INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
49th session
Agenda item 6

71FUND/EXC.49/12
28 June 1996

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

(held from 26 to 28 June 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.49/1.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

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

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	Indonesia	Portugal
Benin	Italy	Republic of Korea
Denmark	Kuwait	Slovenia
Fiji	Monaco	Sweden
France	Morocco	Tunisia
Greece	Poland	United Kingdom
		Venezuela

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

Brazil	Latvia	Peru
Chile	Panama	Saudi Arabia
China		

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

Intergovernmental organisations:
International Oil Pollution Compensation Fund 1992 (1992 Fund)
International Maritime Organization (IMO)

International non-governmental organisations:
Comité Maritime International (CMI)
Cristal Limited
International Association of Independent Tanker Owners (INTERTANKO)
International Group of P & I Clubs
International Tanker Owners Pollution Federation Limited (ITOPF)
Oil Companies International Marine Forum (OCIMF)

3 Incidents involving the IOPC Fund

3.1 *Haven* incident

3.1.1 It was recalled that, at its 48th session, the Director had informed the Executive Committee of two court decisions in respect of the *Haven* incident which occurred on 11 April 1991 off Genoa (Italy). The Committee noted that the first of these decisions related to the method to be used for the determination of the maximum amount payable by the IOPC Fund in national currency (document FUND/EXC.48/3), whereas in the second decision the judge had determined the admissible claims for compensation ("stato passivo") (document FUND/EXC.48/4).

Conversion of unit of account

3.1.2 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 at the time of the incident. The Committee also recalled the IOPC Fund's position that the conversion should be made on the basis of the SDR.

3.1.3 The Executive Committee noted that, in a judgement rendered on 30 March 1996, the Court of Appeal in Genoa 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 Llt 771 397 947 400 (£313 million), including the amount payable by the shipowner under

the Civil Liability Convention, instead of Llt 102 643 800 000 (£42 million), as maintained by the IOPC Fund, calculated on the basis of the SDR.

3.1.4 The Committee noted that the IOPC Fund was entitled to appeal to the Supreme Court of Cassation against the judgement by the Court of Appeal within 60 days of having been formally notified of the judgement by a party to the proceedings. It was also noted that no such notification had yet been made. It was further noted that the running of any period for lodging an appeal would be suspended during the period 1 August - 15 September.

3.1.5 The Executive Committee recalled that, at its 48th session, it had instructed the Director to take the necessary steps to appeal against the Court of Appeal's judgement to the Supreme Court of Cassation (document FUND/EXC.48/6, paragraph 4.1.6).

List of established claims

3.1.6 The Executive Committee recalled 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 ("stato passivo").

3.1.7 The Executive Committee noted that the claims admitted by the judge totalled approximately Llt 186 000 million (£78 million), and that the judge had included the Italian Government's claim relating to environmental damage in the amount of Llt 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, which for the period April 1991-February 1996 would correspond to an increase of some 25%.

3.1.8 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.

3.1.9 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.

3.1.10 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. The Committee 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.

3.1.11 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.

3.1.12 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.

3.1.13 It was recalled that, at its 48th session, the Executive Committee had instructed the Director to lodge an 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. It was also recalled that the Director had been instructed to lodge an opposition in respect of other admitted claims, if the Director considered this appropriate. In addition, it was recalled that the Committee had stated that the time-bar issue should also be addressed in the opposition (document FUND/EXC.48/6, paragraph 4.1.7).

3.1.14 The Executive Committee endorsed the Director's intention to lodge opposition mainly in respect of the Italian Government's claim for environmental damage, the claim for amounts paid in VAT, the claims in respect of the ATI contract, the claims presented by Castalia (clean-up contractor), the claims by the shipowner/UK Club and the decision to add amounts for interest and devaluation. It was noted that the question of time-bar would also be addressed in the IOPC Fund's opposition, as set out in paragraph 3.19 of document 71FUND/EXC.49/2. The Committee noted that some claimants also intended to lodge oppositions.

3.1.15 The Director was instructed to study further the question of the admissibility of claims relating to VAT, in the light of the position of Italian law on this point. It was noted that the question of the admissibility of claims for the reimbursement of amounts paid in VAT varied according to national tax law and jurisprudence.

3.1.16 The Executive Committee noted that the Fund's Italian lawyers were making the necessary preparations for filing oppositions, in accordance with the Committee's instructions.

3.2 *Aegean Sea* incident

3.2.1 The Director introduced document FUND/EXC.49/3 which set out the developments which had taken place in respect of the *Aegean Sea* incident since the Committee's 48th session. In particular he informed the Committee of various aspects of the judgement rendered on 30 April 1996 by the Criminal Court in La Coruña. He referred to the criminal liability of the master and the pilot, the issues relating to civil liability and the Court's decisions in respect of the various claims for compensation. The Director further referred to the analysis of the judgement given in the above-mentioned document and drew attention to the fact that the Court had considered that in respect of most of the claims there was not sufficient evidence for it to assess the quantum of the damage suffered and that for this reason the Court had referred most of the claims to the procedure for the execution of the judgement. The Director mentioned that in respect of a number of other claims the amount awarded by the Court was only a fraction of the amount claimed.

3.2.2 The Director referred to the statement in paragraph 9 of document FUND/EXC.49/3 that, in his view, it would be appropriate to continue negotiations with those claimants whose claims were not time-barred, for the purpose of arriving at out-of-court settlements. In his view, the judgement of the Criminal Court would form a good basis for such negotiations in respect of many of these claims. He stated that the claims could be reassessed on the basis of additional evidence requested by the Court.

General Discussion

3.2.3 The Spanish delegation made a general statement in respect of the IOPC Fund's handling of the *Aegean Sea* incident. The delegation read from a letter sent by the Director General of the Merchant Marine in Madrid to the Director of the IOPC Fund, dated 25 June 1996. In that letter, the Director General of the Merchant Marine had expressed the enormous disappointment of the Spanish Administration, due to the insufficient level of payments made to Spanish claimants and the very low assessment carried out by the IOPC Fund's experts of the losses and damages suffered by the victims of the *Aegean Sea* incident. In the letter the Director General of the Merchant Marine requested information on the compensation paid to victims of other incidents which had taken place since the *Aegean Sea* incident. If that information was not provided, the Director General stated in the letter that he would have to propose that the Spanish Government should take the appropriate diplomatic measures.

