



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND

EXECUTIVE COMMITTEE  
48th session  
Agenda item 6

FUND/EXC.48/6  
17 April 1996

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

(held on 16 April 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.48/1.

### 2 Examination of credentials

2.1 The following members of the Executive Committee were present:

Australia  
Canada  
Finland  
Germany

India  
Japan  
Liberia  
Mexico

Netherlands  
Norway  
Russian Federation  
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 | Ireland           | Tunisia        |
| Denmark | Republic of Korea | United Kingdom |
| France  | Slovenia          | Venezuela      |
| Greece  | Sweden            |                |

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

Saudi Arabia  
United States

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

International Maritime Organization (IMO)  
  
Comité Maritime International (CMI)  
Cristal Limited  
International Association of Independent Tanker Owners (INTERTANKO)  
International Chamber of Shipping (ICS)  
International Group of P & I Clubs  
International Tanker Owners Pollution Federation Limited (ITOPF)  
Oil Companies International Marine Forum (OCIMF)

### 3 Sea Empress Incident

#### 3.1 General

The Executive Committee took note of the information contained in documents FUND/EXC.48/2, FUND/EXC.48/2/Add.1 and FUND/EXC.48/2/Add.2, submitted by the Director, on the developments which had taken place in respect of the *Sea Empress* incident since the Committee's 47th session. The Committee also took note of document FUND/EXC.48/2/1 submitted by the United Kingdom delegation.

#### 3.2 Investigations into the cause of the incident

3.2.1 It was noted that the Marine Accident Investigation Branch (MAIB) of the Department of Transport of the United Kingdom was carrying out an enquiry into the cause of the incident. The Executive Committee also noted the interim findings published by the MAIB as set out in paragraph 4.1 of document FUND/EXC.48/2.

3.2.2 The Executive Committee noted that the Liberian authorities were also carrying out an investigation into the cause of the incident.

3.2.3 The Director informed the Executive Committee that he would examine the results of the investigations when they became available.

#### 3.3 Claims handling

It was noted by the Executive Committee that the shipowner's P & I insurer (Assuranceföreningen Skuld, the Skuld Club) and the IOPC Fund had together established a Claims Handling Office in Milford

Haven, the purpose of which was to receive claims and forward them to the Skuld Club and the IOPC Fund for examination and approval, and to assist claimants in the presentation of their claims. It was further noted that the IOPC Fund and the Skuld Club had engaged a number of experts to examine various groups of claims (viz those relating to clean-up operations, fishing, tourism, salvage and property damage), and that their work was being co-ordinated by the Claims Handling Office.

#### 3.4 Claims for compensation and payments by the IOPC Fund

3.4.1 It was recalled that, at its 47th session, the Executive Committee 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 (document FUND/EXC.47/14, paragraph 3.10.2).

3.4.2 It was also recalled that the Executive Committee had, at that session, 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. It was noted that, for this reason, the Committee had considered it necessary for the IOPC Fund to exercise caution in the payment of claims. It was recalled that, in view of the uncertainty as to the total amount of the claims, the Committee had decided that the Director was not authorised at that stage to make any payments (document FUND/EXC.47/14, paragraph 3.10.5).

3.4.3 The Executive Committee noted that, in order to mitigate financial hardship to claimants, the Skuld Club had set up a procedure for making interim hardship payments which would be in force until the end of April 1996. It was also noted that, up to 16 April 1996, interim hardship payments totalling £240 336 had been made or authorised by the Skuld Club to 41 claimants, after consultation with the Director. It was further noted that these payments had been made only if the Director had agreed that the claims were admissible in principle and that the amounts of the respective interim hardship payments did not exceed the loss suffered by the claimant for the period in question, as assessed by the experts engaged by the Skuld Club and the IOPC Fund.

3.4.4 The Executive Committee expressed its appreciation to the Skuld Club for having established the procedure for interim hardship payments and for having made funds available for such payments.

3.4.5 The Executive Committee took note of the estimate of the likely level of claims made by the Director in document FUND/EXC.48/2/Add.1 and of the information in this regard contained in the document submitted by the United Kingdom delegation (document FUND/EXC.48/2/1).

