being made in the negotiations.

3.2.15 The Committee noted that in July 1995 the Director had been informed that the Italian Government had, at least so far, not been prepared to accept the offer of a global settlement, due to the objections raised by the Ministry of the Environment, that the matter was still being discussed within the Government, but that it would not be possible for the Government to make a final decision before the holiday period.

3.2.16 It was noted that, after discussions within the Consultation Group set up by the Committee at its 42nd session, the Chairman of the Executive Committee had decided to extend the time period within which the offer of a global settlement would be open from 31 July to 2 October 1995, and that the Italian Government had been informed of that decision in a letter dated 21 July 1995, in which the Chairman had also drawn attention to the consequences for all claimants, in particular for individuals and small business, if the Italian Government did not accept the offer.

3.2.17 It was recalled that the agreements between the shipowner/UK Club and a number of the claimants on the admissible quantum of their claims contained a clause to the effect that the agreements would be null and void unless the amounts agreed were paid within six months of signing the respective agreements. The Committee noted that, since the Italian Government had not accepted the offer of a global settlement by the end of July 1995, the shipowner/UK Club had decided that they were unable to pay the agreed amounts to these claimants, and the Italian Government had been informed of this position in a letter dated 24 July 1995.

3.2.18 The Executive Committee was informed that, following further discussion with the Italian Government and the lawyer representing the Region of Liguria, the shipowner/UK Club had, on 27 September 1995, made a revised offer within the terms of the proposed global settlement, under which the shipowner/UK Club offered to pay directly to the Region, for and on behalf of itself and the other local public bodies, part of the ex-gratia payment which had been offered to the State of Italy. It was noted that this revised offer to the Region of Liguria had been accompanied by the equivalent reduction in the offer of the amount available to the State of Italy.

3.2.19 The Director informed the Executive Committee that he had received a request on 29 September 1995 from the Italian Government for a further extension of the time period until the 44th session of the Executive Committee. The Committee noted that, since the offer of a global settlement was under consideration by the Italian authorities at the highest level, the Chairman of the Executive Committee had decided on 2 October to grant a further extension to 11 October 1995, and that the Italian Government had been informed of this decision.

3.2.20 The Executive Committee was informed that the Consultation Group had considered the situation on 11 October 1995. It was noted that, at that meeting, the Chairman had informed the Group that he had learned of what appeared to be the position of the Italian Government to the offer of a global settlement, and that, as he understood it, the Italian Government had taken the position to reject that offer in principle.

3.2.21 The Executive Committee was informed that, on 11 October 1995, as a result of the discussions within the Consultation Group, the Chairman had sent a letter to the Italian Ambassador in London, setting out his understanding of the Italian Government's position. The Committee noted that the Chairman had stated in that letter that, if his understanding was correct, the Committee would have to conclude that the proposal of a global settlement had been rejected by the State of Italy. It was also noted that the Chairman had stated that, if he had misunderstood the Italian Government's position, he would be grateful for a declaration by 16 October 1995 in writing or verbally at the Executive Committee, that his understanding was wrong and that the Italian Government was looking favourably at the offer of a global settlement.

3.2.22 The Italian delegation informed the Executive Committee that the above-mentioned letter requesting urgent clarification of the Italian Government's position had been forwarded to the competent Italian authorities. That delegation noted that the claims for compensation by the claimants in the *Haven* case exceeded by far the amount offered by the shipowner, the UK Club and the IOPC Fund. It was stated that the Italian authorities deemed it important in this context to ascertain the amount destined to compensate pollution damage suffered by the Italian Administration, including expenses incurred to counteract the consequences of pollution and also environmental damage.

3.2.23 It was confirmed by the Italian delegation that the Italian Government had considered with great interest the proposed global settlement, as well as the numerous attempts made to improve it. The Italian delegation stressed the difficulties encountered, in particular that the *Haven* incident had affected a variety of claimants: individuals, commercial operators, local authorities and Government bodies. That delegation drew the Executive Committee's attention to the fact that some local authorities, in particular, had submitted very substantial claims which could considerably influence the amount of compensation that would accrue to the Italian Administration. The Italian delegation stated that the question was being closely examined at various levels within the Italian Administration but that, due to the extreme complexity of the issues involved and the number of competent bodies which would have to agree to a decision, they were as yet unable to finalise their position.

3.2.24 The Italian delegation regretted that it was not able to provide a more positive response at that time, but stressed the importance which the Italian authorities attached to continued efforts for a considered and balanced solution to the problem, which could be to the benefit of all. In this context, that delegation suggested that it might be useful for a delegation from the IOPC Fund to visit Rome for a high level meeting with its counterparts in the Italian Administration, hoping that such a meeting would be helpful in fostering progress towards a positive solution of this question which so far, and in the existing circumstances, had been elusive.

3.2.25 Some delegations expressed their disappointment of the lack of a positive response from the Italian Government.

3.2.26 The Executive Committee noted that the Italian authorities wished to continue their study of the offer of a global solution. Nevertheless, since the conditions set by the Executive Committee for a global solution had not been met, the Committee decided to refer the matter to the Assembly.

3.2.27 The French delegation observed that when reaching agreements during the summer of 1995 on the quantum of their claims, the French victims had, once again, agreed to respect the spirit of the Fund Convention, the purpose of which was to settle claims out of court. The French delegation noted that this had not always been easy for some mayors who had had to waive certain parts of their claims which they considered justified. This delegation stated that those mayors had accepted a compromise within the framework of a global settlement, in order to accelerate the payment of compensation which was very important for the finances of the communes in question.

3.2.28 The French delegation expressed the view that it now appeared very difficult for a global settlement to be reached. The delegation stated that, for those claimants who had observed the time-bar provisions of the Fund Convention, the claims should therefore be paid promptly. The French delegation requested that the Director should take the necessary steps in the coming weeks so that compensation could be paid to French claimants immediately after the next session of the Executive Committee.

3.2.29 The French delegation informed the Committee that a similar request would shortly be made in writing to the UK Club. That delegation stated that it was aware of the technical difficulties which its request would cause, but hoped that the understandable hopes of small claimants in France would be taken into account. The French delegation expressed the view that without such payments the credibility of the IOPC Fund would be badly affected.

3.2.30 The Director stated that, in view of the very complex legal situation, he did not consider that he was able to make any payments to claimants, unless the Assembly or the Executive Committee instructed him to do so. He also stated that he would study the matter further and refer the matter to the Assembly or the Executive Committee for decision.

3.3 *Aegean Sea* incident

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, in particular that a total of Pts 1 414 million (£7.4 million) had so far been paid to claimants, as set out in document FUND/EXC.44/4.

3.3.2 The Committee expressed its concern that in July 1995 protestors had occupied part of the Joint Claims Office in La Coruña for nearly ten hours during which they had refused to leave the premises.