3.2.4 The Spanish delegation also noted the dissatisfaction of its Government that the IOPC Fund Secretariat had not yet presented a study on the time-bar issue, despite its agreement last February to do so. The Spanish delegation reminded the Executive Committee that the Spanish Government had always given its total co-operation to the IOPC Fund. The delegation noted that Spain had always taken a balanced position in order to ensure that the IOPC Fund's rules on the admissibility of claims were followed, even on occasions when these might have conflicted with the interests of Spanish claimants, in order to facilitate out-of-court settlements and in order to achieve the main objective of the IOPC Fund, namely to pay compensation, promptly and fairly, to the victims of pollution damage in Member States.

3.2.5 This delegation stated that the judgement rendered by the Court in La Coruña had determined the criteria to be applied for the assessment of the damage suffered by a number of claimants and that the IOPC Fund should accept that judgement. In the view of the Spanish delegation, although the judgement was not final, it was unlikely that the IOPC Fund could avoid direct liability. This delegation also noted that it was likely that the experts appointed by the Court would consider evidence which had not been available to the IOPC Fund's experts. In its view, the IOPC Fund would have to pay more compensation to victims as a result of the judgement than if the claims had been settled out of court.

3.2.6 The Spanish delegation stated that the Spanish Government did not understand how other incidents which had taken place since the *Aegean Sea* incident had been handled successfully by providing prompt compensation to victims, whereas the victims of the *Aegean Sea* incident had been denied compensation. The Spanish Government requested further and detailed information about the quality of the documentation presented by victims of other incidents, bearing in mind the strictness of the criteria applied by the IOPC Fund's experts in their assessments. The delegation expressed its fear that the Spanish victims had been treated in a discriminatory manner.

3.2.7 It was further stated by the Spanish delegation that the assessments made by the IOPC Fund's experts in the *Aegean Sea* case had been excessively low, that the request for evidence to substantiate the claimants' losses had been out of proportion, that new assessments of the losses should be made and that further compensation should be paid. This delegation expressed its desire for the IOPC Fund to exercise flexibility, efficiency and fairness towards the victims of oil pollution damage, in order to restore the IOPC Fund's credibility in Spain. In the view of the Spanish delegation, it was for the IOPC Fund to find a solution to this situation, and this was the last opportunity to resolve this case promptly.

3.2.8 This delegation also noted that the IOPC Fund's lawyers had taken an active part in the criminal proceedings, accusing the pilot of criminal negligence which, in its view, was a breach of the policy followed by the IOPC Fund of not becoming involved in the criminal liability of individuals. It disagreed with the view of the IOPC Fund's Spanish lawyer that the UK Club and the IOPC Fund would ultimately pay 50% of the compensation and the pilot and the Spanish State would pay the other 50%. The Spanish delegation stated that the IOPC Fund was in breach of the Fund's strict liability as provided by Article 4.2 of the 1971 Fund Convention, and that the IOPC Fund should accept this direct liability. It was noted by the Spanish delegation that in accordance with the judgement of the Court of La Coruña the UK Club and the IOPC Fund would have to pay the maximum amount of compensation available under the 1969 Civil Liability Convention and the 1971 Fund Convention, and that the Spanish State would pay compensation only in excess of that amount.

3.2.9 In the view of this delegation, and bearing in mind the judgement rendered by the Court of La Coruña, the caution exercised by the IOPC Fund in the application of Article 4.5 of the 1971 Fund Convention should not be maintained.

3.2.10 It was further stated by this delegation that the Spanish Government, from the outset, had decided to give priority to private claimants and to await full compensation of the costs incurred by it during the clean-up operations until the private claimants had been fully compensated. With hindsight, in the Government's view, this decision did not allow for any degree of flexibility in the treatment of other claimants.

3.2.11 With regard to the claims presented by the cofradías and shellfish harvesters, the Spanish delegation stated that the decision of the Court, setting criteria to be applied during the execution of the

judgement procedure for the assessment of the losses, should be followed by the IOPC Fund and that the appeal in respect of these claims should therefore be withdrawn.

3.2.12 The Spanish delegation finally expressed its hope that further compensation would be paid and that a pragmatic and satisfactory solution would be found.

3.2.13 The Director expressed his surprise at the intervention made by the Spanish delegation and with the letter of 25 June 1996 from the Director General of the Merchant Marine in Spain. He referred to the fact that the Spanish delegation had alleged that the Fund had not made the same thorough examination of the claims arising out of the *Braer* and the *Sea Empress* incidents. In the Director's view this statement was incorrect. He emphasised that the same requirement for evidence had been used in all cases. He noted that the Director General of the Merchant Marine and the Spanish delegation had alleged that the IOPC Fund, in its handling of the *Aegean Sea* incident, had discriminated against Spain. In the Director's view this would mean either that the decisions taken by the Executive Committee, ie by the Governments of Member States, were discriminatory in respect of Spain, or that the IOPC Fund Secretariat and experts had acted, when implementing these decisions, in a discriminatory way. In the Director's view this serious allegation had no foundation whatsoever.

3.2.14 The Director referred to the dissatisfaction of the Spanish Government at the lack of progress as regards the settlement of claims arising out of the *Aegean Sea* incident. He drew attention to the fact that the total amount of the claims arising out of this incident presented to the Criminal Court and the Civil Court exceeded £160 million, and thereby greatly exceeded the maximum amount available under the Civil Liability Convention and the Fund Convention. He referred to the fact that, in view of the remaining uncertainty as to the total amount of the claims, the Executive Committee had decided several times, most recently at its 46th session, that the payments should be limited to 40% of the damage actually suffered by the claimants as assessed by the IOPC Fund's experts. He stated that the Director and the IOPC Fund's experts had implemented the decisions taken by the Executive Committee that claimants had to substantiate their losses by the presentation of evidence and that the evidence should be such as to allow the Fund's experts to form an independent opinion as to the admissible amount of the claims. He mentioned that the Spanish Government had repeatedly confirmed that it agreed with the IOPC Fund as to the requirement for the production of evidence. He recalled that the Government had offered to make every effort to obtain a reduction of the total amount of the claims so as to enable a significant increase of the percentage payable by the Fund, and that the Government had offered to use its best endeavours to persuade the claimants in the fishery sector to produce evidence to substantiate their claims, so as to enable the IOPC Fund to increase the provisional payments. He noted that, regrettably, the Spanish Government's efforts in these two respects had not succeeded.