3.4.6 The United Kingdom delegation, speaking in its capacity of observer, stated that in its view there was no real risk that the IOPC Fund's limit of £57 million would be exceeded in the *Sea Empress* case. That delegation emphasised that it was particularly important that payments could be made in full in genuine financial hardship situations. Noting the Director's recommendation in document FUND/EXC.48/2/Add.1, the delegation recognised that if claims in general were only to be paid for a given percentage, it could be difficult for the IOPC Fund to make full hardship payments. When asked on the delegation's position if the IOPC Fund were to limit the payments to be made to claimants, the United Kingdom delegation expressed the hope that the Skuld Club would then be able to show flexibility in respect of genuine financial hardship. The delegation stated that, if the Skuld Club were prepared to make hardship payments at a level higher than that decided by the Executive Committee, the United Kingdom Government would offer to provide the Government's claim for compensation for the cost of clean-up operations and preventive measures as security to the Skuld Club, to cover the difference between any such payments by the Skuld Club and the amounts arrived at by applying the percentage determined by the Executive Committee.

3.4.7 The Executive Committee noted that the total amount of the claims arising out of the *Sea Empress* incident might exceed the total amount of compensation available under the Civil Liability Convention and the Fund Convention. The Committee maintained its position that it was necessary, in

such cases, to exercise caution in the payment of claims, since under Article 4.5 of the Fund Convention all claimants had to be given equal treatment. In the Committee's view it was necessary to strike a balance between the need to prevent an overpayment situation from arising and the importance of the Fund paying compensation as promptly as possible to victims of oil pollution damage. In view of these considerations, the Committee decided to authorise the Director to make payments for 75% of the quantum of the damage actually suffered by the respective claimants on the basis of the advice of the IOPC Fund's experts at the time when a payment was made.

### 3.5 Invitation to give evidence before a Parliamentary Committee

3.5.1 The Executive Committee noted that the Director had been invited to give oral evidence before the Welsh Affairs Committee of the House of Commons on 27 March 1996, and that the Skuld Club and the expert engaged by the IOPC Fund and the Club to run the Claims Handling Office in Milford Haven had also been invited to appear before the Committee and give oral evidence.

3.5.2 The Executive Committee noted that the Director, after consultation with the Chairmen of the Assembly and the Executive Committee, had sent a reply to the Chairman of the Welsh Affairs Committee stating that the IOPC Fund would be pleased to assist the Committee in its important task of examining the current problems facing the sea fishing industry in Wales, by providing information concerning the international compensation system. It was noted that the Director had, however, also informed the Committee that its invitation to appear before the Committee had given rise to certain difficulties in view of the particular status of the IOPC Fund as an intergovernmental organisation and that it would be inappropriate for him, as head of the IOPC Fund Secretariat, to give evidence before a Parliamentary Committee in any Member State. The Executive Committee also noted that the Director had informed the Welsh Affairs Committee that, in his view, similar considerations applied to experts working for the IOPC Fund.

3.5.3 It was noted that the Welsh Affairs Committee's hearing scheduled for 27 March 1996 had been cancelled, that an offer by the Director to present to that Committee a memorandum containing information on the compensation system established by the Conventions had been accepted by the Committee, and that such a memorandum had been duly submitted.

3.5.4 The United Kingdom observer delegation stated that the United Kingdom Government agreed with the position taken by the Director in respect of the invitation by the Welsh Affairs Committee. The delegation drew attention to the fact that the IOPC Fund's position in the United Kingdom was different from that in other Member States, in view of the Headquarters Agreement concluded between the United Kingdom Government and the IOPC Fund.

3.5.5 The Executive Committee endorsed the Director's opinion that it would not have been appropriate for him or for the expert in charge of the Claims Handling Office to give evidence before the Parliamentary Committee.

### 3.6 Request for contribution towards a marketing campaign

3.6.1 The Executive Committee took note of a request made by the Wales Tourist Board that the IOPC Fund should contribute towards a marketing campaign intended to offset the decline of tourism caused by the *Sea Empress* incident. The Committee also took note of a budget for such a campaign totalling £550 000 submitted by the Board, as set out in document FUND/EXC.48/2/Add.2.

3.6.2 The Committee noted the view expressed by the Director that it might be appropriate for the Wales Tourist Board to take measures to reduce the effects of the *Sea Empress* incident on the tourism industry. It was also noted that, since the request had been received only on 15 April 1996, the Director had not been able to examine, together with the IOPC Fund's experts, whether the proposed measures fulfilled the criteria for admissibility laid down by the IOPC Fund Assembly and Executive Committee, in

particular whether these measures were appropriate and would have reasonable prospects of being successful. It was also noted that many of the items included in the proposed campaign did not relate to actual targeted markets but were of a general nature, and that the Director had therefore expressed the view that the cost of carrying out some elements of the planned campaign as presented could not form the basis of an admissible claim.

