



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND

EXECUTIVE COMMITTEE  
47th session  
Agenda item 5

FUND/EXC.47/14  
27 February 1996

Original: ENGLISH

## RECORD OF DECISIONS OF THE FORTY-SEVENTH SESSION OF THE EXECUTIVE COMMITTEE

(held on 26 and 27 February 1996)

Chairman: Mr W J G Oosterveen (Netherlands)

Vice-Chairman: Miss A N Ogo (Nigeria)

### 1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document FUND/EXC.47/1.

### 2 Examination of credentials

2.1 The following members of the Executive Committee were present:

Australia	Japan	Nigeria
Canada	Liberia	Norway
Finland	Mexico	Russian Federation
Germany	Netherlands	Spain

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 Member States were represented as observers:

Belgium	Greece	Slovenia
Cyprus	Indonesia	Sweden
Fiji	Mauritius	Tunisia
France	Republic of Korea	United Kingdom

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

China	Panama
Egypt	Saudi Arabia
Jamaica	

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

International Maritime Organization (IMO)  
Regional Marine Pollution Emergency Response Centre for the  
Mediterranean Sea (REMPEC)

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 Haven incident**

3.1.1 The Director introduced documents FUND/EXC.47/2 and FUND/EXC.47/2/Add.1 which set out the developments which had arisen in the *Haven* case since the 46th session of the Executive Committee.

3.1.2 The French delegation, speaking in its capacity of observer, introduced document FUND/EXC.47/2/Add.2 dealing with a request that certain French public bodies (other than the French State) should be paid in full.

3.1.3 The representative of the insurer of the *Haven* (the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd) stated that, contrary to what was stated in document FUND/EXC.47/2/Add.2, the insurer did not accept that interest should be added to the limitation fund. He also stated that the amount of Lft 25 000 million offered as an ex-gratia payment by the shipowner and the insurer was not in any way related to any assessment of ecological damage.

3.1.4 The Executive Committee recalled that only a few claimants, namely the French State, the French municipalities, the Principality of Monaco and a few Italian claimants, had fulfilled the requirements of Article 6.1 of the Fund Convention by making a notification under Article 7.6, thereby preventing their claims from becoming time-barred. The Committee further recalled that it 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). It was also noted that the conditions set by the Executive Committee for a global solution in the *Haven* case had not been met, and that the Committee had referred the matter to the Assembly (document FUND/EXC.44/17, paragraph 3.2.26).

3.1.5 The Executive Committee recalled that the French delegation had expressed the view, at both the 44th session of the Executive Committee and the 18th session of the Assembly in October 1995, that it now appeared very difficult for a global settlement to be reached in the *Haven* case. It was also recalled that the delegation had stated that, for those claimants who had observed the time-bar provisions of the Fund Convention, the claims should be paid promptly. It was noted that the French delegation had 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 Committee's next session (documents FUND/EXC.44/17, paragraphs 3.2.28 and 3.2.29, and FUND/A.18/26, paragraph 11.13).

3.1.6 The Executive Committee noted that the Assembly had decided, at its 18th session, to authorise the Executive Committee to approve at least partial payments to claimants in France, Monaco and Italy who had taken the steps required under the Conventions to prevent their claims from becoming time-barred.

3.1.7 It was noted that in its request the French Government had suggested that payments of the French claims could be made in stages, with the claims presented by the 31 French municipalities, Direction départementale des Services d'incendie et de secours du Var and Parc National de Port-Cros being paid in full while the question of payment to the French State, as well as the payment of interest and legal costs to all French claimants could be referred to a future session, after the court of first instance in Genoa had issued its decision on the list of established claims ("stato passivo").

3.1.8 The Executive Committee took the view that the question of payments to claimants whose claims were not time-barred vis-à-vis the IOPC Fund had to be considered not only for the French claimants but also for the claimants in Monaco and Italy who had also fulfilled the requirements of Article 6.1 of the Fund Convention.

3.1.9 The Executive Committee recalled that, although convinced of the legal validity of the IOPC Fund's position in respect of the time-bar issue, it had nevertheless recognised that the legal proceedings in Italy gave rise to some uncertainty as regards the final outcome of this issue. The Committee recognised that, depending on the outcome of these proceedings, the total amount of the established claims against the Fund could be fixed by the Italian courts at an amount which exceeded the total amount available under the Civil Liability Convention and the Fund Convention. It was noted that in such a situation, each claim would be reduced pro rata. The Committee noted that if, in such a hypothetical situation, the IOPC Fund had paid a number of claimants more than their pro rata share, a complex legal situation would arise.

3.1.10 The Executive Committee noted that the French Government had given the following undertaking to the IOPC Fund (in translation into English), as set out in paragraph 3.4 of document FUND/EXC.47/2/Add.2:

"Should the full and immediate payment of compensation due to the 31 municipalities of the Var and Alpes Maritimes, to the Department of the Var (Direction départementale d'incendie et de secours) and to the Parc national de Port-Cros eventually result in an overpayment by the IOPC Fund, then the State would agree to a reduction of the compensation to which the State would be entitled up to the amounts overpaid to the other French victims".