3.2.15 The Director stated that he shared entirely the Spanish Government's concern as to the slow payments in the *Aegean Sea* case and had full understanding of the frustrations of the claimants. However, in the view of the Director, the delay in payments was due mainly to the two factors mentioned above, namely the high total amount of the claims and the lack of evidence produced by the claimants. The Director drew attention to the fact that the total amount of the claims which the Criminal Court had found substantiated by acceptable evidence was around Pts 840 million (£4.3 million), whereas the UK Club and the IOPC Fund had together made provisional payments totalling Pts 1 600 million (£8.1 million). He also drew attention to the fact that a number of claims had been reduced by the Court to a fraction of the amounts claimed. He also stated that payments had been made promptly in other cases where claimants had submitted proper documentation to substantiate the losses suffered.

3.2.16 With regard to the judgement of the Criminal Court, the Director stated that in his view the Court generally agreed with the IOPC Fund as regards the requirement that the claimants should produce evidence to substantiate their claims. The Director expressed the view that in general the Court's approach to the question of evidence was a fair and balanced one. He stated that the only major point on which the IOPC Fund had an objection concerning the evidence in the fishery sector was as regards the shellfish harvesters, where the Fund considered that it was unlikely that the harvesters would actually use the maximum allowable harvest days and catch the maximum daily quantities, and that the exploitation plan approved by the Xunta anticipated far lower total catches.

3.2.17 The Director reiterated the view that it would be appropriate to continue the negotiations with the claimants whose claims were not time-barred for the purpose of arriving at an out-of-court settlement, on the basis of the requirement for evidence laid down by the Court. He emphasised, however, that it would not be meaningful to enter into negotiations unless such evidence was produced.

3.2.18 With respect to the Spanish delegation's reference to the criminal proceedings, the Director drew the attention of the Executive Committee to the fact that the IOPC Fund's established policy was to try to recover the amount paid by it in compensation from other parties liable for a given incident. He mentioned that under Spanish procedural law the IOPC Fund's only possibility of doing that in the *Aegean Sea* case was by intervening in the criminal proceedings against the party in question (the pilot) and indicating an appropriate sanction in criminal law. He also mentioned that the approach taken by the IOPC Fund in the court proceedings on this point had been reported to the Committee for several years without any objection having been raised in the Committee. He finally mentioned that the Fund had requested a sentence of a fine amounting to Pts 300 000 (£1 500) for the pilot, which was exactly the fine imposed by the Court, whereas a number of other parties had requested a long prison sentence for the pilot.

3.2.19 With respect to the study of the time-bar issue, the Director stated that an analysis of the IOPC Fund's position had been presented to the Executive Committee at its 46th session (document FUND/EXC.46/12) and that the major outstanding issue related to the so-called conciliation acts in respect of which no litigation had been started. In view of the fact that the time-bar issue was not subject to litigation at present, the Director had not been able to give it the high priority that he would have liked, due to the other more urgent issues that had arisen in the *Aegean Sea* case.

3.2.20 A number of delegations, both Members of the Executive Committee and other Fund Member States, expressed their surprise and regret at the statement made by the Spanish delegation. They stated that they could not accept the allegations that any discrimination against Spain had taken place, and there was no indication whatsoever that the claimants in Spain had been treated less favourably than claimants in other cases. It was stated that the delay in payments was due mainly to the fact that the total amount of the claims presented to the Courts greatly exceeded the total amount of compensation available under the Conventions and that the great majority of the claimants had not submitted evidence to substantiate the losses allegedly suffered. Reference was also made to the fact that the Director had made great efforts over the years to settle claims out of court. A number of delegations emphasised that it was essential for the survival of the system of compensation that Member States did not use political means in claim settlement procedures, and that the Executive Committee, the IOPC Fund Secretariat and the experts engaged by the Fund should be given total independence in their task of dealing with claims. It was also stated that the Executive Committee had regularly been kept fully informed of the position taken by the IOPC Fund in respect of the various groups of claims and that the Director had acted totally within the Committee's instructions. A number of delegations stated that the Director and the IOPC Fund Secretariat enjoyed their full confidence and emphasised that the Director had acted with full impartiality and in conformity with the decisions taken by the Executive Committee and in accordance with the policy for dealing with claims adopted by the Assembly and the Executive Committee.

3.2.21 A number of delegations expressed their satisfaction that the Criminal Court in La Coruña had in general agreed with the position taken by the IOPC Fund that each claimant had to substantiate his loss by supporting documents or other evidence, and stated that the position taken by the Court could form a useful basis for negotiations with a number of claimants.

3.2.22 As regards the IOPC Fund's involvement in the criminal proceedings, a number of delegations supported the position taken by the Fund and drew attention to the fact that the Committee had been kept fully informed, and they stated that they totally agreed with the position taken by the Fund in this regard.

3.2.23 Some delegations emphasised the importance of Member States ensuring that the Civil Liability Convention and the Fund Convention were properly implemented in their national law. They expressed their concern that this appeared not always to be the case. Reference was made to the fact that the master of the *Aegean Sea* had been made liable to pay compensation in spite of the provision of Article III.4 of the Civil Liability Convention which barred such a claim against him.

3.2.24 Replying to a question by one delegation, the Director indicated which experts the IOPC Fund used for the assessment of claims and the criteria for their selection. The Director undertook to present a document containing information in this respect to the Executive Committee at its 50th session.

3.2.25 The Executive Committee concluded that there was no indication that the IOPC Fund, the Director, the Secretariat or the Fund's experts had discriminated against Spain or Spanish claimants nor that they had dealt with the incident in an unfair or biased manner. The Committee stated that the Director had acted in full conformity with the policy laid down by the Assembly and the Executive Committee as regards the procedures to be followed and the requirements with respect to the presentation of evidence. The Committee expressed its full confidence in the Director's handling of this case. The Committee also emphasised the importance of States ensuring that the provisions of the Conventions were respected in their national law and that the rules and criteria laid down by the governing bodies of the IOPC Fund were also respected. Furthermore, the Committee emphasised that it was essential for the functioning of the system established by the Civil Liability Convention and the Fund Convention that Member States accepted the need for uniformity of application in spite of differences which might exist between various legal systems. Finally, the Committee expressed the view that it was essential that all parties involved should continue their efforts to solve as many of the outstanding issues as possible and that the judgement would on many points form a good basis in this regard.

