INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
52nd session
Agenda item 6

71FUND/EXC.52/11
20 February 1997

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

(held on 18 and 19 February 1997)

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 71FUND/EXC.52/1.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

Australia	Germany	Nigeria
Belgium	Greece	Republic of Korea
Canada	Malaysia	Russian Federation
Denmark	Morocco	Spain
Finland	Netherlands	United Kingdom

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

2.2 The following Member States were represented as observers:

Algeria	Italy	Poland
Benin	Japan	Slovenia
Cyprus	Liberia	Sweden
Fiji	Mexico	Tunisia
France	Norway	

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

Mozambique	Chile	Egypt
Argentina	China	Panama
Brazil	Ecuador	Peru

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)
United Nations
International Maritime Organization (IMO)

International non-governmental organisations:
Baltic and International Maritime Council (BIMCO)
Comité Maritime International (CMI)
International Chamber of Shipping (ICS)
International Group of P & I Clubs
International Salvage Union (ISU)
International Tanker Owners Pollution Federation Limited (ITOPF)
International Union for the Conservation of Nature and Natural Resources (IUCN)
Oil Companies International Marine Forum (OCIMF)

3 Incidents involving the 1971 Fund

3.1 *Haven* incident

3.1.1 The Executive Committee recalled that the Assembly, at its 19th session, had instructed the Director to explore, with the Italian Government and the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd (UK Club), the possibility of arriving at a global settlement in the *Haven* case which, as regards the 1971 Fund, fell within the maximum amount of compensation that would be available under the 1971 Fund Convention, ie the difference between 60 million SDR and 14 million SDR, minus the amounts which the 1971 Fund had paid or might have to pay to other claimants. It was recalled that the Assembly had emphasised that such discussions were without prejudice to the 1971 Fund's position in respect of the time bar issue. It was also recalled that the Assembly had authorised the Executive Committee to approve any global settlement within certain parameters (documents 71FUND/A.19/30, paragraph 17.11 and 71FUND/EXC.52/2, paragraph 2.3).

3.1.2 It was noted that the shipowner/UK Club had continued to settle and pay claims as admitted in the stato passivo, and that the situation as at 12 February 1997 was as follows:

(a) Agreements as to the quantum had been reached with the French Government, all other French public bodies and the Principality of Monaco, and the claims of the French public bodies (other than the French Government) had been paid in full by the 1971 Fund.

(b) The claims of two Italian contractors (Ecolfriuli and Ecolmare) had been paid in full by the 1971 Fund.

(c) Agreement had been reached by the shipowner/UK Club in respect of all but five of the claims submitted by Italian claimants and by private claimants in France for the amounts included in the stato passivo, and the shipowner/UK Club had paid or would be paying these claims in the very near future. In respect of those claims where a settlement agreement had expired due to the fact that the Club had been unable to make payments, interest had been added for the period between the expiry date and the date of the publication of the stato passivo.

(d) Agreement had not been reached with the Italian State, with one non-ATI clean-up contractor (Oromare) whose claim had been admitted in the stato passivo at Llt 1 000 million (£384 100) and with three other claimants whose claims as admitted in the stato passivo totalled Llt 95 217 891 (£35 800).

3.1.3 The Executive Committee noted that the shipowner/UK Club had undertaken to waive their claims against the shipowner's limitation fund and the 1971 Fund (Llt 1 354 768 078 + US$224 900 + £237 679, corresponding to a total of £884 700) if a global settlement was reached.

3.1.4 The Executive Committee noted that, in the light of the deliberations which took place on the occasion of the 19th session of the Assembly, discussions had been held between the Italian Government and the Director and between the Government and the UK Club, and that discussions had also taken place between the UK Club and the Director concerning the shipowner's/UK Club's right to indemnification pursuant to Article 5.1 of the 1971 Fund Convention. It was noted that, in the discussions with the Italian Government and the shipowner/UK Club, the Director had made it clear that he was not authorised to make any commitment on behalf of the 1971 Fund in respect of a global settlement.