3.1.11 It was noted that the claim of the French State had been agreed at FFfr12 580 724 (£1 623 000), that the accepted claims by the 33 other public claimants totalled FFfr10 659 469 (£1 375 200) and that the amount of the French State's claim was higher than the aggregate amount of the other French claims.

3.1.12 A number of delegations stated that the IOPC Fund should exercise great caution in accepting to make payments against guarantees of any kind, and that this should be done only in very special cases and provided that the guarantees offered gave the IOPC Fund security against overpayment.

3.1.13 The Committee noted that the French Government offered to provide as security the amount payable by the IOPC Fund to the French State for the State's accepted claim. It was noted that this security was not a State guarantee. In view of the very special situation which had arisen in the *Haven* case and the protection against overpayment which the undertaking made by the French Government would give the IOPC Fund, the Executive Committee decided to instruct the Director to pay in full the claims presented by the Direction départementale des Services d'incendie et de secours du Var, the 31 municipalités and Parc national de Port-Cros for the amounts set out in the table reproduced in paragraph 4.1 of document FUND/EXC.47/2, totalling FFfr10 659 469 (£1 375 200).

3.1.14 It was noted that, according to the French Government, the IOPC Fund would have to pay interest and legal costs to the French claimants if the Italian courts were to decide that the majority of the other claims were time-barred. It was also noted that, in the French Government's view, the claims for interest and costs would be withdrawn, if a global settlement were reached out of court with all claimants.

3.1.15 The Executive Committee agreed with the French Government's position in respect of interest and legal costs, as set out in paragraph 3.1.14 above.

3.1.16 The Director informed the Executive Committee that two Italian claimants, whose claims were not time-barred against the IOPC Fund, namely the contractors Ecolfriuli and Ecolmare, had contacted the IOPC Fund's Italian lawyer to discuss the possibility of being paid. It was noted that these claimants had indicated that, if the IOPC Fund were to pay their claims, they would be prepared to submit to the IOPC Fund a bank guarantee ensuring repayment of any amounts paid by the Fund which resulted in these claimants receiving more than their share, should the claims later be reduced pro rata (document FUND/EXC.47/2/Add.1).

3.1.17 It was noted that the quantum of the claims presented by Ecolfriuli and Ecolmare had been agreed in the amounts of Lit 262 million (£110 000) and Lit 1 738 million (£728 000), respectively.

3.1.18 The Executive Committee instructed the Director to pay in full the agreed amounts to any Italian claimant whose claim was not time-barred against the IOPC Fund and who provided a bank guarantee or other suitable security which would give the IOPC Fund adequate protection against overpayment if later the claims were to be reduced pro rata.

3.1.19 The Executive Committee noted that Ecolfriuli and Ecolmare had received partial payments from the State of Italy, probably in the amounts of Lit 41 400 805 (£17 300) and Lit 376 257 505 (£157 500), respectively. It was decided that any amounts which these claimants had received from the State of Italy should be deducted from the IOPC Fund's payment to these claimants.

### 3.2 Aegean Sea incident

3.2.1 The Director introduced document FUND/EXC.47/3 concerning developments which had arisen in the *Aegean Sea* case since the 46th session of the Executive Committee.

#### *Court proceedings in La Coruña*

3.2.2 The Director informed the Executive Committee that the hearing in the criminal proceedings against the master of the *Aegean Sea* and the pilot had been held in the Penal Court in La Coruña from 9 January to 1 February 1996. It was noted that the Court had considered not only the criminal aspects but also the claims for compensation which had been presented in the criminal proceedings against the shipowner, the master, the shipowner's P & I insurer (the UK Club), the IOPC Fund, the owner of the cargo on board the *Aegean Sea* and the pilot. The Committee noted the position taken by the IOPC Fund in respect of various issues and the arguments put forward by the Fund and by various claimants during the proceedings, as set out in document FUND/EXC.47/3, paragraphs 3.5.4-3.5.33).

3.2.3 The Spanish delegation expressed the disappointment and frustration of both central and local government (the Xunta de Galicia) for the lack of progress experienced in the settlement and payment of claims despite the fact that more than three years had passed since the incident occurred. In its view, the policy followed by the IOPC Fund could be summarised in one single statement: "no evidence, no payment". This delegation felt that the key issue all claimants faced was therefore to prove their losses. This delegation agreed with the key rules and principles laid down by the Assembly and Executive Committee on many occasions, ie that the IOPC Fund was only entitled to pay compensation against evidence of losses and that the IOPC Fund had to limit the level of payments to ensure an equitable treatment of all victims. The Spanish delegation emphasised that a degree of flexibility should be exercised by the IOPC Fund's experts when assessing the evidence presented by claimants. In its view, the evidence given by the IOPC Fund's experts in the proceedings had not been impartial. The Spanish delegation stated that different incidents in different countries might require different methods of proof and asked for a new effort to assess the damages to cope with the situation. The delegation asked the IOPC Fund not to be too cautious in making partial payments and to take into account that Article 4.5 of the Fund Convention, which deals with equal treatment of claimants, was not an end in itself. In this delegation's view, if the principles of the IOPC Fund were interpreted in a restrictive manner and all incidents finished in court, the trust of the general public in the IOPC Fund would be weakened. The Spanish delegation felt that something should be done to avoid this situation occurring, as the credibility of the compensation system would otherwise be seriously undermined.