IOPC Fund's policy in respect of appeals

3.2.26 As regards the policy to be followed by the IOPC Fund in court proceedings in respect of appeals, the Executive Committee agreed with the Director that the IOPC Fund should appeal on matters of principle where a judgement was at variance with the criteria for the admissibility of claims laid down by the IOPC Fund Assembly or Executive Committee or where the court accepted claims which fell outside the scope of application of the Conventions. The Committee decided that the IOPC Fund should also appeal where the quantum of the compensation determined by a court differed substantially from the amount assessed by the IOPC Fund's experts and the amounts involved were considerable. The Committee considered that it would not be appropriate for the IOPC Fund to appeal in cases where a court had taken a view in respect of evidence which was different from the view which the IOPC Fund would have taken but where the court's decision was not unreasonable. The Committee stated that the same should apply if the amount determined by a court in respect of a particular claim differed from the amount assessed by the IOPC Fund, but where the court's assessment was, in the Fund's view, nevertheless reasonable. The Committee also shared the Director's view that it would not be appropriate for the IOPC Fund to appeal in respect of small claims where no matters of principle were involved.

3.2.27 The Committee noted that the Director would normally submit to the Committee for consideration whether and to what extent the IOPC Fund should appeal against a particular court decision or judgement. The Committee recognised, however, that in many cases this would not be possible due to the short time periods for lodging appeals. It was also noted that the Director would report to the Executive Committee on any appeal lodged on behalf of the IOPC Fund, and that the Committee would be free to decide that the IOPC Fund's appeal, or part thereof, should be withdrawn.

The IOPC Fund's appeal in the Aegean Sea case

3.2.28 The Committee noted that in its appeal in the *Aegean Sea* case, the IOPC Fund had stated that it could be obliged to pay compensation only for damage which fell within the definitions of "pollution damage" and "preventive measures" as laid down in Articles I.6 and I.7 of the Civil Liability Convention which formed part of Spanish law. It was also noted that the IOPC Fund had maintained that the decisions taken by the competent bodies of the Fund as regards the criteria for the admissibility of claims for compensation should be taken into account. The Committee took note of the fact that attention had been drawn to the preamble of the Civil Liability Convention which states that the Parties to the Convention were "desiring to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases" and that reference had been made in the appeal to the Report of the 7th Intersessional Working Group and to the Assembly's endorsement of this Report. The Committee also noted that the IOPC Fund had stated in the appeal that the Court had admitted a number of claims which could not be considered as "damage caused by contamination" or as "preventive

measures", and that the IOPC Fund had added that parties other than the Fund might be liable for these claims. It was finally noted that the IOPC Fund had also appealed against the judgement on points where, in the Fund's view, the claim was admissible in principle but where the claimant had not substantiated his loss or the Court's assessment of the damage was incorrect.

3.2.29 The Executive Committee endorsed the position taken by the IOPC Fund in the various appeals.

3.2.30 The Executive Committee examined the various claims in respect of which the Director had lodged an appeal on behalf of the IOPC Fund, and considered in particular whether the Fund should withdraw the appeal in respect of any of these claims. The Committee decided, however, that the appeal should be maintained in its entirety and thus should be pursued in respect of all these claims.

3.2.31 The Executive Committee instructed the Director to investigate the possibility of reaching out-of-court settlements with claimants covered by this judgement on the basis of the requirements of evidence laid down by the Court in the judgement.

3.3 *Braer* incident

Settlement of claims for on-going losses by way of lump sum payment

3.3.1 The Executive Committee recalled that, at its 44th session, it had dealt with claims for loss of income sustained by the owners of four small whitefish vessels which normally fished in an area to the west of the island of Burra (known as the Burra Haaf). It was recalled that the Committee had 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 the small size of their vessels, had very limited opportunities to mitigate their losses by fishing on more distant fishing grounds or by using alternative fishing methods. It was further recalled that the Committee had decided that the IOPC Fund should not pay compensation for on-going losses by way of a lump sum, but should maintain its policy of assessing and compensating such losses as and when they arose (document FUND/EXC.44/17, paragraph 3.4.12).

3.3.2 It was recalled that the issue had been considered again by the Executive Committee at its 47th session. The Committee recalled that the preliminary advice of counsel had been that there was no realistic prospect that the Court would deal with the Burra Haaf fishermen's claims otherwise than by the awarding of a lump sum. It was recalled that, in view of the fact that these claims were subject to court proceedings, the question had been raised of whether the Committee should reassess its previous decision in respect of these claims. It was further recalled that some delegations had considered it acceptable that the Fund settled claims in a lump sum in certain situations, provided that the loss was certain and could be quantified with a degree of accuracy, while other delegations had considered that the IOPC Fund should maintain its previous policy of assessing compensation of losses as and when they arose. It was also recalled that a number of delegations had 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 that session. The Executive Committee recalled that it had decided to maintain its policy in respect of future losses, at least for the time being, and to re-examine this matter at a future session on the basis of a document prepared by the Director (document FUND/EXC.47/14, paragraphs 3.3.8 and 3.3.9).

3.3.3 The Director informed the Executive Committee that counsel had confirmed his opinion in respect of Scottish law that there was no realistic prospect that the Court would deal with the Burra Haaf fishermen's claim otherwise than by the award of a lump sum, and that any other method of compensation would not, in his view, be regarded as admissible. It was noted that counsel had stated that two principles were established beyond question in Scottish law: firstly, that the whole damage resulting from a single wrongful act must be recovered in one action, and secondly, that (in the absence of an express legislative provision to the contrary) damages awarded must take the form of a single lump sum.

3.3.4 The Committee noted that the Director had obtained opinions on this question in respect of eleven other Member States. It was noted that these opinions seemed to indicate that the courts in several other

Member States would award compensation for future losses in the form of a lump sum and that in others it was possible, at least in principle, that the courts would grant compensation for future losses. It was recognised, however, that in some of these States the courts would not accept such claims.