3.6.3 The Executive Committee agreed with the Director that if the Wales Tourist Board were to develop further its plan for a marketing campaign, the Director should be prepared to discuss with the Board on a without prejudice basis, with the assistance of the IOPC Fund experts, whether and to what extent any measures which the Board might wish to take could be considered as fulfilling the criteria for admissibility.

3.6.4 The Executive Committee reiterated its position that in principle the IOPC Fund should not consider claims for marketing activities until the activities have been carried out and the results could be assessed. The Committee referred to the discussions on this point in the 7th Intersessional Working Group (document FUND/A.17/23, paragraph 7.2.43).

#### **4 Information on other incidents**

##### **4.1 Haven incident**

###### *Conversion of unit of account*

4.1.1 The Director introduced document FUND/EXC.48/3 which set out the developments in the *Haven* case concerning the question of the conversion into Italian Lire of the unit of account laid down in the Civil Liability Convention and the Fund Convention.

4.1.2 The Executive Committee recalled that some claimants had maintained in the limitation proceedings in the Court of first instance in Genoa that the conversion of the maximum amount payable by the IOPC Fund (900 million (gold) francs) into Italian Lire should be made by using the free market value of gold, and not on the basis of the Special Drawing Right (SDR), since there was no longer any official value of gold and the 1976 Protocol to the Fund Convention which replaced the (gold) franc with the SDR was not in force. The Committee also recalled the IOPC Fund's position that the conversion should be made on the basis of the SDR.

4.1.3 It was recalled that a judge of the Court of first instance in Genoa, who was in charge of the limitation proceedings, had rendered his decision on this issue in March 1992. The Committee recalled that the judge had held that the maximum amount payable by the IOPC Fund should be calculated by the application of the free market value of gold, which gives an amount of Lit 771 397 947 400 (£313 million) (including the amount paid by the shipowner under the Civil Liability Convention), instead of Lit 102 643 800 000 (£42 million), as maintained by the IOPC Fund, calculated on the basis of the SDR.

4.1.4 The Executive Committee recalled that an opposition to this decision lodged by the IOPC Fund had been considered by the Court of first instance (composed of three judges, including the judge who had rendered the decision in 1992), and that in July 1993 the Court had upheld the decision of March 1992. It was also recalled that the IOPC Fund had appealed against this judgement to the Court of Appeal in Genoa.

4.1.5 The Director informed the Executive Committee that, in a judgement rendered on 30 March 1996, the Court of Appeal had confirmed the position taken by the Court of first instance that the maximum amount payable by the IOPC Fund should be calculated by the application of the free market value of gold, giving an amount of Lit 771 397 947 400 (£313 million), including the amount payable by the shipowner under the Civil Liability Convention.

4.1.6 The Executive Committee instructed the Director to take the necessary steps to appeal against the Court of Appeal's judgement to the Supreme Court of Cassation.

*List of established claims*

4.1.7 The Executive Committee noted that the judge in the Court of first instance in Genoa, who is in charge of the limitation proceedings in the *Haven* case, had in a decision dated 5 April 1996 determined the admissible claims for compensation ("stato passivo").

4.1.8 The Executive Committee noted that the claims admitted by the judge totalled approximately Lit 186 000 million (£78 million), and that the judge had included the Italian Government's claim relating to environmental damage in the amount of Lit 40 000 million. It was noted that the judge had held that the amounts determined by him should be increased by interest at the legal rate (10% per annum) from the date when the respective damage had been sustained to the date of payment, and that many of the admitted amounts should also be increased to compensate for devaluation, on the basis of an official index relating to the cost of living.

4.1.9 It was noted by the Committee that the "stato passivo" had been established in the context of the limitation proceedings initiated by the shipowner and his P & I insurer (United Kingdom Mutual Steamship Insurance Association (Bermuda) Ltd, the UK Club), and that the IOPC Fund had intervened in these proceedings, pursuant to Article 7.6 of the Fund Convention.

4.1.10 It was recalled that the Executive Committee had taken the position that the majority of the claims arising out of the *Haven* incident were time-barred vis-à-vis the IOPC Fund, since the claimants had not fulfilled the requirements of Article 6.1 of the Fund Convention. The Committee noted that in his decision the judge had made an observation to the effect that the IOPC Fund's position in respect of the time-bar issue was clearly groundless, since in his view the intervention of the IOPC Fund under Article 7.4 of the Fund Convention had the same effect as a notification under Article 7.6.