3.2.4 With regard to the position taken by the IOPC Fund that the pilot was liable for the incident (document FUND/EXC.47/3, paragraph 3.5.7), the Spanish delegation stated that, in the view of the Spanish Government, the incident was caused by an error of navigation and not by any fault of the pilot or port authority.

3.2.5 It was noted that according to two decisions by the Spanish Supreme Court relating to the 1957 Convention relating to the limitation of liability of owners of sea-going ships and a statement in a decision by the Supreme Court regarding the 1976 Convention on limitation of liability of maritime claims, the shipowner was not entitled to limit his liability if the master had been guilty of a criminal act. The Executive Committee drew attention to the fact that under the 1969 Civil Liability Convention, the shipowner could be deprived of the right to limit his liability only if the incident occurred as a result of the actual fault or privity of the owner (Article V.2), and that no claims for compensation could be brought against the owner otherwise than in accordance with the Convention.

3.2.6 It was also noted that claims for compensation had been made against the master. The Committee drew attention to the fact that under Article III.4 of the Civil Liability Convention no claims for compensation could be made against the servants or agents of the owner. The Committee took the view that claims for compensation could not be brought against the master under the Convention or otherwise, since he clearly fell within the concept of servants or agents of the owner.

3.2.7 The Executive Committee reiterated that it was for the claimant to prove that he had suffered a loss caused by contamination and to demonstrate the quantum of his loss. The Committee took the view that it was not the obligation of the IOPC Fund nor of its experts to provide evidence of the damage suffered.

3.2.8 The Executive Committee agreed with the Director that the claims referred to in paragraphs 3.5.15-3.5.20 of document FUND/EXC.47/3 were not admissible, for the reasons set out therein.

3.2.9 The Committee noted the series of studies prepared by the University of Santiago de Compostela in the form of an economic analysis of losses suffered in the fisheries and aquaculture sector as a result of the *Aegean Sea* incident. The Committee agreed that these studies could not be used as a basis for the assessment of damage, since it was a theoretical study which did not assess the economic losses actually suffered by individual claimants. It was also agreed that it was not correct to calculate damage on the basis of a theoretical assessment of the biomass of fish products, which was the approach used in the University studies. It was further agreed that the only correct method of assessing the losses actually suffered was a comparison between the actual income of claimants in the years before the

incident and the income during the period when the fishing activities had been affected, on the basis of documents, for example accounts, catch records or tax declarations (cf document FUND/EXC.47/3, paragraph 3.5.21-3.5.24).

3.2.10 It was also noted that in the view of the IOPC Fund's experts, the University of Santiago studies were seriously flawed in a number of regards, as set out in paragraphs 3.5.25 and 3.5.26 of document FUND/EXC.47/3. The Committee insisted that in any assessment deductions should be made for costs saved by the claimants during the period of inactivity as well as for payments made to claimants by the Commission of the European Communities through Directorate-General XIV (fisheries). The Committee agreed in general with the approach taken by the IOPC Fund's experts, as set out in paragraphs 3.5.23 and 3.5.27-3.5.29 of document FUND/EXC.47/3.

3.2.11 The Spanish delegation requested the IOPC Fund to reconsider the assessment of the claims in the light of the reports of the University of Santiago de Compostela with a view to increasing the payments of compensation.

3.2.12 The Director reported that at a meeting with representatives of the Spanish Government and the Xunta of Galicia it had been agreed that the IOPC Fund should set out in a concise form the main points of disagreement between the Fund and the claimants, as explained during the court hearing.

3.2.13 It was noted that at the court hearing a number of claimants had raised the issue of the method to be applied to convert into Spanish Pesetas the maximum amount payable under the Civil Liability Convention and the Fund Convention which was expressed in (gold) francs (Poincaré francs). It was further noted that these parties had maintained that the amount should be converted using the free market value of gold instead of on the basis of the Special Drawing Right (SDR), since the 1976 Protocol to the Fund Convention which replaced the franc as unit of account by the Special Drawing Right of the International Monetary Fund had not entered into force at the time of the *Aegean Sea* incident.

3.2.14 The Executive Committee reiterated its position that the conversion should be made on the basis of the SDR, for the reasons invoked by the IOPC Fund in the *Haven* case.

3.2.15 The Spanish delegation stated that the Spanish Government had always supported the IOPC Fund's position as regards the method to be applied for the conversion, as set out in paragraph 3.2.14.

#### *Time-bar*

3.2.16 It was noted that claims against the IOPC Fund become time-barred three years after the date when the damage occurred unless the claimant had taken certain legal steps, as set out in Article 6.1 of the Fund Convention. It was also noted that the three-year time period specified in Article 6.1 had expired in the *Aegean Sea* case for most claimants on or shortly after 3 December 1995, and that this Article related to the extinction of rights.