3.3.5 A number of delegations stated that, if the IOPC Fund were to accept settlement of on-going losses by way of a lump sum payment, this would represent a change of policy for the IOPC Fund. Several delegations took the view that such a change of policy would have far-reaching consequences and opposed the IOPC Fund accepting such settlements. Other delegations stated that they were in favour of, or could accept such a change of policy.

3.3.6 The observer delegation of the International Group of P & I Clubs expressed the view that great caution should be exercised in accepting lump sum settlements for future losses.

3.3.7 Some delegations suggested that the IOPC Fund should accept to make lump sum settlements for on-going losses only in States where it was clear that the courts would make awards in the form of lump sums. Other delegations pointed out that this would result in the IOPC Fund accepting lack of uniformity, with different treatment of claimants in different jurisdictions.

3.3.8 The Chairman introduced document 71FUND/EXC.49/WP.1 which summarised the alternative solutions in respect of this issue.

3.3.9 The Executive Committee decided that the IOPC Fund should retain its policy that compensation should be paid only for losses which had already been suffered. It was also decided that claims for future losses that became the subject of legal proceedings should be opposed by the IOPC Fund on the basis that the Civil Liability Convention and the Fund Convention did not allow such claims. The Committee recognised that there was no certainty that the IOPC Fund's position would be accepted by the courts of all Member States. The Committee took the view that when considering claims for future losses, the courts should take into account the importance of a uniform application of the Conventions.

Developments in the court proceedings

3.3.10 The Executive Committee took note of the information concerning the claims situation as set out in document 71FUND/EXC.49/4/Add.1. The Committee noted that some claims had been withdrawn from the proceedings in the Court of session in Edinburgh, in particular some claims for so-called salmon price damage.

3.4 *Kihnu* incident

3.4.1 The Executive Committee recalled that the *Kihnu* had grounded off Tallin (Estonia) on 16 January 1993, resulting in a spill of some 100 tonnes of heavy fuel oil and 40 tonnes of diesel oil. It was noted that the Finnish authorities, at the request of the Estonian authorities, had despatched two oil combatting vessels and a helicopter to Estonia to assist the Estonian authorities in dealing with the spill. The Committee noted further that the Finnish authorities had informed the IOPC Fund of the incident on 18 January 1993, stating that they had intervened for the purpose of protecting Finland's waters and coast. It was also noted that no further information had been given by the Finnish authorities in response to a request by the IOPC Fund. It was finally noted that the Fund Convention had entered into force in respect of Estonia on 1 March 1993 and that Estonia was therefore not a Member of the IOPC Fund at the time of the incident.

3.4.2 It was noted that in December 1995 the Finnish authorities had submitted a claim to the IOPC Fund for FM713 055 (£105 000), maintaining that there had been a risk that the oil would have been taken by winds and currents to the Finnish coast, which is only some 80 kilometres north of Tallin. It was noted that the Finnish authorities had argued that the measures were carried out to prevent and minimise pollution damage in Finland, and that the costs incurred were admissible for compensation under the Civil Liability Convention and the Fund Convention. It was further noted that the Director had reserved the IOPC Fund's position as to the admissibility of this claim.

3.4.3 The Executive Committee noted that the IOPC Fund's technical experts had advised the Director that, in the event of a total loss of the heavy fuel oil on board the *Kihnu*, it would have been likely that the Estonian authorities' clean-up efforts would have failed to prevent the escape of oil from the port of Tallin, and that it would also have been likely that the prevailing winds and the current circulation in the inner Gulf of Finland would soon have carried any persistent oil escaping from the vicinity of the port of Tallin into Finnish waters and on to Finnish shores. It was noted that the experts were of the view that the clean-up response and the transfer of the remaining cargo from the *Kihnu* to onshore storage tanks by the Finnish response vessels had prevented any escape of oil from the port.

3.4.4 The Director informed the Executive Committee that the State of Finland, through the Finnish Environment Agency, had lodged a legal action against the IOPC Fund in the Helsinki District Court on 16 January 1996. The Committee was informed that the writ had been served on the IOPC Fund on 20 June 1996.

3.4.5 The Executive Committee noted that the State of Finland had taken legal action also against the shipowner's insurer (the Ocean Marine Mutual Protection and Indemnity Association Ltd).

3.4.6 The Executive Committee considered that, although the claim of the Finnish authorities related to activities undertaken within the territorial waters of a non-Member State, the measures were taken to prevent or minimise pollution damage within the territory or territorial sea of Finland, an IOPC Fund Member State. The Committee decided, therefore, that the measures taken by the Finnish authorities in principle fell within the scope of application of the Civil Liability Convention and Fund Convention.

3.4.7 The Director was instructed to investigate whether, and if so, to what extent the Finnish authorities had taken the necessary steps to recover the costs incurred from the shipowner and his insurer or from the Estonian authorities, and to examine the reasonableness of the amount claimed. The Director was also instructed to examine the relationship between applicable regional agreements relating to cooperation in respect of oil spills and the compensation regime established by the Civil Liability Convention and the Fund Convention.

3.5 *Seki* incident

General claims situation

3.5.1 The Executive Committee took note of the general claims situation in the *Seki* case, as presented by the Director in document 71FUND/EXC.49/6.

Claim for environmental damage

3.5.2 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.

3.5.3 The Committee recalled that, at its 48th session, it had 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". It was also recalled that the Committee had 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 of reinstatement actually incurred or to be incurred qualified for compensation.

3.5.4 It was recalled that, at its 48th session, the Executive Committee had 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 (document FUND/EXC.48/6, paragraph 11.3).

3.5.5 The Director informed the Executive Committee that the IOPC Fund's lawyer in the United Arab Emirates had examined whether a claim relating to environmental damage of the type presented by the Government of Fujairah would be admissible under the law of the United Arab Emirates. He had expressed the view that the courts in the United Arab Emirates would require the claimant both to prove that he had actually suffered an economic loss and to provide evidence of the quantum of his loss. The Committee noted that, in the lawyer's opinion, claims based on a theoretical formula of the type used for the calculation of the claimed amount in the *Seki* case would not be admissible.