3.3.3 The Director referred to the meeting held in London in July 1995 between representatives of the Spanish Government and of the Government of the Region of Galicia and the IOPC Fund to consider how progress should be made towards an out-of-court settlement of the most important group of claims, ie those relating to fishery and aquaculture. He mentioned that at that meeting agreement was reached that in order to make progress towards a settlement of all claims belonging to this group it was necessary for the claimants to submit evidence to justify their claims. He also mentioned that at that meeting it had been agreed that a meeting should be held between experts on both sides to examine what evidence was available and the extent to which the evidence would support the amounts claimed. It was mentioned that a meeting of experts had been scheduled for 14 September 1995 in La Coruña and that the meeting had been cancelled at the request of the Government of the Region of Galicia. The Director expressed his regret that the planned meeting had not taken place and hoped that a meeting between the respective experts would take place in the very near future so that progress could be made in the assessment of these claims.

3.3.4 The Spanish delegation welcomed the progress being made in identifying the method for assessing damages and for producing documentary evidence requested by the IOPC Fund. The Spanish delegation expressed its concerns about the time it was taking to settle claims and pay compensation.

3.3.5 The Spanish delegation referred to the fact that there were three main groups of claims, ie boat fishing and shellfish harvesting, aquaculture and depuration plants, and property damage. The delegation stated that the Spanish authorities were especially concerned in respect of the claims relating to the first group, ie those concerning boat fishing and shell harvesting submitted by the Cofradias. The delegation mentioned that these claims concerned 3 680 fishermen and that it requested that these claimants should be given priority. The delegation made the point that the provisional payments made so far in respect of this group of claims had been insufficient to alleviate the financial difficulties encountered by these claimants. It was also stated that the Spanish authorities were concerned about the situation of the second group of claimants, those relating to aquaculture and depuration plants, since the economic situation of the claimants concerned was very weak.

3.3.6 The Spanish delegation referred to the meeting held in July 1995 to consider how progress could be made towards an out-of-court settlement of the most important groups of claims. That delegation mentioned that in order to arrive at such a settlement, each group of claims should be substantiated to the IOPC Fund's satisfaction by further supporting documentation.

3.3.7 The Spanish delegation stated that at the meeting in London referred to in paragraph 3.3.3 above the representatives of the Spanish Government has suggested as a first step that all the claims submitted

to the Court in La Coruña should be reduced to a figure which fell within the maximum amount of compensation available under the Fund Convention, ie 60 million SDR, so as to make further partial payments possible. The delegation also stated that the Spanish Government and the Government of the Region of Galicia were prepared to withdraw their claims to the benefit of other Spanish claimants. The delegation expressed its agreement with the Director that the outstanding issues should be examined by the experts of the parties involved and the representatives of the claimants themselves.

3.3.8 With regard to the investigation into the cause of the incident, the Spanish delegation drew attention to the fact that the Greek investigation had concluded in its first report that the shipowners were solely responsible for the incident. The delegation pointed out that this report had been amended some months later. The delegation stated that the second report of the Greek investigation had concluded that the master was at fault, that the incident was due to an error on the part of the vessel, and that the shipowners were in breach of their natural obligation to ensure good navigation and seamanship.

3.3.9 The Greek delegation referred to the formal investigation and stressed that, on the basis of the information available, this investigation had concluded that the incident was as a result of force majeure. This delegation pointed out that the term "force majeure" included acts or omissions of third parties.

3.3.10 In connection with the dissatisfaction which had been expressed in Spain concerning the time taken to settle claims and pay compensation, the Committee noted the Director's view that any delay in the settlement of claims and payment of compensation in the *Aegean Sea* incident was due to the fact that most major claimants had not presented the documentation or other evidence required for the assessment of the losses actually suffered, in spite of repeated requests made to the claimants through the Joint Claims Office and by the Director.

3.3.11 The Executive Committee noted that there was agreement between the Spanish Government and the IOPC Fund that the claimants would have to present proof of the losses actually suffered.

3.4 *Braer* incident

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.44/5. The Committee noted the developments in respect of, *inter alia*, claims for the loss of income suffered by fishermen due to an alleged reduction in prices, claims by shell fishermen and mussel farmers, claims for alleged loss of income as a result of the failure of roe-in herring fishery, claims for alleged loss of income suffered by pelagic fishermen due to a reduction in mackerel prices, personal injury claims, claims for alleged damage to asbestos roofs, claims in respect of the fees of claimants' advisers and the legal action taken against the IOPC Fund by Landcatch Ltd.

Alleged loss of income suffered by salmon farmers due to reduction in prices

3.4.2 The Executive Committee recalled that the IOPC Fund had accepted that there was a fall in the relative price of Shetland salmon during the months immediately following the *Braer* incident and that, after a thorough analysis of the extent and duration of this fall, compensation had been paid to a number of salmon farms located outside the exclusion zone. It was noted that the salmon farmers had not accepted that the IOPC Fund's position reflected the full extent of the damage. It was also noted that the experts engaged by the IOPC Fund had taken the view that the relative position of Shetland salmon had returned to normal in the summer of 1993, and that in the autumn of 1993 there had been a general fall in price on the European market due to overproduction. The Director informed the Committee that the claimants had argued that the Shetland prices fell more than other prices. The Committee took note of the view of the IOPC Fund's experts that the evidence produced by the claimants did not demonstrate a link of causation between the price fall in the autumn of 1993 and the contamination caused by the *Braer* incident, and that the Director had therefore rejected any claim for further compensation for the alleged reduction in price.

3.4.3 The Committee instructed the Director to continue the dialogue with the claimants so that they would become fully aware of the reasons for the IOPC Fund's position in respect of these claims.

King and queen scallops

3.4.4 The Executive Committee considered the suggestion of members of the Shetland inshore fishing fleet that, during the first weeks following the lifting of the exclusion zone for king and queen scallops on 9 February 1995, the landings of those species were lower than expected, with fewer juveniles than expected, and that this was a consequence of the *Braer* incident.

3.4.5 The Committee noted that the IOPC Fund's fishery experts had, in the spring of 1995, made a limited but representative survey of the scallop stocks in Shetland waters by using divers to take samples at a series of sites, both inside and outside the exclusion zone. It was also noted that the survey and the analysis of its results had been criticised by the Shetland Fishermen's Association and that the Association had commissioned its own studies, the report of which was being examined by the IOPC Fund's experts who were expected to report soon.

3.4.6 The Executive Committee shared the Director's view that claims for loss of income suffered by fishermen who normally caught king and queen scallops in the area formerly covered by the exclusion zone would be admissible in principle only if the claimants demonstrated that there was actually a reduction in stocks and that such a reduction was a result of the oil pollution resulting from the *Braer* incident. The Committee stated that it would not be sufficient for claimants to indicate that this damage *could* have been caused by the oil pollution.