3.2.17 The Committee recalled that at its 46th session it had considered, *inter alia*, a group of claims in respect of which "conciliation acts" had been presented before the Civil Court in La Coruña. It was also recalled that the IOPC Fund had not been served with the documents at that time and that the Fund did not have any information concerning the claimants, the defendants or the amounts claimed. It was noted that the IOPC Fund's Spanish lawyer had informed the Committee that conciliation acts, according to a decision by the Spanish Supreme Court, had the effect of interrupting prescription but not of preventing the extinction of rights ("caducidad"). It was further recalled that the Committee had decided to postpone its decision in respect of the time-bar issue concerning these claims to its 47th session.

3.2.18 The Director stated that it had been agreed with the Spanish delegation that the IOPC Fund would prepare a document setting out the Fund's position on the time-bar issue in respect of various groups of claims.

3.2.19 The Executive Committee decided to revert to this issue at its 48th session.

3.2.20 Some delegations stressed that the provisions in the Conventions on time-bar should be applied uniformly in all Member States.

3.2.21 The Spanish delegation, in view of the particularities of Spanish law, argued that the relationship between criminal and civil proceedings might make such a uniform application more difficult. In the view of the Spanish delegation it was unfortunate that some claimants might not have protected their rights in accordance with the Fund Convention. In addition, the Spanish delegation stated that all main groups of claims had no time-bar problems in the light of the interpretation of the Convention in conjunction with the internal law of Spain. This delegation pointed out, however, that the Spanish Government had given detailed and full explanations to claimants as regards the time-bar issue.

*Negotiation with claimants*

3.2.22 The Executive Committee shared the Director's view that it would be appropriate to continue the negotiations with those claimants whose claims were not time-barred, for the purpose of arriving at out-of-court settlements. The Committee instructed the Director to continue his efforts to reach out-of-court settlements in respect of such claims.

### 3.3 Braer incident

*Legal action in the Court of Session in Edinburgh*

3.3.1 The Executive Committee noted that claims against the IOPC Fund had become time-barred on or shortly after 5 January 1996, ie at the expiry of a period of three years from the date when the damage occurred. It was also noted that, at the expiry of the three-year period, some 250 claimants had taken legal action against the shipowner and the shipowner's P & I insurer (the Skuld Club) and had notified the IOPC Fund of the action, or in some cases had taken action also against the IOPC Fund. The Committee noted that the total amount claimed was approximately £80 million. It was also noted that the summonses submitted to the Court gave, with a few exceptions, little information as to the details of the alleged losses or how the claimed amounts had been calculated.

3.3.2 The Committee noted that a large number of these claims had previously been rejected by the Executive Committee as inadmissible in principle. It was also noted that in the Director's view the amounts claimed were in most cases highly inflated.

3.3.3 It was noted that defences had been prepared or were being prepared on behalf of the IOPC Fund in respect of each claim, on the basis of the relevant decisions of the Executive Committee and the general policy of the IOPC Fund as regards the admissibility of claims, taking into account that the claims were brought under the United Kingdom legislation implementing the Civil Liability Convention and the Fund Convention (Merchant Shipping Acts 1971 and 1974).

3.3.4 The Executive Committee took note of the summary of the claims presented in court, as set out in tabular form in the Annex to document FUND/EXC.47/4.

3.3.5 The Director made the following statement:

The IOPC Fund intends to examine the claims pending in Court and prepare its defences on the basis of the same principles as those previously applied for arriving at out-of-court settlements, ie on the basis of the relevant decisions of the Executive Committee and the general policy of the IOPC Fund as regards admissibility of claims, taking into account that the claims are brought before the Court under the United Kingdom legislation implementing the Civil Liability Convention and the Fund Convention (Merchant Shipping Acts 1971 and 1974). Unfortunately, the summonses submitted in Court give, with a few exceptions, very little information as to the details of the alleged losses or how the amount claimed has been calculated.

A number of claims presented in Court appear to be admissible in principle, for example a number of claims submitted by fishermen. It appears, however, that the amounts claimed are in most cases highly inflated. The Director intends to enter into negotiations as soon as possible with each individual claimant whose claim is admissible in principle and who has submitted sufficient evidence to substantiate his loss, in order to try to reach agreement on the quantum of the admissible claim. On the other hand, the Director does not feel it meaningful to enter into negotiations with those claimants whose claims have been rejected by the Executive Committee as not admissible in principle.

3.3.6 The Executive Committee instructed the Director to pursue negotiations with those claimants whose claims in the IOPC Fund's view were admissible in principle, for the purpose of reaching agreement on the admissible quantum.

3.3.7 In connection with the examination of the table of claims set out in the Annex to document FUND/EXC.47/4, it was recalled that the Executive Committee had, at its 44th session, dealt with claims for loss of income sustained by the owners of four small whitefish vessels which normally fish in an area to the west of the island of Burra (known as the Burra Haaf). It was also recalled that the Executive Committee considered two alternative methods for compensating losses sustained by the owners of these vessels 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. It was noted that the Executive Committee had 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 arose.