3.5.6 The delegation of the United Arab Emirates, giving the view of the Government of Fujairah, stated that the position taken by the Committee in respect of the requirement of evidence, namely "no evidence - no pay", would not solve the problem. It was not acceptable, in the view of that delegation, that compensation would not be payable unless the claimant could quantify his claim. This delegation stated that if damage had been suffered, compensation should be payable. In the view of this delegation, compensation should be assessed on the basis of equity if the damage could not be quantified, since otherwise the denial of compensation would lead to injustice. It was stated that the victim should in any case be reinstated to the financial situation in which he would have been, had the incident not occurred. The delegation stated that in the case of a disagreement between the IOPC Fund and a claimant, it would be for the competent national court to take the final decision. It was also stated by the delegation that the legal advice which the Government had obtained was different from that given to the IOPC Fund, since the Government's lawyer had expressed the view that claims for environmental damage would be accepted by the courts of the United Arab Emirates.

Special deposit made by the shipowner

3.5.7 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 in 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 a claim presented by the Government could be paid from this deposit even if it 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.

3.5.8 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 other 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.

3.5.9 It was further 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.

3.5.10 The Executive Committee recalled 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 recalled 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.

3.5.11 The Director informed the Committee that the IOPC Fund had not yet been informed of any legal action against the Britannia P & I Club and the Fund by World-Wide Shipping Agency Ltd to recover the amount paid from the above-mentioned deposit, although it was expected that such an action would be taken. The Committee recalled that, at its 48th session, it had instructed the Director that, if such an action were brought, he should oppose the action on behalf of the IOPC Fund (document FUND/EXC.48/6, paragraph 4.2.9).

3.5.12 The delegation of the United Arab Emirates expressed the view that the Memorandum of Agreement between the Government of Fujairah and World-Wide Shipping Agency Ltd was a private agreement and should therefore not be discussed in the Executive Committee.

3.5.13 The Executive Committee took note of the recent developments in this case.

3.6 Oil spill from unidentified source in Morocco

3.6.1 The Executive Committee noted that in March 1995 the IOPC Fund had been informed of an oil spill which had occurred on 30 November 1994 in the port of Mohammedia (Morocco). The Director informed the Committee that the Moroccan authorities had claimed compensation for clean-up costs totalling Dhr 2.6 million (£196 900), but had not given any indication as to the source of the spill, stating that the oil could only have come from the sea, either as a result of the escape of ballast water, the cleaning of tanks, or accidental pollution. It was also noted that the Director had presented a document in respect of this spill for consideration by the Committee (document 71FUND/EXC.49/7).

3.6.2 The Moroccan delegation informed the Committee that the Government had set up a committee to investigate this oil spill in order to try to establish the source of the oil. For this reason, the Moroccan delegation requested that consideration of this incident be postponed to a later session.

3.6.3 The Executive Committee decided to postpone consideration of this case to its 50th session.

3.7 Developments in respect of certain incidents in the Republic of Korea

3.7.1 The Director introduced document 71FUND/EXC.49/8 which set out recent developments in respect of certain incidents in the Republic of Korea, namely the *Keumdong N°5, Sung Il N°1, Dae Woong* and *Sea Prince* incidents.

Keumdong N°5

3.7.2 The Executive Committee took note of the developments in respect of the *Keumdong N°5* incident.

Sung Il N°1

3.7.3 In respect of the *Sung Il N°1* incident, the Executive Committee noted that the shipowner had not commenced limitation proceedings within six months of receiving claims which together exceeded the limitation amount (approximately Won 23 million, or £18 900), and that, under Korean law, he had therefore lost the right to limit his liability.

3.7.4 The Executive Committee considered whether the IOPC Fund should take recourse action against the shipowner to recover the amount which the Fund had paid in compensation, viz Won 37.8 million

(£42 400). The Committee noted that an investigation carried out by the IOPC Fund's lawyer in Korea had revealed that the shipowner had no assets against which the IOPC Fund could make a recovery. The Committee therefore decided that it would not be meaningful for the IOPC Fund to take recourse action against the shipowner.

3.7.5 The Executive Committee considered that, although the Fund Convention did not contain any provision making the shipowner's right to indemnification conditional on his being entitled to limit his liability, it would be inappropriate for the IOPC Fund to indemnify the owner of the *Sung Il N°1* for a portion of the amount he had paid in compensation.

Dae Woong

3.7.6 The Executive Committee noted that the *Dae Woong* was not entered with any P & I Club but had a financial security, issued by a Korean bank, corresponding to the limitation amount. The Committee also noted that it had come to light that the shipowner had revoked the bank guarantee by returning the original thereof to the bank two days after he had received the certificate of insurance cover. The Committee noted that, as a consequence, the ship was not covered by any insurance or other financial security at the time of the incident, even though a certificate had been issued stating that financial security was in force for a one-year period. It was noted that the Korean legislation implementing the Civil Liability Convention required a Korean ship to have a certificate of insurance for the voyage in question, when a ship was carrying more than 200 tonnes of oil in bulk as cargo. It was also noted, however, that the requirement under Article V.1 of the Civil Liability Convention applied only to ships carrying more than 2 000 tonnes. The Executive Committee therefore shared the Director's view that, as regards the voyage in question, the Korean authorities were not in breach of the provisions of the Civil Liability Convention for having issued a certificate without ensuring that the bank guarantee could not be revoked before the expiry of the three-month period laid down in the Convention.

Sea Prince

3.7.7 The Executive Committee took note of the developments in respect of the *Sea Prince* incident, *inter alia* that the shipowner had commenced limitation proceedings in February 1996.

3.7.8 With regard to the cause of the incident, the Committee noted that the *Sea Prince* had grounded off Sorido Island during a typhoon, having lost control while on passage from the anchorage in Yosu Bay to take refuge in the open sea. The Committee noted the Director's view that the incident had been caused by a navigational error on the part of the master of the *Sea Prince* and that the unusual movement of the typhoon had contributed to the incident. The Executive Committee therefore decided not to challenge the shipowner's right to limit his liability.

3.7.9 The Director drew the Executive Committee's attention to the fact that there was a difference between the 1969 Civil Liability Convention and the implementing Korean legislation in respect of the criteria for depriving the shipowner of his right to limit his liability: although the 1969 Convention provided that the shipowner lost this right if the incident occurred as a result of the owner's actual fault or privity (Article V.2), under Korean legislation, the shipowner was not entitled to limit his liability if the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result, which was the criterion laid down in the 1992 Civil Liability Convention. The Committee noted the advice received from the IOPC Fund's Korean lawyer that the Korean courts would apply the Korean statute rather than the text of the Convention, which would make it more difficult to breach the shipowner's right of limitation.