Burra Haaf

3.4.7 The Executive Committee noted that compensation for loss of income sustained until the end of June 1995 due to reduced catches had been paid to the owners of four small whitefish vessels of less than 20 metres which normally fish in an area to the west of the island of Burra (known as the Burra Haaf).

3.4.8 It was noted that a detailed study of the distribution of *Braer* oil in the Burra Haaf sediments had been undertaken by the Scottish Office during the period 1993-1995, supplemented by sediment sampling commissioned by the IOPC Fund in 1994 and that the results of these surveys had recently been analysed by scientists of the Scottish Office Agriculture and Fisheries Department (SOAFD). The Director stated that on the basis of this analysis, it had been understood that the concentration of hydrocarbons in the surface sediments of the Burra Haaf area would have been reduced by natural degenerative processes to within background levels by about the year 2000, although below the sediment surface, at depths of six to ten centimetres, the concentration of hydrocarbons was declining more slowly, and might remain elevated for a longer period.

3.4.9 The Committee noted that catches of commercial fish species from the Burra Haaf area remained reduced in comparison with those from other Shetland fishing grounds. It was recognised that, although the precise mechanisms through which fish populations were deterred by high concentrations of hydrocarbons in the Burra Haaf sediments were not understood, it was reasonable to expect that the fishery would have returned to normal by the time that concentrations of hydrocarbons in the surface sediments had been reduced to background levels.

3.4.10 The Executive Committee considered two alternative methods for compensating losses sustained by the owners of the vessels mentioned in paragraph 3.4.7 which continued to be affected by the scarcity of fish in the Burra Haaf area, and which, by virtue of their small size, had very limited opportunities to mitigate their losses by fishing on more distant fishing grounds or by using alternative fishing methods.

3.4.11 Some delegations stated that they were in principle prepared to agree to the Fund paying compensation for continuing losses on the basis of a lump sum, provided that the losses were certain and could be quantified with a degree of accuracy. Several other delegations considered, however, that the IOPC Fund should not pay compensation for losses which had not yet arisen.

3.4.12 The Executive Committee decided that the IOPC Fund should not pay compensation for on-going losses by way of lump sum settlements in advance, but should maintain its policy of assessing and compensating such losses as and when they arise.

Loss of quotas

3.4.13 The Executive Committee considered a claim submitted by the Shetland Fish Producers Organisation (SFPO) relating to alleged loss of fishing quotas in respect of whitefish (haddock and whiting) and Norway lobster.

3.4.14 It was noted that the United Kingdom Government allocates the United Kingdom fish quotas amongst various fish producer organisations and that, in respect of Shetland, this organisation is SFPO. It was further noted that each organisation received a quota based on the actual catch of its member vessels during the preceding three years and that the Shetland sectoral quotas for 1995 were therefore based on the actual catches of member vessels during 1992, 1993 and 1994. It was recognised that each organisation endeavoured to catch its allocated quota in full, so that it could maintain this quota for coming years. The Committee noted that if the United Kingdom quota was not caught in full, any producer organisation which had caught its allocation could apply for an additional quota allocation. It was also noted that, if such an application were granted and the additional quota was caught, the organisation would improve its actual catch record for the year in question, which in turn would result in that organisation being allocated an increased quota for the following year.

3.4.15 The Executive Committee recalled that fishing for whitefish within the exclusion zone was prohibited during the period 7 January - 24 April 1993, resulting, according to SFPO, in a reduction in the total catch of whitefish by its members in 1993. It was noted that, during 1993, the United Kingdom organisations did not catch their full quota allocations of haddock and whiting in the North Sea, although the members of SFPO did catch their full quotas. The Committee noted that SFPO had stated that, as a result of the *Braer* incident, this was achieved at a later date than would otherwise have been the case, which reduced SFPO's chance of obtaining an additional quota allocation, and that to compensate for this loss SFPO had purchased whitefish quota for a total cost of £720 000.

3.4.16 The Executive Committee noted that the Norway lobster fishery in the North Sea was subject to sectoral quotas for the first time in 1993, and that SFPO had been allocated its first Norway lobster quota in 1995, based on the actual catches during the years 1992, 1993 and 1994 by vessels owned by SFPO members. It was noted that SFPO had maintained that the Shetland Norway lobster fishery was only beginning to develop in 1993, and that the continued ban on fishing for this species within the exclusion zone had prevented the accumulation of a track record, thereby reducing the sectoral quota for 1995 and future years. The Committee took note of the fact that SFPO had argued that it would have no alternative but to purchase additional Norway lobster quota to secure a reasonable allocation in future years.

3.4.17 The Committee noted that any quota purchases would be financed by levies on SFPO members, who would thus incur an economic loss as a result of the *Braer* incident. It was noted that SFPO had argued that the cost of purchasing quota should be compensated by the IOPC Fund.

3.4.18 The United Kingdom delegation stated that it would wish to provide the Director with further information on the quota system.

3.4.19 Several delegations took the view that the alleged losses incurred by the members of SFPO (viz the cost of purchasing quotas) were as a result of the administrative system for allocating fishery quotas, and that these losses could not be considered as damage caused by contamination.

3.4.20 The Executive Committee decided that although several delegations considered that the claim was not admissible, the matter would be re-examined after the United Kingdom delegation had provided further information.

P & O Scottish Ferries Ltd

3.4.21 The Executive Committee considered a claim for £902 561 submitted by P & O Scottish Ferries Ltd for alleged loss of income from its ferry service from Aberdeen to Shetland as a result of a reduction in the number of tourists visiting the Shetland Islands and a reduction in the volume of freight.

3.4.22 It was noted that P & O Scottish Ferries Ltd, whose main office in Aberdeen, is a wholly owned subsidiary of the Peninsular and Oriental Steam Navigation Company. The Executive Committee noted that the claimant was the only operator of passenger ferries between Shetland and the United Kingdom mainland (Aberdeen), whereas there were also two other companies which operated cargo services to and from Shetland. The Director informed the Committee that it appeared from the accounts that the 1993 turnover of P & O Scottish Ferries Ltd in respect of the Shetland service represented approximately £12.3 million of a total turnover of more than £20 million.

3.4.23 The Executive Committee considered whether this claim was admissible in principle, as falling within the definition of "pollution damage" laid down in the Civil Liability Convention and the Fund Convention, ie whether it could be considered as damage caused by contamination. It was recalled that the 7th Intersessional Working Group had taken the view that, in order for a claim to qualify for compensation, the basic criterion should be whether there was a reasonable degree of proximity between the contamination and the loss or damage sustained by the claimant. It was further recalled that the Working Group had also taken the view that, when considering whether the criterion of reasonable proximity was fulfilled, the following elements should be taken into account:

- the geographic proximity between the claimant's activity and the contamination
- the degree to which a claimant was economically dependent on an affected resource
- the extent to which a claimant had alternative sources of supply
- the extent to which a claimant's business formed an integral part of the economic activity within the area affected by the spill

3.4.24 The United Kingdom delegation explained the particular importance to the Shetland Islands of the claimant's ferry service and how integral it was to the Shetland infrastructure.