3.3.8 It was noted that the Director had obtained counsel's opinion on this issue and that counsel had advised that there was no realistic prospect that the Court would deal with the Burra Haaf fishermen's claim otherwise than by the awarding of a lump sum. In view of the fact that these claims were now subject to court proceedings, the question was raised whether the Executive Committee should reassess its previous decision in respect of these claims. Some delegations considered it acceptable that the Fund settle claims in a lump sum in certain situations, provided that the loss was certain and could be quantified with a degree of accuracy. Other delegations considered, however, that the IOPC Fund should maintain its previous policy of assessing compensation of losses as and when they arose. A number of delegations stated that, although they would be prepared to reassess the Fund's position on this point, they would not be prepared to make a decision at this session.

3.3.9 The Executive Committee decided to maintain its policy in respect of future losses, at least for the time being. It also decided that this matter should be re-examined at a future session on the basis of a document prepared by the Director.

#### *Suspension of payments*

3.3.10 The Executive Committee recalled that, at its 44th session, it had taken note of the total amount of the claims presented so far and had noted that a number of claimants intended to bring legal actions against the shipowner, the Skuld Club and the IOPC Fund. It was also recalled that the Committee had instructed the Director to suspend any further payments of compensation until the Committee had re-examined at its 46th session the question of whether the total amount of the established claims would exceed the maximum amount available under the Civil Liability Convention and the Fund Convention, viz 60 million Special Drawing Rights (SDR) (document FUND/EXC.44/17, paragraph 3.4.45).

3.3.11 It was further recalled that, at its 46th session, the Executive Committee had decided, in view of the remaining uncertainty as regards the outstanding claims, that the suspension of payments should be maintained until the matter had been re-examined at its 47th session (document FUND/EXC.46/12, paragraph 3.3.23).



3.3.12 It was recognised that for a number of individuals, in particular some fishermen, whose claims were admissible in principle, the suspension of payments was causing severe financial hardship. Nevertheless, in view of the remaining uncertainty as regards the outstanding claims, the Executive Committee decided that the suspension of payments should be maintained for all claims until the matter had been examined at its 48th session.

*Consideration of challenging the shipowner's right of limitation*

3.3.13 The Executive Committee held a session in private, pursuant to Rule 12 of the Rules of Procedure, to discuss whether the Committee should reconsider the decision not to challenge the shipowner's right to limit his liability. During the closed session, covered by paragraphs 3.3.13-3.3.20, only the representatives of IOPC Fund Member States were present.

3.3.14 It was recalled that, after careful consideration and in view of the fact that a successful recovery by the IOPC Fund of any significant amounts was unlikely, the Executive Committee had decided at its 46th session that the Fund should not challenge the shipowner's right of limitation or take legal action against him to recover the amounts paid by the IOPC Fund in compensation. It was also recalled that the Committee had decided that, if new information became available showing that the IOPC Fund had greater prospects of success, the Director - after consultation with the Chairman - should take action to challenge the shipowner's right of limitation and take actions for recovery, if such actions were still possible.

3.3.15 The Director informed the Executive Committee that one delegation had contacted him and requested that the Committee should be given the possibility to reconsider whether the IOPC Fund should challenge the shipowner's right to limit his liability. It was noted that the main reason given for this request was that the total amount of the claims against the IOPC Fund presented in the Court of Session in Edinburgh was much higher than what was estimated when the matter was considered by the Committee in December 1995.

3.3.16 It was noted that no new information had become available since the Executive Committee's 46th session to show that the IOPC Fund's prospects of a successful recovery of significant amounts were greater than assumed at the Committee's 46th session.

3.3.17 The Executive Committee decided to uphold the decision made at its 46th session that the IOPC Fund should not challenge the shipowner's right to limit his liability.

*Indemnification of the shipowner*

3.3.18 The Executive Committee recalled that, at its 46th session, it had considered the question of whether and, if so, to what extent the IOPC Fund was exonerated from its obligation to indemnify the shipowner and his insurer under Article 5.1 of the Fund Convention. It was further recalled that the Committee had decided to postpone its decision on this issue to its 47th session.

3.3.19 The Director informed the Executive Committee that, as instructed by the Committee, he was discussing the issue of indemnification with the Skuld Club.

3.3.20 The Committee decided to postpone its decision on this issue to a future session.

3.4 Keumdong N°5 incident

3.4.1 The Director introduced document FUND/EXC.47/5 which set out the developments which had taken place in the *Keumdong N°5* incident since the Executive Committee's 44th session.

3.4.2 The Executive Committee recalled that, at its 38th session, it had endorsed the Director's decision to limit the IOPC Fund's payments, at least for the time being, to 50% of the established damage suffered by each claimant (cf document FUND/EXC.38/9 paragraph 3.6.5).

3.4.3 The Committee noted that claims for compensation had been submitted by, inter alia, the Kwang Yang Bay Oil Pollution Accident Compensation Federation, representing eleven fishery co-operatives with some 6 000 members in all, for a provisional total of Won 93 132 million (£77 million). It was also noted that the Federation had indicated that it would submit further claims in the region of Won 90 000 million (£75 million).