3.1.5 It was noted that a meeting had been held in London on 14 February 1997 between representatives of the Italian Government, representatives of the shipowner/UK Club, and the Director to discuss the possibilities of reaching a global settlement of all outstanding issues in the *Haven* case. The Director informed the Executive Committee that the solution discussed would have resulted in the 1971 Fund paying the Italian State approximately Llt 70 000 million (£26.3 million), an amount which was equivalent to the difference between 60 million SDR and the limitation amount applicable to the shipowner of 14 million SDR, less the amounts paid or payable by the 1971 Fund to other claimants. The Committee noted that the amount to be paid by the UK Club to the Italian State would represent the balance on the shipowner's limitation fund (Llt 23 950 220 000) plus interest thereon (estimated at Llt 9 069 403 286) after all other claims had been settled and paid, plus a further amount to be paid *ex gratia* to the Italian State (in addition to the amount already paid *ex gratia* by the shipowner/UK Club to certain local public bodies).

3.1.6 The Committee noted that, in the Director's view, a solution along the lines set out in paragraph 3.1.5 above would fulfill the conditions laid down by the Assembly and the Executive Committee, namely that such a global settlement as regards the 1971 Fund would fall within the total amount that would be available under the 1969 Civil Liability Convention and the 1971 Fund Convention (ie 60 million SDR), that the 1971 Fund's payment would be made only in respect of quantifiable economic loss actually suffered by a claimant and that the 1971 Fund would not pay compensation for damage to the marine environment per se.

3.1.7 The Director informed the Executive Committee that, in the global settlement under discussion, all legal actions in the Italian courts would be withdrawn. It was recalled that, at its 48th session, the Committee had instructed the Director to take the necessary steps to appeal to the Supreme Court of Cassation against the Court of Appeal's judgement on the method of conversion of (gold) francs into national currency. It was further recalled that the 1971 Fund was entitled to appeal to the Supreme Court of Cassation against the judgement by the Court of Appeal relating to the conversion of the unit of account laid down in the 1971 Fund Convention within 60 days of having been formally notified of the judgement by a party to the proceedings or within one year from the date of the judgement. The Director informed the Committee that no such notification had yet been received, but that the period of one year expired on 30 March 1997. It was noted that the 1971 Fund was at present lodging its appeal and was notifying the appeal to all other parties in the same way as had been done in respect of the appeal against the Court of first instance's judgement on this issue.

3.1.8 The Executive Committee noted that the 1971 Fund's Italian lawyer had advised the Director that, once all claims had been settled and paid, it would not be possible to pursue this issue in the Supreme Court of Cassation, since there would no longer be any dispute. The Committee endorsed the Director's view, in the light of this advice, that, if a global settlement were concluded and became binding on all parties, the 1971 Fund should withdraw its appeal.

3.1.9 The Executive Committee instructed the Director to continue the discussions with the Italian Government and the shipowner/UK Club concerning the possibility of arriving at a global settlement in the *Haven* case within the parameters laid down by the Assembly and the Committee.

3.2 *Aegean Sea* incident

3.2.1 The Director introduced document 71FUND/EXC.52/3 which set out the developments which had taken place in respect of the *Aegean Sea* incident since the Committee's 50th session. In particular the Director informed the Executive Committee of the situation concerning the negotiations with representatives of a group of shellfish harvesters.

3.2.2 The Spanish delegation referred to the content of its statements at the 49th and 50th sessions of the Executive Committee (documents 71FUND/EXC.49/12, paragraphs 3.2.3–3.2.12, and 71FUND/EXC.50/17, paragraphs 3.3.3–3.3.7). The delegation stated that the operation of the 1971 Fund had not met the expectations of the Spanish Central and Regional Administrations. In the view of the Spanish delegation the experts appointed by the shipowner, the UK Club and the 1971 Fund had been unreasonable in their demands for evidence from the claimants, and the judgement of the Court of Appeal, which was expected during 1997, would shed some light on the quantum of the damage suffered by the claimants. The Spanish delegation reiterated the view of both the Central and Regional Authorities that negotiations between the claimants and the 1971 Fund should continue in an effort to make progress towards the settlement of claims.