3.4.25 The Executive Committee took the view that the criterion of reasonable proximity was not fulfilled. In particular, it was considered that there was not sufficient proximity between the claimant's activity and the contamination. It was also considered that the claimant's business did not form an integral part of the economic activity of Shetland. For these reasons, the claim was rejected.

Personal injury claims

3.4.26 The Executive Committee noted that 13 unquantified personal injury claims had been submitted to the shipowner, the Skuld Club and the IOPC Fund for alleged injury, such as respiratory conditions resulting from the inhalation of oil vapour and skin complaints resulting from contact with oil. It was noted that one claimant, who had allegedly developed an asthmatic condition as a result of inhaling oil emanating from the *Braer*, had recently been granted legal aid to pursue an action against the shipowner, the Skuld Club and the IOPC Fund.

3.4.27 The Committee took the view that, in the light of the discussions at the 1969 International Conference which adopted the Civil Liability Convention, the Convention in principle covered personal injury caused by contamination whereas personal injury resulting from other causes was not admissible. The Committee emphasized that it was for the claimant to prove that the alleged damage was actually caused by contamination by the oil escaping from the ship in question and the amount of the loss or damage sustained. It was agreed that the IOPC Fund should require the same level of proof independent of the State where the damage occurred.

3.4.28 The Executive Committee reiterated the position taken at its 35th session that exposure to health risks and anxiety would not fall within the definition of pollution damage and could therefore not be accepted (document FUND/EXC.35/10, paragraph 3.4.25).

3.4.29 The observer delegation of the International Group of P & I Clubs indicated that the P & I Clubs agreed that personal injury caused by contamination in principle fell within the scope of the Civil Liability Convention and the Fund Convention.

Property damage claims

3.4.30 The Executive Committee took note of the pending claims, totalling £3.4 million, relating to alleged damage to asbestos cement tiles and corrugated sheets that are used as roof covering for homes and agricultural buildings. It was noted that the claimants had alleged that the damage, which consisted of the disintegration of the material, was as a result of the pollution following the *Braer* incident. The Director mentioned that the IOPC Fund had carried out a detailed investigation to determine whether or not oil was capable of affecting these materials in this way. He indicated that the results of this investigation were expected to be available in the near future, and that he would inform the claimants of the IOPC Fund's position concerning these claims as soon as he had had the possibility of examining the results of this investigation. He stated that it was hoped that these results would be available before the Executive Committee's 46th session, to be held in December 1995.

Fees of claimants' advisers

3.4.31 The Executive Committee took note of the situation in respect of claims for the recovery of fees payable by a number of claimants to their advisers. The Committee endorsed the position taken by the Director in respect of such claims, as set out in paragraph 3.16.3 of document FUND/EXC.44/5.

Landcatch Ltd: smolt producer

3.4.32 It was recalled that the Executive Committee had at its 40th session rejected a claim for £2 601 506 presented by Landcatch Ltd for alleged losses as a result of the *Braer* incident interrupting the normal stocking of salmon smolt in Shetland waters (document FUND/EXC.40/10, paragraphs 3.5.11 and 3.5.12).

3.4.33 The Committee noted that Landcatch Ltd had taken legal action against the IOPC Fund in the Court of Session (Edinburgh), claiming a total of £1 961 347.

Kinloch Damph Ltd: smolt supplier

3.4.34 The Executive Committee recalled that it had, at its 39th session, considered a claim from a supplier of smolt (Kinloch Damph Ltd, "Kinloch") from its installation on mainland Scotland (document FUND/EXC.39/4/Add.1, paragraphs 2.1- 2.4). It was also recalled that the Executive Committee had taken the view that the claim presented by Kinloch did not fulfill the criteria laid down by the Committee, in that the claimant's activities did not form an integral part of the economy of the area affected by the contamination, and that the Committee had rejected this claim (document FUND/EXC.39/8, paragraph 3.3.20).

3.4.35 It was noted that Kinloch had recently requested that the claim should be reconsidered by the Executive Committee, since the claimant had stated that, when the claim was originally submitted in May 1993, the criteria relating to the admissibility of claims were not fully appreciated by the claimant and the particular grounds upon which the claim was rejected had not previously been brought to the claimant's attention. The Committee took note of the additional information provided by the claimant, as set out in paragraphs 3.18.5 and 3.18.6 of document FUND/EXC.44/5, in particular in respect of the alleged geographic proximity between its activities and the contamination, the degree to which the claimant was economically dependent upon the affected resource and the extent to which the claimant's business allegedly formed an integral part of the economic activity within the area affected by the spill.

3.4.36 The Executive Committee considered that Kinloch's smolt breeding activity, which took place at Strathcarron on mainland Scotland, was more remote from the contamination than the activities of claimants who had received compensation in the *Braer* case and in previous cases. The Committee took the view that, as regards the claim under consideration, Kinloch should be considered as a supplier of raw material to the Shetland salmon farming industry. Although Kinloch might to some extent be dependent upon its sales of smolt to Shetland, Kinloch could not, in the Committee's view, be considered as forming an integral part of the economic activity of the area affected by the contamination. For these reasons, the Executive Committee decided that the claim did not fulfill the criteria of admissibility and confirmed its decision to reject the claim.

Public authorities

3.4.37 The Executive Committee took note of the situation in respect of the claims presented by the United Kingdom Government and the Shetland Islands Council, as set out in paragraphs 3.21.1 and 3.21.2 of document FUND/EXC.44/5.

Limitation proceedings and related issues

3.4.38 The Executive Committee took note of the fact that it was expected that the Skuld Club would initiate limitation proceedings in the Court of Session in Edinburgh in the very near future, establishing the limitation fund by means of a letter of guarantee. It was noted that the limitation amount was estimated at 5 790 000 SDR (£5.4 million).

3.4.39 The Director informed the Committee that he had been studying, with the assistance of the IOPC Fund's lawyer and technical experts, whether the Fund should challenge the shipowner's right to limit his liability. He stated that he had requested further information on some points from the shipowner. In view of the importance of this issue, the Director proposed that the Committee's consideration of the question should be postponed to its 46th session. The Executive Committee accepted this proposal.

Total amount of claims

3.4.40 The Executive Committee noted that so far a total of £45.9 million had been paid in compensation, out of which the IOPC Fund had paid £41.1 million and the Skuld Club £4.8 million. It was also noted that the maximum amount available under the Civil Liability Convention and the Fund Convention, 60 million SDR, would correspond to £57 114 000, calculated on the basis of the rate of exchange prevailing on 12 October 1995.