3.4.4 It was noted that in December 1995 agreement on a final settlement had been reached with the fishery co-operative which had presented the largest group of claims. It was also noted that these claims had been settled for a total amount of Won 4 360 million (£3.6 million), compared to the amount claimed of Won 18 428 million (£15.3 million). The Director informed the Committee that in February 1996 the IOPC Fund had paid to the claimants belonging to this co-operative the sum of Won 2 150 million (£1.8 million), representing 50% of the settlement amounts minus the amounts that the claimants had previously received from the shipowner's limitation fund.

3.4.5 It was recalled that, in order to make it possible for the IOPC Fund to pay agreed items in full, an agreement in principle had been reached between the Fund and the Kwang Yang Bay Federation that the admissible amount of the claims of the members of the co-operatives forming part of the Federation would not exceed a given amount, so as to protect the IOPC Fund against overpayment, as set out in paragraph 2.10 of document FUND/EXC.47/5. It was recalled that, at its 44th session, the Executive Committee had shared the Director's view that once an agreement of the type described had been 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 (document FUND/EXC.44/17, paragraph 3.5.4). It was also noted that this agreement had not yet been signed on behalf of the co-operatives.

3.4.6 A number of delegations stated that the IOPC Fund should exercise caution in accepting to make full payments against guarantees of this type. The Committee noted that it had accepted this procedure in respect of the *Keumdong N°5* incident. It was agreed, however, that procedures of this type should be used only in very particular situations and provided that any guarantee provided would give the IOPC Fund security against overpayments.

3.4.7 It was recalled that the IOPC Fund had joined in the proceedings for the sale of the other ship involved in the incident (the *Bi Jia Shan*) for the purpose of recovering part of the amounts paid by the Fund to claimants. The Director informed the Committee that the *Bi Jia Shan* had been sold in October 1995, but that the price obtained did not even cover the cost of the sale. The Committee noted that the IOPC Fund would therefore not recover any money from the sale.

### 3.5 Seki incident

At the request of the Government of the United Arab Emirates, the Executive Committee decided to postpone its further consideration of the *Seki* incident (cf document FUND/EXC.47/6) to its session in June 1996.

### 3.6 Sea Prince incident

3.6.1 The Executive Committee took note of the developments in respect of the *Sea Prince* incident, as set out in document FUND/EXC.47/7.

3.6.2 The Committee recalled that it had decided, at its 46th session, that the IOPC Fund's payments should for the time being be limited to 25% of the established damage suffered by each claimant, since the aggregate amount of the claims presented or indicated still greatly exceeded the total amount

available under the Civil Liability Convention and the Fund Convention (document FUND/EXC.46/12, paragraph 4.3.3).

3.6.3 In the light of the information contained in document FUND/EXC.47/7 on the aggregate amount of the claims presented, the Executive Committee decided to increase the IOPC Fund's payments from 25% to 50% of the established damage suffered by each claimant, subject to confirmation of a significant reduction of the total amount of the fisheries related claims.

### 3.7 Yuil N°1 Incident

3.7.1 The Executive Committee took note of the information contained in document FUND/EXC.47/8 on the *Yuil N°1* incident.

3.7.2 The Executive Committee recalled that, at its 46th session, the Committee had decided that, in view of the uncertainty concerning the aggregate amount of the claims, payments by the IOPC Fund should for the time being be limited to 60% of the established damage suffered by each claimant (document FUND/EXC.46/12, paragraph 4.5.6).

3.7.3 The Committee noted that claims had been agreed for a total of Won 14 541 million (£12 million), out of which Won 11 841 million (£9.8 million) related to clean-up operations and Won 2 701 million (£2.2 million) to fishery claims. It was further noted that payments made so far totalled Won 9 799 million (£8.1 million), out of which the IOPC Fund's payments totalled Won 8 315 million (£6.8 million).

3.7.4 In view of the remaining uncertainty concerning the total amount of the established claims, the Executive Committee decided to maintain the limit of the IOPC Fund's payments at 60% of the established damage suffered by each claimant.

3.7.5 It was noted that the owner of the *Yuil N°1* had employed a specialist British company to establish the condition of the wreck of the tanker, which had sunk in 70 metres of water, ten kilometres from the mainland. The Executive Committee was informed that in November 1995 the Marine Police had ordered the shipowner to remove the oil or the wreck. It was noted that, on the basis of studies carried out by experts employed by the shipowner, the owner had maintained that it would be unnecessary and unwise to remove the oil or the wreck. It was also noted that the shipowner had argued that there was a minimal release of oil and that there was no risk of any significant release of oil if the wreck were left where it was, since the wreck was slowly being covered by mud which would help to prevent further significant releases of oil. It was further noted that the owner had stated that if an oil removal or wreck removal operation were to be carried out, there would be a significant risk that oil would escape causing further pollution.