3.2.3 The Spanish delegation stated that it considered the United Kingdom delegation's proposal in respect of emergency payments in cases of financial hardship to be worthy of further consideration. The delegation considered that the international compensation system established by the 1969 Civil Liability Convention and the 1971 Fund Convention should not require States to find extra money in their budgets for this purpose. It was stressed that compensation should be prompt and fair to be meaningful.

3.2.4 The Spanish delegation reminded the Executive Committee of the delegation's proposal discussed at the Committee's 51st session to develop a code of conduct for the appointment of experts and their working methods in the assessment of claims (documents 71FUND/EXC.51/2 and 71FUND/EXC.51/3, paragraphs 4.2–4.4).

3.2.5 In response to the Spanish delegation, the Director referred to his statements at the Committee's 49th, 50th and 51st sessions and the conclusions made by the Committee at those sessions.

3.3 *Braer* incident

On-going legal proceedings

3.3.1 The Executive Committee took note of document 71FUND/EXC.52/4 which set out the developments which had taken place in respect of the *Braer* incident, in particular in respect of the legal proceedings in the Court of session in Edinburgh. It was noted that some claims had been settled, withdrawn or reduced in amount, and that the total amount now claimed in court had accordingly been reduced from £80 million to £72 million.

3.3.2 The Committee noted that the Director intended to continue negotiations with those claimants whose claims in the 1971 Fund's view were admissible in principle for the purpose of reaching an agreement on the admissible quantum.

3.4 *Kihnu* incident

3.4.1 The Executive Committee took note of the developments in the *Kihnu* case, as contained in document 71FUND/EXC.52/5.

3.4.2 It was recalled that the State of Finland had taken legal action against the 1971 Fund and the P & I insurer in the Helsinki District Court, claiming compensation for FM 713 055 (£90 000). The Committee noted that this amount had been reduced in January 1997 to FM 701 676 (£89 000).

3.4.3 It was noted that the 1969 Civil Liability Convention and the 1971 Fund Convention entered into force for Estonia on 1 March 1993, ie after the *Kihnu* incident. It was recalled that, at its 49th session, the Executive Committee had considered that, although the claim of the Finnish Government 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, a 1971 Fund Member State. It was further recalled that the Committee had decided, therefore, that the measures taken by the Finnish authorities in principle fell within the scope of application of the 1969 Civil Liability Convention and 1971 Fund Convention (document 71FUND/EXC.49/12, paragraph 3.4.6).

3.4.4 It was noted that, following discussions with the Director, the Finnish Government had reduced its claim from FM 713 055 (£90 000) to FM 543 618 (£69 000), but that this reduction of the claim was dependent upon an out-of-court settlement being reached. The Director informed the Committee that, subject to the decisions of the Executive Committee on the issues dealt with in paragraphs 3.4.5-3.4.10, he had accepted as admissible the Finnish Government's claim in the reduced amount of FM 543 618.

3.4.5 The Executive Committee recalled that, at its 49th session, the Director had been instructed to examine the relationship between applicable regional agreements relating to co-operation in respect of oil spills and the compensation regime established by the 1969 Civil Liability Convention and the 1971 Fund Convention. The Committee shared the Director's view that the Finnish Government's right to compensation from the shipowner and the 1971 Fund for the costs incurred was not dependent on whether the Government was entitled to recover its costs from the Estonian authorities. The Committee recalled that, under Article I.7 of the 1969 Civil Liability Convention, any person carrying out preventive measures was entitled to compensation. It was further considered that the Estonian authorities would have been entitled to present a subrogated claim against the shipowner and the 1971 Fund, if they had reimbursed the Finnish Government for its costs.

3.4.6 It was also recalled that the Committee had instructed the Director, at its 49th session, to investigate whether, and if so, to what extent the Finnish authorities had taken the necessary steps, as provided in Article 4.1(b) of the 1971 Fund Convention to recover the costs incurred from the shipowner and his insurer or from the Estonian authorities.