3.4.41 The Executive Committee noted the Director's estimate that the private claimants, whose claims had been considered admissible in principle, would total some £3 million, that the Skuld Club had presented a claim for some £1.8 million for reimbursement of the payment made to a salvage company under LOF 90, that the Shetland Islands Council had presented a claim for £1.5 million and the United Kingdom Government a claim for some £4 million. It was recognised that there were a number of claims which had been rejected by the Executive Committee but in respect of which the claimants had not agreed with that decision, and that there were also a number of outstanding claims for significant amounts in respect of which no decision had been taken as to their admissibility. It was noted that the United Kingdom Government intended to pursue its claim. It was recalled, however, that at the Committee's 34th session, the United Kingdom delegation had stated that the United Kingdom Government would not compete with other claimants for the purpose of obtaining compensation (document FUND/EXC.34/9, paragraph 3.3.29).

3.4.42 The Director drew the attention of the Committee to the fact that he had been advised shortly before the present session that a number of claimants (in addition to Landcatch Ltd) intended to bring legal action against the shipowner, the Skuld Club and the IOPC Fund, claiming compensation for significant amounts, an amount of some £25 million having been mentioned. He stated that he did not have any information of the types of claims involved, nor of their legal basis.

3.4.43 The Director stated that he still believed that the total amount of the established claims would stay below the maximum amount available under the Civil Liability Convention and the Fund Convention, ie 60 million SDR. He mentioned, however, that if the courts were to accept as admissible the claims for substantial amounts which had not been considered as admissible in principle by the IOPC Fund, the total amount of the established claims might exceed that limit. The Director drew attention to the fact that the IOPC Fund would in that case find itself being subject to two conflicting obligations under the Fund Convention, namely that under Article 4.5 to ensure that all claimants were treated equally and that under Article 4.4 that the compensation under the Civil Liability Convention and the Fund Convention should not exceed 60 million SDR. For this reason, he requested the Committee to instruct him on the action to take in this situation.

3.4.44 A number of delegations expressed their serious concern that this situation had arisen. They recognised, however, that it was often very difficult for the IOPC Fund to establish with certainty whether the total amount of the established claims would exceed the limit of 60 million SDR. It was also recognised that in the *Braer* case the situation was unclear, and that it was by no means sure that the total amount of the established claims would exceed that limit. However, in view of the uncertainty, a number of delegates expressed the view that the IOPC Fund should suspend any further payments until the situation had been clarified.

3.4.45 The Executive Committee decided to instruct the Director to continue the negotiations concerning the outstanding claims for the purpose of arriving at agreements on the quantum of the losses sustained. At the same time, the Committee instructed the Director to suspend any further payments until the matter had been re-examined by the Committee at its 46th session, to be held in December 1995. The Director was also instructed to make this decision known in an appropriate way to the affected community in Shetland. He was finally instructed to study the legal and practical problems that would arise if, in a given case, a number of claims had been paid in full and the total amount of the established claims were to exceed the limit of 60 million SDR.

3.4.46 The Director stated that in many major cases, it is difficult to establish at an early stage whether the total amount of the established claims would ultimately exceed 60 million SDR. He indicated that, if it were to be required that, before any payments were made in full to claimants, there would have to be absolute certainty that this limit would not be exceeded, it would be impossible to pay any claims in full, or even to pay a high percentage of any agreed amounts, until the periods of three and six years laid down in Article 6 of the Fund Convention had expired and all claims brought before the courts had been decided by final judgement. He considered that if such certainty were required, the IOPC Fund would not be able to pursue its present policy, of ensuring the prompt payment of compensation to victims. The Director mentioned that in every case, he examined, together with the Fund's experts, the likely level of the established claims, but could not be sure that his estimate of the total figure was correct.

3.5 *Keumdong N°5* incident

3.5.1 The Executive Committee took note of the information concerning the *Keumdong N°5* incident, as set out in document FUND/EXC.44/6, in particular the developments which had taken place since the Committee's 40th session.

3.5.2 It was recalled that claims had been submitted by the Kwang Yang Bay Oil Pollution Accident Compensation Federation (which represented 11 fishery co-operatives) in respect of some 6 000 fishermen for a provisional total of Won 93 132 million (£77 million) and that the Federation had indicated that it would submit further claims in the region of Won 90 000 million (£75 million). The Director informed the Executive Committee that agreements had been reached in July 1995 on the admissible amount in respect of a number of items of the claims presented by the Kwang Yang Bay Federation. It was noted that these items, which related to damage to equipment and loss of earnings, had been agreed for a total of Won 1 273 961 731 (£1 056 400).

3.5.3 The Executive Committee noted that the total amount of the claims arising out of this incident exceeded the maximum amount available under the Civil Liability Convention and the Fund Convention. The Director informed the Committee that, to make it possible for the IOPC Fund to pay agreed items in full, an agreement in principle had been reached between the IOPC Fund and the Kwang Yang Bay Federation to the effect that the admissible amount of the claims of all the members of the above-mentioned 11 fishery co-operatives would not exceed Won 60 000 million (£49.8 million). It was noted that this sum had been arrived at by reducing the amount of 60 million SDR (Won 68 994 million) by the total amount paid so far (Won 5 588 million) and by making a further reduction to give the IOPC Fund a certain safety margin. It was also noted that this agreement would be signed by the Chairmen of the co-operatives, on the basis of powers of attorney issued by all the individual members. The Committee took note of the fact that the technical problems relating to this guarantee were being discussed between the IOPC Fund's Korean lawyer and the lawyer representing the Federation.

3.5.4 The Committee shared the Director's view that, once the agreement referred to in paragraph 3.5.3 was properly signed to the satisfaction of the IOPC Fund's Korean lawyer, the Fund would be in a position to pay any established claims in full.

3.5.5 The Executive Committee recalled that despite requests from the IOPC Fund, the fishery co-operatives had previously refused to make available for inspection any documents substantiating the alleged losses. The Committee noted, however, that an agreement in principle had been reached in September 1995 whereby the co-operatives would make sales records available for inspection by the Fund's Korean lawyer and Korean surveyors. The Director informed the Committee that it was expected that this inspection would take place in the near future.

3.5.6 The Executive Committee took note of the information given in paragraphs 4.3-4.5 of document FUND/EXC.44/6 concerning the attack which was carried out on 4 August 1995 on the IOPC Fund's surveyor, Captain S K Kim, President of Korea Marine & Oil Pollution Surveyors Co Ltd (KOMOS), by some 12 representatives of the fishermen who had presented claims in respect of the *Keumdong N°5* incident.

3.5.7 The Director expressed his appreciation for the support of the Korean authorities following this regrettable accident and for the support in general that the Korean Government had given the IOPC Fund. He also expressed his deep appreciation of the interest that the Korean Ambassador in London had personally taken in the activities of the IOPC Fund in general and in the problems facing the IOPC Fund in the context of the *Keumdong N°5* incident in particular.