3.7.10 As regards the shipowner's right to indemnification under Article 5.1 of the Fund Convention, the Executive Committee noted that, on the basis of the investigation of the local Marine Enquiry Agency, there was no indication that the ship did not comply with the requirements laid down in Article 5.3 of that Convention. The Committee therefore considered that the IOPC Fund would not be relieved of its obligation to indemnify the shipowner.

3.7.11 The Executive Committee instructed the Director to investigate whether the IOPC Fund could recover any amount paid by it from any person who had contributed to the incident.

Yuil N°1

3.7.12 The delegation of the Republic of Korea, speaking in its capacity as observer, expressed its concern regarding the delay in the payment of the expenses incurred during clean-up operations. This delegation indicated that in the *Yuil N°1* incident the claims for the clean-up operations had been settled, but that only 60% of the settled amounts had been paid. It was stated by this delegation that this delay in payment might lead to a mistrust of the Korean Government by those who participated in the clean-up operations. This delegation feared that in the event of a future oil spill, clean-up operations might therefore not be carried out as efficiently as they had been in the past. In the view of this delegation a possible solution would be to give priority to claims for clean-up costs.

3.7.13 The Director stated that he regretted this situation. He drew attention to the fact that under the Fund Convention all claimants had to be treated equally and no claims could be given priority. He also mentioned that when the Executive Committee decided to limit the IOPC Fund's payments to a specified percentage of the agreed amounts, this percentage had to be applied to all claims.

3.7.14 The Executive Committee endorsed the Director's position on this point.

3.8 *Sea Empress* incident

3.8.1 The Executive Committee took note of the information contained in documents 71FUND/EXC.49/9 and 71FUND/EXC.49/9/Add.1, submitted by the Director, on the developments which had taken place in respect of the *Sea Empress* incident since the Committee's 48th session. The Committee also took note of document FUND/EXC.49/9/1, submitted by the United Kingdom delegation. The Committee was shown a video presentation of the incident.

Claims situation

3.8.2 It was noted by the Executive Committee that as at 21 June 1996, 323 claims for compensation had been submitted to the Claims Handling Office in Milford Haven. The Executive Committee took note that the Skuld Club and the IOPC Fund had approved claims for payment for a total of £1 781 212 and that payments had been made by the Skuld Club to 179 claimants, totalling £1 728 516. It was further noted that cheques for £52 696 were awaiting collection by the claimants. It was also noted that most of these payments corresponded to 75% of the approved amounts and that payments of up to 100% of the approved amounts had been made by the Skuld Club in a number of cases, where the amount of compensation was small or the claimant has been able to demonstrate that a payment of more than 75% was necessary to avoid immediate financial hardship.

3.8.3 The Spanish delegation noted that the Skuld Club in the *Sea Empress* case had paid more than 75% in respect of certain claims. The delegation asked whether in other cases the P & I Clubs had made payments over the percentage decided by the Executive Committee and, if so, the amounts of such payments.

3.8.4 The Director stated that in the *Aegean Sea* case the UK Club had paid 100% of the agreed amounts in respect of many small claims, although the IOPC Fund's payments were limited to 40% of these amounts. He also stated that the Clubs had made full payments in some cases in the Republic of Korea where the IOPC Fund had limited its payments to a certain percentage. The Director added that since these payments had been made by the Clubs at their discretion, the IOPC Fund did not have any detailed figures of these payments.

Fish processing and sales companies

3.8.5 The Executive Committee considered three claims which had been received from fish processing and sales companies located outside the area covered by the fishing bans which had maintained that they had been deprived of their supply of shellfish as a result of the incident (documents 71FUND/EXC.49/9, paragraph 7.2 and 71FUND/EXC.49/9/Add.1, paragraph 2).

3.8.6 The Executive Committee recalled a number of its previous decisions in respect of the criteria for the admissibility of claims for pure economic loss, as set out in paragraphs 7.2.4 and 7.2.5 of document FUND/EXC.49/9. The Committee noted that, in the Director's view, the mere fact that a claimant's activities were located slightly outside the area immediately affected by the spill should not, by itself, disqualify the claimant from compensation. The Committee further noted that the Director was of the view that the further away from the affected area that the claimant's business was located, the greater the weight that would need to be given to the other criteria.

3.8.7 The Executive Committee first considered a claim submitted by a shellfish processor based in Newquay (Wales) some 80 kilometres by road to the north of the area covered by the fishing ban (document 71FUND/EXC.49/9/Add.1, paragraph 2.2). It was noted that the company had since 1995 processed whelks originating from inside the area and that approximately 62% of its whelk production originated from within that area. It was noted that the whelk fishing in the Milford Haven area had expanded recently and that this company had increased its capacity by extending its processing plant. It was also noted that this company bought whelks landed by 11 of the 22 boats fishing for whelks in the area.

3.8.8 The Executive Committee considered that as this processing plant was located close to the area covered by the fishing ban, this claim fulfilled the criterion of geographic proximity between the claimant's activity and the contamination. It was further noted by the Committee that the claimant was highly dependent on the supplies from the area and that it had limited possibilities of obtaining supplies elsewhere. The Committee took the view that the claimant's business should be considered as forming an integral part of the economic activity of the area. For these reasons, the Committee was of the opinion that there was a reasonable degree of proximity between the contamination and the alleged loss, and decided that this claim was admissible in principle.

3.8.9 The Executive Committee considered a claim by a fish sales company located in Saltash in Cornwall, some 400 kilometres by road from Milford Haven (document 71FUND/EXC.49/9/Add.1, paragraph 2.3). It was noted that 57% of the company's supply came from fishermen within the area covered by the fishing ban. It was further noted that the company could buy shellfish from other suppliers who were located up to 18 hours travelling time from the ferry ports as its specially equipped goods vehicle allowed it to do so. It was also noted that seven of the 100 vessels operating in the area covered by the fishing ban sold their catches to the claimant and that these sales accounted for approximately 10% of the total annual value of shellfish caught in the area.