3.4.7 The Committee noted that it appeared very unlikely that the Finnish Government would have been able to recover its costs for preventive measures from the shipowner, the bare-boat charterer or the insurer by taking legal action in Estonia, since Estonia was not Party to the 1969 Civil Liability Convention and the 1971 Fund Convention on the date of the incident, nor did it have any domestic law governing liability for oil pollution. It was noted that, if the Finnish Government had taken action in Finland against the registered owner (the Tallinn Port Authority), it would have been extremely unlikely that a judgement could have been enforced either in Estonia or in any State Party to the 1969 Civil Liability Convention. The Committee also noted that, pursuant to the Finnish Act implementing the 1969 Civil Liability Convention, it would not have been possible for the Finnish Government to bring legal action in Finland against the bare-boat charterer. It was further noted that the ship's insurance had not been issued under Article VII.1 of the 1969 Civil Liability Convention and that it had been taken out by the bare-boat charterer and not by the registered owner. It was recognised, therefore, that it was unlikely that the Finnish courts would accept a direct action against the P & I insurer, as Finnish law did not allow direct action against insurers except in cases specifically provided by statute, and that it was improbable that a direct action against the insurer in the Turks & Caicos Islands (a United Kingdom dependency), where the insurer had its registered office, would be successful.

3.4.8 For the reasons set out in paragraph 3.4.7 above, the Executive Committee shared the Director's view that the Finnish Government had taken all reasonable steps to pursue the legal remedies available to it to recover its costs from parties other than the 1971 Fund.

3.4.9 The Committee examined whether the 1971 Fund should await the outcome of the legal proceedings in respect of the Finnish Government's action against the insurer before paying compensation, or whether the Fund should immediately compensate the Government for the amount agreed. As it was considered unlikely that the Finnish Government's direct action against the P & I insurer would succeed, the Executive Committee decided that the 1971 Fund should pay compensation to the Finnish Government in the amount agreed (FM 543 618) without waiting for the Court's decision in respect of the Government's action against the insurer.

3.4.10 The Committee decided that the 1971 Fund should not pursue the Finnish Government's action against the insurer in order to recover the amount paid to the Government, since such an action was unlikely to succeed.

3.4.11 The Finnish delegation informed the Committee that under Finnish law, when a court action was withdrawn, each party to the proceedings had to bear its own costs.

3.5 *Yuil N°1* incident

3.5.1 The Director introduced document 71FUND/EXC.52/6 which dealt with developments in the *Yuil N°1* case.

3.5.2 The Executive Committee recalled that it had decided, at its 50th session, to maintain the limit of the 1971 Fund's payments at 60% of the established damage suffered by each claimant, in view of the uncertainty concerning the total amount of the established claims (document 71FUND/EXC.50/17, paragraph 3.4.2). The Committee noted that in January 1997 the National Federation of Fisheries Co-operatives (NFFC) had paid the remaining 40% of most of the established claims for clean-up operations, and had thereby acquired the subrogated rights against the 1971 Fund in respect of the amounts paid.

3.5.3 The delegation of the Republic of Korea noted that the NFFC had paid the remaining 40% of the clean-up claims in order to avoid further delay in the payment of those claims. The delegation stated that the 1971 Fund should reimburse NFFC for the amount paid for these claims, together with due interest.

3.5.4 The Director stated that, in his view, it would not be possible for the 1971 Fund to reimburse the NFFC for its subrogated claim, which represented the balance of the established clean-up claims, while the Fund's payments were limited to 60% of the established claims as decided by the Executive Committee, since all claimants had to be given equal treatment.

3.5.5 The delegation of the Republic of Korea emphasised that solutions should be found within the compensation system to solve this problem since it was not acceptable that Governments should feel obliged to intervene to mitigate financial hardship. This delegation referred to a document on emergency payments in cases of financial hardship presented by the United Kingdom delegation to the 19th session of the 1971 Fund Assembly (document 71FUND/A.19/27).