4.1.11 It was noted that the claims in respect of which agreement on quantum had been reached between the claimants and the shipowner/UK Club had – with a few exceptions – been admitted by the judge for the agreed amounts, since these amounts had not been challenged.

4.1.12 The Executive Committee noted that the judge had ruled that the numerous claims which had not been documented could not be admitted.

4.1.13 The Committee noted that the judge had held that the Italian local authorities were not entitled to compensation for "damage to touristic image" since, in his view, only individual tourism operators could claim compensation for such loss of image to the extent that this resulted in a loss in the claimant's economic activity. It was also noted that the judge had stated that the local authorities could be entitled to compensation for the cost of promoting tourism to the extent that it was proved that, as a consequence of the incident, such expenses had not been effective or expenses had been incurred after the incident to promote the touristic image.

4.1.14 It was noted that, as regards the claims for environmental damage, the judge had held that the Civil Liability Convention and the Fund Convention did not exclude such damage. The Committee also noted that the judge had stated that only the State of Italy was entitled to compensation for environmental damage and that consequently the local authorities had no right to such compensation. It further noted the judge's opinion that the environmental damage could not be quantified according to a commercial or economic evaluation, and that he had assessed this damage as a proportion (approximately 1/3) of the cost of the clean-up operations. The Executive Committee noted the judge's view that the amount arrived at by this assessment would represent the damage which was not repaired by these operations.

4.1.15 The Executive Committee noted that the judge's decision had been rendered after proceedings of a summary nature and that he had remarked that the amounts included in the "stato passivo" which

had not been agreed by the parties should be considered as an indication to the parties of a balanced solution which could form the basis of an agreement to avoid lengthy and costly proceedings.

4.1.16 The Director informed the Executive Committee that any oppositions to the "stato passivo" would be considered by the Court of first instance, composed of three judges (including the judge in charge of the limitation proceedings), and that a first hearing on such oppositions would be held on 28 November 1996.

4.1.17 The Executive Committee instructed the Director to lodge opposition in respect of those claims admitted by the judge which, in view of the criteria for admissibility laid down by the Assembly and the Committee, were not admissible in principle, in particular the Italian Government's claim for environmental damage, as well as any other admitted claims if the Director considered this appropriate. The Committee stated that the time bar issue should also be addressed in the opposition.

4.1.18 It was recalled that an offer for a global settlement of all claims arising out of the *Haven* incident had been made by the shipowner/UK Club and the IOPC Fund. It was also recalled that this offer had not been accepted by the Italian Government. It was further recalled that at its 18th session the Assembly had endorsed the following statement made by Professor H Tanikawa of the Japanese delegation as the position of the IOPC Fund (document FUND/A.18/26, paragraph 11.8):

We have heard the report of the Chairman of the Executive Committee. We regret that there has been no further reaction by the Italian Government on the offer of a global settlement made by the shipowner/UK Club and the IOPC Fund. For this reason we interpret this to mean that the offer has not been accepted by the Italian Government. We therefore believe that any future initiative towards a global settlement must be taken by the claimants, including the Italian Government. As already decided by the Assembly, the *Haven* Major Claims Fund remains, but no further contributions have been levied. The terms and conditions of the previous offer of a global settlement are well known. Should the claimants, including the Italian Government, wish to revert to a settlement on the terms of that offer, then the matter would have to be referred to the Assembly for decision.

*Payments to certain claimants*

4.1.19 It was recalled that the French Government had requested, at the Executive Committee's 47th session, that the French claimants other than the French State should be paid in full. It was also recalled that the French Government had given an undertaking that the amount payable by the IOPC Fund to the French State for the State's accepted claim would form a security against overpayment by the IOPC Fund to these French claimants and that this undertaking read as follows:

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.

4.1.20 The Executive Committee recalled that, 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 Committee had decided, at its 47th session, 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 municipalities and Parc national de Port-Cros for the amounts agreed, totalling FFfr10 659 469 (£1 375 200) (document FUND/EXC.47/14, paragraph 3.1.13).

4.1.21 The Director informed the Executive Committee that all the 33 French public claimants concerned (other than the French State) had been paid.

4.1.22 It was recalled that two Italian claimants whose claims were not time-barred (Ecolfriuli and Ecolmare) had offered to provide a bank guarantee to protect the IOPC Fund against overpayment, if their claims were paid. It was further recalled that the Executive Committee had authorised the Director to pay in full these two claims on condition that the claimants provided a bank guarantee which would give the IOPC Fund adequate protection against overpayment if claims were later reduced pro rata. The Committee noted that the wording of the required bank guarantee was still under consideration.