3.5.8 The Korean delegation expressed the deep regret of its Government for the attack on Captain Kim. This delegation stated that, although the considerable delay in the settlement of the claims arising out of the *Keumdong N°5* incident had caused great frustration on the part of the fishermen involved, this was in no way any excuse for the attack. The delegation also informed the Committee that two executive members of the *Keumdong N°5 Compensation Claims Committee* had been sent to the office of the regional prosecutor as those primarily behind the attack and that the prosecutor was undertaking further investigations. The delegation informed the Committee that the competent authorities had taken appropriate measures to ensure that all surveyors would be able to carry out their work in safety and have persuaded the fishermen that actions of this kind were not the right way to resolve outstanding issues. The Korean delegation urged the Director to make early settlements, in view of the hardship suffered by the fishermen, and to give priority to this matter.

3.5.9 The Executive Committee expressed its serious concerns in respect of the attack. It was recognised that the attack on Captain S K Kim had been carried out by individuals without the knowledge of the Korean authorities. The Committee emphasised, however, that unless the Fund's surveyors and experts were able to carry out their tasks in full safety, without any risk of physical violence, threat or intimidation, the IOPC Fund could not fulfill neither its functions as laid down in the 1971 Fund Convention nor any tasks entrusted to it by Member States.

3.5.10 The Executive Committee instructed the Director to give priority to the assessment of the claims arising out of the *Keumdong N°5* incident.

3.5.11 The Executive Committee expressed its sincere thanks to the various experts acting on behalf of the IOPC Fund and stated that they enjoyed the full confidence of the Committee.

3.5.12 The Director informed the Committee that its Korean surveyor, Captain S K Kim of KOMOS, had been summoned to testify in respect of the *Keumdong N°5* incident before the Agriculture and Fisheries Committee of the Korean National Assembly and that he had been ordered to present to that Committee certain correspondence exchanged with the IOPC Fund and other documents relating to that incident. The Director stated that he had advised Captain Kim to comply with any requirement of Korean law in respect of this order.

3.5.13 The Executive Committee expressed concern as regards the consequences for the operation of the IOPC Fund of orders of the type referred to in paragraph 3.5.12. The Committee agreed with the approach taken by the Director.

3.6 *Seki* incident

3.6.1 The Executive Committee took note of the information concerning the *Seki* incident, as set out in document FUND/EXC.44/7, in particular the developments which had taken place since the Committee's 43rd session.

3.6.2 It was recalled that the Executive Committee had, at its 42nd session, 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. It was noted that the Committee had 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. The Committee had expressed the view that it was necessary to investigate all possible elements of proof available, which would not be limited to accounts or taxation documents. The Committee had taken 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 had 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 had been emphasised that it was necessary that the experts engaged by the shipowner's P & I insurer (the Britannia P & I Club) and the IOPC Fund were given the possibility of forming an independent opinion of the quantum of the losses actually suffered.

3.6.3 It was recalled that the Executive Committee had, at its 42nd session, instructed the experts to establish whether it would be possible to make an individual evaluation of the damage actually suffered by the individual claimants other than on the basis of a simple declaration made by the claimants or by other organisations; if such an individual assessment were 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 (document FUND/EXC.42/11, paragraph 3.5.14). The Director informed the Committee that the experts had considered that it would not be possible, on the basis of the elements of proof available, to evaluate the damage suffered by individual claimants and that they had therefore made an assessment of the losses suffered by groups of fishermen.

3.6.4 The Committee noted that, since its 43rd session, there had been significant developments in respect of fisheries claims, whereas there had been little development in respect of any other claims. It was noted that additional advance payments had been made by the Britannia P & I Club in respect of claims for the cost of clean-up operations.

3.6.5 It was noted that fishery experts engaged by the Britannia P & I Club and the IOPC Fund had visited Fujairah from 26 May to 5 June 1995 to meet with the fisheries sub-committee of the Government of Fujairah, collect further information, meet with the individuals who actually filled in the assessment forms in respect of the individual claims, and search for any further evidence and elements of proof in support of the fishery claims, in accordance with the instructions given by the Director following the decision of the Committee's 42nd session (document FUND/EXC.42/11, paragraph 3.5.14). The Committee noted that all information and documentation requested had been provided by the Government of Fujairah to the experts by the end of June 1995, to the extent that such information and documentation were available to the authorities.

3.6.6 The Director informed the Executive Committee that the most important new documentation consisted of records pertaining to fish landings and fish market sales from 1993 and onwards. It was noted that, on the basis of this data and information collected earlier, a more detailed analysis had been carried out by the experts of the coastal fisheries in the affected region.

3.6.7 The Committee noted that, in their reassessment, the experts had used the information at their disposal, and that on this basis, their best assessment of the total losses in respect of the fishery claims amounted to Dhr 13.7 million (£2.3 million), compared with Dhr 5.2 million (£890 000) initially assessed and the revised assessment of Dhr 6.6 million (£1.1 million) made in January 1995.

3.6.8 The Executive Committee noted that, after consultation with the Director, the Britannia P & I Club had offered to make a further payment of the difference between the experts' January 1995 assessment and their present assessment, viz Dhr 7.0 million (£1.2 million).

3.6.9 The delegation of the United Arab Emirates presented the position of its Government, as set out in document FUND/EXC.44/7/1. The delegation expressed its Government's dissatisfaction with the clean-up policy of the shipowner. It was of the view that the information on the alleged completion of the clean-up was incorrect and referred to the fact that the experts used for the assessment of the clean-up were from a body established by tanker owners and pointed out that the interests of the owner of the *Seki* were in conflict with those of the victims.

3.6.10 The United Arab Emirates delegation regretted the IOPC Fund's application of a rigid rule as regards the requirements for a victim to prove his loss which had been expressed as "no evidence, no pay". The delegation stated that its Government was not against this requirement in itself but against its application in a manner which would conflict with the internationally recognised policy that through the Civil Liability Convention and the Fund Convention victims should be given equitable compensation rather than be oppressed by complicated and sophisticated procedural measures which might not be required in a court. It was maintained that where there was damage equitable compensation should be paid even if the experts could not assess the damage sustained.

3.6.11 It was stated by the United Arab Emirates delegation that the co-operation between the experts of the parties had proved to be extremely useful in respect of the fisheries claims, resulting in reducing the areas where there were divergences of opinions. The delegation expressed the view that this co-operation between experts should continue not only in respect of the fishery claims, but also in respect of all other pending claims.

3.6.12 The United Arab Emirates delegation requested on behalf of its Government that the Director should be instructed to instruct the experts engaged by the Britannia P & I Club and the IOPC Fund to co-operate with the experts of the Government of Fujairah in the assessment of the claims so as to reduce the differences of opinion between the parties and arrive at an equitable settlement of all claims. The delegation also requested that the Director should be instructed to support the Government to achieve a satisfactory completion of all clean-up activities. It was finally requested that the Director should be instructed to support compensation and reinstatement of the environment affected by the incident.