3.7.6 It was noted that the Korean Government had informed the IOPC Fund that there was a growing concern about the possibility of an oil spill from the wreck which could cause pollution in the nearby coastal area and which could severely affect the livelihood of the local people. It was noted that, according to the Government, Korean experts were of the opinion that there was a need to carry out a further investigation of the wreck in order to obtain more information about its condition. It was further noted that the Korean Government had asked the IOPC Fund whether the Fund would either carry out further investigations into the condition of the wreck or compensate the Korean authorities for the cost of carrying out such investigations, which the Government considered as measures to prevent further pollution. It was finally noted that the Korean Government had asked whether the IOPC Fund would fund the costs incurred by the Government for removing the sunken tanker and its cargo.

3.7.7 The Committee shared the view of the Director that it was not the task of the IOPC Fund to carry out clean-up operations or preventive measures itself, nor to undertake studies in these fields. The Committee endorsed the Director's position that the IOPC Fund should not undertake the investigation requested. It was agreed that it would be for the Committee to decide, on an objective basis and in the light of all circumstances of the case, whether the cost of any investigation or of any operation carried

out by the Korean Government in respect of the removal of the oil or the wreck would be admissible for compensation.

3.7.8 The Korean delegation requested that the level of compensation payable by the IOPC Fund be increased from 60% to 100%. The delegation stated that, if this request were accepted, the Korean Government was prepared to provide a guarantee to protect the IOPC Fund against overpayment.

3.7.9 A number of delegations expressed the view that the IOPC Fund should be very cautious in accepting to make payments against State guarantees. It was pointed out that there was a difference between State guarantees and the undertaking given by the French Government in the *Haven* case.

3.7.10 In view of the considerations set out in paragraph 3.7.9, the Executive Committee decided not to accept a guarantee of the type proposed by the Korean delegation. It was also decided that in view of the remaining uncertainty concerning the total amount of the established claims, the limit of the IOPC Fund's payment should be maintained at 60% of the established damage suffered by each claimant.

3.7.11 The Korean delegation stated that the Korean Government wished to find a solution to the wreck removal issue and the question of guarantees against overpayment. The delegation mentioned that an ad hoc Committee composed of several interested government authorities had been set up to take anti-pollution measures and that a final decision would be taken after all aspects had been duly considered, including the position taken by the Executive Committee. The delegation stated that the Korean Government would like to have a more detailed discussion with the IOPC Fund after the Government's decision had been taken.

### 3.8 Honam Sapphire incident

3.8.1 The Executive Committee took note of the developments which had taken place in the *Honam Sapphire* incident since the Committee's 46th session (document FUND/EXC.47/10).

3.8.2 It was recalled that, at its 46th session, the Executive Committee had 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, and that the Committee considered it necessary for the IOPC Fund to exercise caution in the payment of claims. The Committee also recalled that it had 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, but had not authorised him to make any payments (document FUND/EXC.46/12, paragraphs 4.6.2 and 4.6.3).

3.8.3 In the light of the information contained in document FUND/EXC.47/10 on the aggregate amount of the claims, the Executive Committee authorised the Director to make payments of claims which were settled. In view of the remaining uncertainty concerning the total amount of the claims, however, the Committee decided that the IOPC Fund's payments should for the time being be limited to 60% of the established damage suffered by each claimant.

### 3.9 Toko Maru incident

3.9.1 The Executive Committee took note of the information contained in document FUND/EXC.47/9 on the *Toko Maru* incident, which had occurred on 23 January 1996 in Japan.

3.9.2 The Executive Committee authorised the Director to make final settlements 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 Sea Empress incident

3.10.1 The Executive Committee took note of the information contained in document FUND/EXC.47/11 on the *Sea Empress* incident, which had occurred on 15 February 1996 off Milford Haven in Wales (United Kingdom).

3.10.2 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.

3.10.3 As regards the question of whether the Director should be authorised to make payments, a number of delegations considered that it was premature to take any decision authorising payments by the IOPC Fund, in view of the fact that the incident had taken place only shortly before the session and that for this reason it was not possible to make any estimate of the aggregate amount of the claims. It was stated that the IOPC Fund was liable to pay compensation only when the total amount of payments made by the shipowner exceeded the limitation amount applicable to the ship, which in this case was approximately £8 million. It was also mentioned that, if the IOPC Fund were to start making payments at this early stage, there was a risk that an overpayment situation might arise.

3.10.4 The United Kingdom observer delegation expressed its serious concern of the position taken by a number of delegations. The delegation agreed that the IOPC Fund should exercise due care where it was necessary to protect itself against an overpayment situation, but took the view that the IOPC Fund should not be over-cautious, otherwise the system of compensation established under the Civil Liability Convention and the Fund Convention would not be working the way it was intended. The United Kingdom delegation drew attention to the initial assessment of the Fund's experts and pointed out that there was a great difference between the *Braer* incident and the *Sea Empress* incident, since in the latter case it was unlikely that there would be significant claims for damage to agriculture or to houses and the mariculture industry was much smaller than in Shetland. In the view of that delegation there was therefore every reason to expect the Fund's limit to be sufficient to meet claims. The United Kingdom delegation stated that if the IOPC Fund were not prepared to make payments at an early stage in cases of this type, the Fund would be paralysed and would not be able to fulfill its objective, namely to provide prompt compensation to victims of oil pollution damage.