#### 4.2 Seki incident

4.2.1 The Director stated that, although the Executive Committee had decided at its 47th session to postpone further consideration of the *Seki* incident to its 49th session in June 1996, he had felt that the Committee should be informed at the present session of certain developments as regards a claim for environmental damage presented by the Government of Fujairah to the P & I insurer (the Britannia Steam Ship Insurance Association Limited, the Britannia P & I Club) (document FUND/EXC.48/5).

##### *Claim for environmental damage*

4.2.2 The Executive Committee recalled that on 8 February 1996 a claim for compensation for environmental damage had been presented by the Government of Fujairah to the Britannia P & I Club, for an amount of US\$15 983 610 (£10 million), but that the claim had not been formally submitted to the IOPC Fund. It was also recalled that the claim was based on a study made by a consultancy company based in Jeddah (Saudi Arabia), using a mathematical formula to arrive at the amount claimed. It was noted that the Britannia P & I Club had rejected the claim as not admissible under the Civil Liability Convention since, in the Club's view, the assessment of compensation was not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models.

4.2.3 The Executive Committee referred to the Resolution adopted by the IOPC Fund Assembly in 1980 (Resolution N°3) which stated that "the assessment of compensation to be paid by the International Oil Pollution Compensation Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models". The Committee also referred to the policy of the IOPC Fund 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.

4.2.4 The Executive Committee endorsed the Director's view that the claim for environmental damage presented by the Government of Fujairah to the Britannia P & I Club was not admissible under the Civil Liability Convention and the Fund Convention since it was calculated on the basis of a theoretical model.

##### *Special deposit made by the shipowner*

4.2.5 The Executive Committee recalled that, through its agent (World-Wide Shipping Agency Limited), the owner of the *Seki* had entered into a Memorandum of Agreement with the Government of Fujairah on 20 June 1994 and that, pursuant to this Memorandum, the shipowner had deposited US\$19.6 million (£12.6 million) with a bank in the United Arab Emirates. It was also recalled that claims presented by the Government could be paid from this deposit even if they had been rejected by the Britannia P & I Club or the IOPC Fund, and that if such a payment were made for a rejected claim, the shipowner could take legal action in respect of that claim against the Club and the IOPC Fund in the competent court in the United Arab Emirates. It was further recalled that under the Memorandum the Government of Fujairah was obliged to refund to the shipowner the amount received towards any part of a claim not upheld by the court.

4.2.6 It was noted that, having been informed of the on-going discussions concerning the conclusion of the above-mentioned Memorandum, the Director had expressed to the shipowner the IOPC Fund's concern, since the Memorandum would create a system of payments at variance with the Civil Liability Convention and the Fund Convention, and would in fact result in the establishment of two limitation funds.



It was also noted that the Director had pointed out to the shipowner that under Article III.4 of the Civil Liability Convention no claims for compensation could be made against the shipowner otherwise than in accordance with the Convention, and that the intention of the international legislator had been to channel all claims against the shipowner within the Convention.

4.2.7 It was noted that in a letter dated 24 June 1994 the Director had made it clear to the authorities of the United Arab Emirates that the Memorandum constituted a private arrangement and would not affect the legal position of the IOPC Fund. It was also noted that the Director had stated in that letter that the IOPC Fund was not bound by any agreement in respect of a claim unless that claim had been approved explicitly by the Fund or had been established by a final judgement rendered by a competent court in legal proceedings brought under Article IX of the Civil Liability Convention or Article 7.1 of the Fund Convention.

4.2.8 The Executive Committee noted that the Director had been informed on 25 March 1996 that the Government of Fujairah had drawn upon the deposit made by World-Wide Shipping Agency Ltd in respect of the claim relating to environmental damage for a total of US\$15 983 610 (£10 million), which corresponded to the amount claimed. It was also noted that, in view of this development, the Director had reminded the Government of Fujairah on 27 March 1996 of the IOPC Fund's position in respect of claims for environmental damage.

4.2.9 The Executive Committee noted that it was expected that the shipowner would take legal action against the Britannia P & I Club and the IOPC Fund to recover the amount paid from the above-mentioned deposit to the Government of Fujairah in respect of the environmental damage claim. The Committee instructed the Director that, if such action were brought, he should oppose the action on behalf of the IOPC Fund.

## **5 Any Other Business**

No matters were raised under this agenda item.

## **6 Adoption of the Report to the Assembly**

The Executive Committee authorised the Director to prepare the Record of Decisions in consultation with the Chairman.

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