3.8.10 The Executive Committee considered that this claim did not fulfill the criterion of geographic proximity between the claimant's activity and the contamination. It was also noted that although this claimant had to some extent alternative sources of supply, the claimant was somewhat dependent on supplies from the area. The Committee considered that the claimant's business did not form an integral part of the economic activity of the area affected by the spill. For these reasons, the Committee took the view that there was not a reasonable degree of proximity between the contamination and the loss suffered by the claimant. The Committee therefore decided that this claim should be rejected.

3.8.11 The Executive Committee examined a claim submitted by a fish sales company located in Newport (Wales) some 160 kilometres by road from Saundersfoot (the main whelk landing port affected by the fishing ban) (document 71FUND/EXC.49/9/Add.1, paragraph 2.4). It was noted that this company bought whelks from fishermen, arranged for their processing by the shellfish processor in Newquay (Wales) referred to in paragraphs 3.8.7 and 3.8.8 above, and exported the produce, mostly to the far east. It was

further noted that the company bought the whelks from 11 of the 22 vessels that fished in the affected area and that the company had invested in the infrastructure of this type of fishing in the area. The Committee noted that 88% of the claimant's turnover related to whelks caught inside the area affected by the fishing ban.

3.8.12 The Executive Committee noted that this claimant's business operated some distance from the area affected by the contamination. It was considered, however, that the company was highly dependent on products from the area covered by the fishing ban and that this company had made a significant contribution to the development of the infrastructure of whelk fishery in the area. The Committee considered therefore that there was a reasonable degree of proximity between the contamination and the alleged loss, and decided that this claim was admissible in principle.

Angling clubs, owners of river beds and private fishing rights

3.8.13 The Executive Committee noted that the Director had been informed that a number of angling clubs and private owners of river beds and private fishing rights in South Wales would present claims for economic loss allegedly suffered as a result of the *Sea Empress* incident (cf document 71FUND/EXC.49/9, paragraphs 7.3 and 7.4).

3.8.14 The Executive Committee confirmed its position that claims should not be considered until they had actually been submitted. The Committee decided therefore not to consider the admissibility of these potential claims.

Marketing campaign for tourism

3.8.15 The Executive Committee considered a claim presented by the Wales Tourist Board with a revised plan for marketing which was intended to offset the alleged decline in tourism caused by the *Sea Empress* incident, as set out in document FUND/EXC.49/9/Add.1. It was noted that the total cost of the proposed campaign was £172 000, compared with £550 000 in respect of the campaign originally proposed. It was also noted that the Wales Tourist Board had argued that without a major reassurance campaign there was likely to be a significant decline in the level of tourism, with a loss of income of the order of £15 million in the local Pembrokeshire economy. It was noted that the Board had argued that some of that loss would be the subject of claims for compensation.

3.8.16 The Committee recalled that at its 17th session the Assembly had endorsed the position taken by the 7th Intersessional Working Group (cf documents FUND/A.17/23 and FUND/A.17/36, paragraph 26.8) that measures to prevent or minimise pure economic loss which would fall within the definition of "pollution damage" as interpreted by the IOPC Fund should be considered as preventive measures, provided that they fulfilled the following requirements:

- the costs of the proposed measures were reasonable;
- the costs of the measures were not disproportionate to the further damage or loss which they were intended to mitigate;
- the measures were appropriate and offered a reasonable prospect of being successful; and
- in the case of a marketing campaign, the measures related to actual targeted markets.

3.8.17 The Spanish delegation drew attention to the fact that in the *Aegean Sea* case a claim relating to a marketing campaign presented by the Xunta of Galicia had been rejected by the Executive Committee, since the Committee considered that it did not fulfill the established criteria. This delegation was of the view that the claim by the Wales Tourist Board should also be rejected.

3.8.18 The Executive Committee noted that the Wales Tourist Board had not yet provided the necessary information and documentation on a number of points. The Committee was therefore not in a position to decide on the admissibility of the various items of the proposed marketing campaign. The Committee authorised the Director to approve the items of this campaign which fulfilled the criteria referred to in paragraph 3.8.16 above, as and when they had been carried out.

Level of payments

3.8.19 The Executive Committee recalled that it had decided at its 48th session to limit the Director's authority to make payments to 75% of the damage actually suffered by the respective claimant, since 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 recalled that in the document presented by the Director to that session, he had stated that he was unable to make an accurate estimate of the total amount of the admissible claims arising out of the incident, due mainly to the uncertainty in respect of the level of admissible claims in the tourism sector and, to a lesser extent, in the fishing sector.

3.8.20 The Executive Committee took note of the estimate presented by the United Kingdom delegation in document 71FUND/EXC.49/9/1 of the likely level of claims.

3.8.21 The Director informed the Executive Committee that he considered that the uncertainty referred to in paragraph 3.8.19 still existed, and that he could not be certain that the total amount of the established claims would not exceed the maximum amount available, viz 60 million SDR (£58 million). The Committee decided that the IOPC Fund's payments should for the time being remain limited to 75% 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 payment was made.

3.9 *Kugenuma Maru* incident

3.9.1 The Executive Committee took note of the information contained in document FUND/EXC.49/11 with regard to the P & I insurer's request that the IOPC Fund should, in the *Kugenuma Maru* case, waive the requirement to establish the limitation fund.

3.9.2 The Executive Committee noted that disproportionately high legal costs would be incurred in establishing the limitation fund in respect of this incident compared with the low limitation amounts under the Civil Liability Convention in this case, and took note of the Committee's decisions at its 22nd, 24th, 26th, 34th and 44th sessions in respect of other requests to the same effect. In view of these facts, the Executive Committee agreed that the requirement to establish the limitation fund should be waived in respect of the *Kugenuma Maru* case, so that the IOPC Fund could, as an exception, pay compensation and indemnification without the limitation fund being established.

3.10 Other incidents in Japan

The Director informed the Executive Committee that all the claims arising out of three Japanese incidents, namely the *Senyo Maru, Toko Maru* and *Shinryu Maru* incidents, had been settled and paid by June 1996 for approximately £2.3 million, £105 000 and £55 250, respectively. The Executive Committee noted these settlements with satisfaction.

4 Admissibility of claims relating to salvage operations and similar activities

The Executive Committee noted that the Director would report to the Committee's 50th session on his study of the admissibility of claims relating to salvage operations and similar activities.

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 document FUND/EXC.49/WP.2, was adopted, subject to certain amendments.