3.6.13 In response to the statement made by the delegation of the United Arab Emirates, the Director first drew attention to the fact that the IOPC Fund was not involved in any clean-up operations but only in matters of compensation. He also stated that, although the experts engaged by the IOPC Fund and the Britannia P & I Club were drawn from the International Tanker Owners Pollution Federation Ltd, a company financed by tanker owner interests, these experts were the most experienced in the world and always carried out their task with complete impartiality. The Director emphasised that these experts enjoyed the IOPC Fund's full confidence. He stated that, as instructed by the Executive Committee, the experts' assessment reflected in their most recent report was made on the basis of all the evidence available. He expressed the view that the fact that these experts had made a significant adjustment to their previous assessment after more evidence had been provided showed that the only way to make progress was for the claimants to submit evidence in support of their claims. He also stated that the only way forward would be full co-operation between the experts of the Britannia P & I Club/IOPC Fund and the experts of the authorities and claimants involved.

3.6.14 A number of delegations emphasised that the IOPC Fund acted within the framework of a mutual system and that it was necessary, therefore, that there were rules on the admissibility of claims which were respected by all Member States. These delegations also expressed their support of the policy as regards the need for evidence to substantiate the claims, as laid down by the Executive Committee at its 42nd session.

3.6.15 The Executive Committee noted with satisfaction the progress made in respect of the fishery claims. It expressed its appreciation to the Government of Fujairah for its co-operation with the experts engaged by the IOPC Fund and the Britannia P & I Club. The Committee took note of the fact that the revised

assessment had been made in accordance with the instructions which it had given at its 42nd session and that the experts had taken a flexible approach to the requirement of proof. The Committee expressed the hope that further co-operation would make it possible to arrive at a settlement of all claims, respecting the requirement laid down by the Committee in respect of evidence to support claims.

3.6.16 The Executive Committee reiterated its position from the 42nd session that the IOPC Fund could only pay compensation to the extent that a claimant had demonstrated an actual loss supported by evidence which would enable the Fund's experts to form an independent opinion of the damage sustained. The Committee stated that, although a certain flexibility would have to be exercised as regards the application of the requirement of proof, the criteria laid down at that session should be respected.

3.6.17 As regards environmental damage, the Executive Committee referred to the IOPC Fund's policy which had been laid down by the Assembly, namely that damage to the environment per se was not admissible whereas reasonable costs for reinstatement actually incurred or to be incurred qualified for compensation, and referred to the summary of the IOPC Fund's policy as set out in paragraphs 3.22 and 3.23 of document FUND/EXC.42/6.

3.6.18 The Director was instructed to continue to work with the authorities of the Government of Fujairah for the purpose of arriving at an agreement on the quantum of the losses sustained.

3.7 *Toyotaka Maru* incident

3.7.1 The Executive Committee took note of the information concerning the *Toyotaka Maru* incident, as set out in document FUND/EXC.44/8.

3.7.2 The Committee noted that all claims for compensation had been settled and paid within nine months of the incident for a total of ¥777.6 million (£5.7 million), out of which ¥703 million related to clean-up operations and ¥56.6 million to fishery damage.

3.8 *Sea Prince* incident

3.8.1 The Director introduced documents FUND/EXC.44/9 and FUND/EXC.44/9/Add.1 which contained information on the *Sea Prince* incident which had occurred on 23 July 1995 in the Republic of Korea.

3.8.2 The Executive Committee noted that this incident had already given rise to claims for clean-up operations, fishery damage and loss in tourism related activities. The Committee expressed its concern that the total amount of the established claims might exceed the total amount of compensation available under the Civil Liability Convention and the Fund Convention. For this reason, the Committee considered it necessary for the IOPC Fund to exercise caution in the payment of claims.

3.8.3 The Executive Committee authorised the Director to make final settlements as to the quantum of all claims arising out of this incident to the extent that the claims did not give rise to questions of principle which had not previously been decided by the Committee. The Director was not authorised at this stage to make any payments. He was instructed to include in any settlement agreement a proviso qualifying the Fund's obligation to pay the amount agreed in the event that the total amount of the established claims were to exceed 60 million SDR.

3.9 *Yeo Myung* incident

3.9.1 The Executive Committee took note of the information contained in documents FUND/EXC.44/12 and FUND/EXC.44/12/Add.1 on the *Yeo Myung* incident, which had occurred on 3 August 1995 in the Republic of Korea.

3.9.2 The Executive Committee authorised the Director to make final settlement of all claims arising out of this incident, to the extent that the claims did not give rise to questions of principle which had not previously been decided by the Committee.

3.10 *Senyo Maru* incident

3.10.1 The Director introduced document FUND/EXC.44/13 which contained information on the *Senyo Maru* incident which had occurred on 3 September 1995 in Japan.

3.10.2 The Executive Committee authorised the Director to make final settlement of all claims arising out of this incident, to the extent that the claims did not give rise to questions of principle which had not previously been decided by the Committee.

3.11 *Yuil N°1* incident

3.11.1 The Executive Committee took note of the information contained in document FUND/EXC.44/15 on the *Yuil N°1* incident, which had occurred on 21 September 1995 in the Republic of Korea.

3.11.2 The Executive Committee expressed its concern that the total amount of the established claims arising out of this incident might exceed the total amount of compensation available under the Civil Liability Convention and the Fund Convention. For this reason, the Committee considered it necessary for the IOPC Fund to exercise caution in the payment of claims.

3.11.3 The Executive Committee authorised the Director to make final settlements as to the quantum of all claims arising out of this incident to the extent that the claims did not give rise to questions of principle which had not previously been decided by the Committee. The Director was not authorised at this stage to make any payments. He was instructed to include in any settlement agreement a proviso qualifying the Fund's obligation to pay the amount agreed in the event that the total amount of the established claims were to exceed 60 million SDR.

3.12 Certain incidents of particular interest

3.12.1 The Executive Committee took note of the information regarding the *Patmos, Kasuga Maru N°1, Rio Orinoco, Vistabella, Agip Abruzzo, Taiko Maru, Iliad* and *Sung Il* incidents contained in document FUND/EXC.44/10.

3.12.2 In respect of the *Patmos, Kasgua Maru N°1, Rio Orinoco, Agip Abruzzo* and *Taiko Maru* incidents, the Committee noted that all claims had been settled and paid and all fees and expenses had been met.

3.12.3 As regards the *Vistabella* incident it was noted that all claims presented had been paid, that further claims were time-barred, and that the IOPC Fund was involved in legal proceedings for the purpose of recovering the amount of compensation it had paid.