3.10.5 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. In view of the uncertainty as to the total amount of the claims, the Committee decided that the Director was not authorised at this stage to make any payments.

3.10.6 The United Kingdom observer delegation expressed its deep concern as regards the Committee's decision not to authorise the Director to make any payments - even in cases of hardship. It stated that the United Kingdom Government would explore every avenue to assist those whose livelihood had been affected by the incident. The delegation reiterated the view that if this were to be the normal Fund policy in the future, the Fund regime had become paralysed.

3.10.7 The Director suggested that the Executive Committee might wish to hold a short session during the International Conference on Hazardous and Noxious Substances and Limitation of Liability, which would be held from 15 April to 3 May 1996, to consider certain aspects of the *Sea Empress* incident in the light of further information concerning the extent of the pollution damage and the level of claims which could be expected.

#### 4 Any Other Business

##### 4.1 Certificates of insurance

The Executive Committee took note of the information contained in a document submitted by the Government of Japan relating to the issuing of certificates of insurance in respect of ships flying the flag of a State Party to the 1969 Civil Liability Convention but not to the 1992 Civil Liability Convention (document FUND/EXC.47/12).

##### 4.2 Draft International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea

The Executive Committee took note of a document which the Director had submitted for consideration by the International Conference on Hazardous and Noxious Substances and Limitation of Liability, which would be held from 15 April to 3 May 1996, containing the IOPC Fund's observations on the draft International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (document FUND/EXC.47/13).

##### 4.3 New Member States

The Committee noted that the Fund Convention had entered into force for Mauritania on 17 February 1996. It was also noted that Tonga had deposited an instrument of accession in respect of the Fund Convention on 1 February 1996 and that the Convention would enter into force for Tonga on 1 May 1996, bringing the number of Member States to 68.

##### 4.4 1992 Protocols amending the 1969 Civil Liability Convention and the 1971 Fund Convention

4.4.1 The delegation of the Netherlands informed the Committee that the Netherlands would probably be in a position to ratify the 1992 Protocols amending the 1969 Civil Liability Convention and the 1971 Fund Convention during the summer of 1996.

4.4.2 It was noted that ratification of the Protocols by the Netherlands would result in the threshold of 750 million tonnes being reached, which would trigger the compulsory denunciation of the 1969 Civil Liability Convention and the 1971 Fund Convention by the States which had deposited instruments of ratification in respect of the 1992 Protocol to the Fund Convention. It was also noted that these States would then have six months in which to deposit instruments of denunciation, with effect 12 months later. It was further noted that after these denunciations had taken effect, the burden on contributors in the remaining 1971 Fund Member States would increase significantly.

##### 4.5 Preparations for the entry into force of the 1992 Protocols

The Director informed the Committee of the on-going preparations for the entry into force of the 1992 Protocols to the Civil Liability Convention and the Fund Convention.

##### 4.6 New incident

The Director informed the Committee of two incidents in which the IOPC Fund had recently become involved, namely the *Kihnu* incident which had occurred on 16 January 1993 in Estonia and a spill from an unknown source which had taken place on 30 November 1994 in Morocco.

#### 4.7 Payment of contributions

4.7.1 It was recalled that the Assembly had, at its 18th session, decided to levy contributions to the General Fund and three Major Claims Funds for a total amount of £43 million, payable by 1 February 1996. The Director informed the Executive Committee that invoices had been issued for £41 076 824 and that, as at 23 February 1996, £38 600 675 had been received, corresponding to 93.97% of the invoiced amounts.

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

#### 4.8 IOPC Fund Secretariat

4.8.1 One delegation drew attention to the fact that the IOPC Fund Secretariat had during the last years had to cope with a great increase in workload as a result of the Fund being involved in a number of major incidents. This delegation wondered whether it would not be necessary to strengthen the Secretariat.

4.8.2 The Director agreed that the Secretariat was at present facing a very heavy workload. He stated that it had been possible to cope with this workload only because of the quality of the staff, their loyalty and the hard work performed by every staff member. He agreed that it might be necessary to increase the number of staff and indicated that he would consider this matter and, if appropriate, submit a proposal to the Assembly in due course.

#### 4.9 Date of next session

4.9.1 It was noted that the Executive Committee might hold a session during the International Conference referred to in paragraph 4.2 above, to be held from 15 April to 3 May 1996, to deal with certain questions relating to the *Sea Empress* incident.

4.9.2 The Executive Committee decided to hold a session during the week of 24-28 June 1996, in connection with the first Assembly of the Organisation established under the 1992 Fund Convention ("1992 Fund") and the second extraordinary session of the Assembly of the IOPC Fund.

### 5 Adoption of the Report to the Assembly

The Executive Committee adopted the parts of the Record of Decisions contained in documents FUND/EXC.47/WP.1, FUND/EXC.47/WP.1/Rev.1 and FUND/EXC.47/WP.1/Add.1 (viz paragraphs 1-3.9.2), subject to certain amendments. The Committee authorised the Director to prepare the remaining part of the Record of Decisions (paragraphs 3.10-5), in consultation with the Chairman.

---