3.13 Incidents with developments of lesser importance

3.13.1 The Executive Committee took note of the information contained in documents FUND/EXC.44/11 and FUND/EXC.44/11/Add.1 concerning certain incidents of lesser importance.

3.13.2 As regards the *Hoyu Maru N°53* and *Shinryu Maru N°8* incidents, the Executive Committee took note of the P & I insurer's requests that the IOPC Fund should waive the requirement to establish the limitation funds. The Executive Committee noted that disproportionately high legal costs would be incurred in establishing the limitation funds compared with the low limitation amount under the Civil Liability Convention in these cases, and took note of the Committee's decisions at previous sessions in respect of

other requests to the same effect. In view of these facts, the Executive Committee decided that the requirement to establish the limitation funds should be waived in respect of these cases, so that the IOPC Fund could, exceptionally, pay compensation and indemnification without the limitation funds being established.

3.14 Admissibility of claims relating to salvage operations and related activities

3.14.1 The Executive Committee noted that the shipowners in the *Aegean Sea* and *Braer* cases had engaged the services of salvage contractors under Lloyd's Open Form salvage agreement 1990 (LOF 90) and had made payments to the contractors based on this agreement. The Director informed the Committee that the question had been raised by these shipowners and these P & I insurers of which criteria should be applied to determine the admissibility of claims against the IOPC Fund for the recovery of amounts paid for services rendered under LOF 90. The Committee noted that this led to the wider question of admissibility in general of claims for salvage operations and similar activities, which was of relevance beyond the *Aegean Sea* and *Braer* cases.

3.14.2 The Committee took note of the information contained in document FUND/EXC.44/14, which set out the policy applied by the IOPC Fund as regards the admissibility of claims for the recovery of costs for operations of this type, the legal framework applicable to such operations and the position taken by the shipowners and P & I Clubs concerned in the *Aegean Sea* and *Braer* cases.

3.14.3 It was noted that the Director took the view that the "primary purpose test" and the "dual purpose test" had proved to be useful and workable, but that the entry into force of the 1989 Salvage Convention and the inclusion of the terms of that Convention in standard forms for salvage contracts justified an examination by the IOPC Fund of the issues involved. It was also noted that, in the Director's view, the amendment to the definition of "preventive measures" in the 1992 Protocol to the Civil Liability Convention also made such an examination appropriate.

3.14.4 The Executive Committee noted that an important point raised by the shipowners and the P & I Clubs was whether the criteria for admissibility should differ according to whether the services were contractual or not, their view being that contractual and non-contractual services should be dealt with differently. The Committee noted that the approach to the admissibility of claims proposed by the shipowners and P & I Clubs was that amounts of special compensation awarded under Article 14 would be admissible for compensation under the Civil Liability Convention and the Fund Convention, whereas amounts awarded under Article 13 would not be admissible.

3.14.5 It was noted that the IOPC Fund's policy so far had been to examine each case on its own merits, applying the "primary purpose test" and the "dual purpose test", as appropriate. The Executive Committee noted that the question was whether, within the parameters of the applicable provisions of the Civil Liability Convention, it would be possible to find a solution which could be applied in all cases and would lead to an equitable result for all parties involved.

3.14.6 In view of the importance of the issues dealt with in this document, the Executive Committee instructed the Director to make an in-depth study of these issues, for consideration by the Executive Committee at a future session.

3.15 Time-bar provisions in the Civil Liability Convention and the Fund Convention

3.15.1 The United Kingdom delegation introduced document FUND/EXC/44.16 in which it had raised certain questions concerning the need for claimants to take proper legal action to prevent their claims from becoming time-barred, as well as concerning the legal costs which claimants who took such actions would incur. This delegation stressed the importance of Member States ensuring that their claimants were informed of the existence of the time-bar provisions in the Civil Liability Convention and the Fund Convention. The delegation stated that the United Kingdom Government intended to provide such publicity to claimants following the *Braer* incident.

3.15.2 The United Kingdom delegation mentioned that there appeared to be a number of circumstances where it was unclear whether or not legal action was necessary to protect claims, and gave the following examples:

(a) when the IOPC Fund has agreed a full settlement, but has only made a partial payment. This had occurred in the case of the *Aegean Sea* incident, where the Committee had instructed the Director to make partial payments of agreed claims, in view of the probability that the total claims would exceed the limit on compensation per incident;

(b) where the IOPC has agreed to pay a claim in principle, subject to further discussions on the quantum. Several outstanding claims from the *Braer* claim fell into this category. In some instances, the quantum could not be agreed because the claimant had failed to provide sufficient information to justify his claim. In other instances, action rested with the Fund secretariat;

(c) where some elements of a claim are settled, but other elements remain under discussion. The United Kingdom delegation was aware of one claim following the *Braer* where settlement of one element had been agreed but withheld, subject to settlement of the remaining elements. It was unclear whether the claimant needed to take legal action to protect all or part of his claim.

3.15.3 A number of delegations stated that the United Kingdom delegation had raised some very interesting legal questions. However, most of these delegations expressed the view that it would not be for the IOPC Fund to interpret the provisions in the Conventions relating to time-bar, since the Fund should not act as a legal adviser to claimants. The point was also made that the provisions of the Conventions concerning the time-bar were very clear and imposed very strict rules which claimants had to observe. It was also mentioned that, since the legal situation in respect of time-bar varied from one jurisdiction to another, it would be very dangerous for the IOPC Fund to give any advice to claimants. A number of delegations pointed out that claimants should not take any risks in this regard, but should take legal action to protect their rights whenever they thought it appropriate.

3.15.4 The Executive Committee took the view that the IOPC Fund should not give any interpretation of the relevant provisions in the Conventions relating to time-bar and should not give legal advice to claimants. The Committee also endorsed the view that the strict provisions in the Conventions should be applied in every case.

3.15.5 The United Kingdom delegation addressed the issue dealt with in its document concerning whether legal fees incurred by claimants who took legal action against the IOPC Fund in order to protect their rights should be reimbursed by the Fund. The delegation mentioned three cases:

(i) when legal costs were incurred in respect of a claim which was later the subject of an out-of-court settlement;

(ii) when legal costs were incurred in respect of a frivolous claim or a claim which had previously been rejected by the IOPC Fund, unless the Fund's decision was subsequently overturned by the court; and

(iii) when legal costs were incurred in respect of any outstanding claim where the IOPC Fund had not taken any decision before the expiry of the three-year period.

3.15.6 The Executive Committee considered the question of whether and to what extent the legal costs for such actions would form an admissible claim against the IOPC Fund. The Committee decided that this would depend on the outcome of the legal proceedings and the applicable national law.

4 Date of next session

The Executive Committee decided to hold its 45th session on Friday 20 October 1995, 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.44/WP.1, FUND/EXC.44/WP.1/Add.1 and FUND/EXC.44/WP.1/Add.2 was adopted, subject to certain amendments.