3.5.6 The Committee noted the results of the investigation carried out by the Korean Maritime Accident Inquiry Agency into the cause of the incident, in respect of both the initial grounding and the refloating/towing operation which led to the sinking. It was noted that the hull insurer of the *Yuil N°1* had taken legal action in the Republic of Korea against the owner of the tug which had taken part in the refloating/towing operation, and against the Korean Government, for the purpose of recovering the amount it had paid for the damage to the hull. It was also noted that the Court of first instance would render its judgement on this case in the spring of 1997.

3.6 *Sea Empress* incident

3.6.1 The Executive Committee took note of the information contained in document 71FUND/EXC.52/7 on the developments which had taken place in respect of the *Sea Empress* incident since the Committee's 50th session.

Claims situation

3.6.2 It was noted by the Executive Committee that as at 14 February 1997, 681 claims for compensation had been submitted to the Claims Handling Office in Milford Haven. The Committee took note that the P & I insurer, Assuranceforeningen Skuld (Skuld Club) and the 1971 Fund had approved claims for a total of £8 543 443 and that payments had been made by the Skuld Club to 373 claimants, totalling £6 082 876. It was further noted that cheques for £147 783 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 where the claimant had been able to demonstrate that a payment of more than 75% was necessary to avoid immediate financial hardship.

Claim by shellfish merchants

3.6.3 The Executive Committee considered a claim submitted by two shellfish merchants relating to their operations in the collection and processing of cockles and mussels in the area affected by the spill, which had given rise to two questions of principle, ie whether losses allegedly suffered by the claimants as a result of not being able to sell to a regular customer and losses incurred as a result of a new customer not paying for produce delivered to him were admissible for compensation (document 71FUND/EXC.52/7/Add.1, paragraph 2).

3.6.4 On the first part of the claim, it was noted that the claimants had provided the following information:

> The claimants had a long-term relationship with a French customer who purchased quantities of cockles at regular intervals, and that during the period of the ban on the collection of cockles, the French customer had repeatedly asked the claimants when they would again be in a position to supply him. The last such occasion had been on 2 July 1996, the day before the ban was lifted. Immediately after the lifting of the ban on 3 July the claimants informed the French customer that they were able to resume deliveries of cockles. The French customer had then stated that he had already agreed to buy cockles from an Irish supplier and that he could not resume purchases from the claimants until 1 September 1996. The claimants maintained that, as a result, they had suffered a loss through not being able to make sales to their usual customer in France for the period 3 July - 31 August 1996.

3.6.5 The Executive Committee noted that, from the date when the ban on cockles was lifted, the claimants had been in a position to resume delivery to their regular French customer, but that, in the meanwhile, the French customer had agreed to buy from an Irish merchant. The Committee recognised that the claimants could not have known when the harvesting ban would be lifted. It was noted that the French customer had resumed his business relationship with the claimants two months after the lifting of the ban (ie on 1 September 1996), and that this part of the claim related to alleged loss of sales after the ban on the collection of cockles had been lifted.

3.6.6 The United Kingdom delegation considered that the loss of an identifiable long-standing business customer should be eligible for compensation, since it was comparable with the 1971 Fund's existing policy of paying compensation to tourism operators who had lost customers as a result of an oil spillage.

3.6.7 The Executive Committee considered that the claimants' losses were not a direct result of the contamination and the ensuing fishing ban, but were due to a commercial decision by a third party to protect his business for a period of time, until he could be sure that the claimants would be able to resume normal deliveries, and that for this reason there was not a sufficient degree of proximity between the loss and the contamination. The Committee therefore decided to reject this part of the claim.

3.6.8 The Committee noted that the claimants, after the lifting of the harvesting ban, had purchased larger quantities of cockles from the gatherers than before the ban, at higher than the prevailing price. It was further noted that the claimants had maintained that this was done in order to re-establish a loyal group of gatherers. It was also noted that the claimants did not, at that time, have customers for the increased quantities and that, apart from a sale to a new customer in Spain, the cockles purchased by the claimants were sold to a shellfish processor at a reduced price.

3.6.9 The Executive Committee took the view that, after the harvesting ban had been lifted, and in the knowledge that their major customer would not be buying from them for two months, it was not reasonable for the claimants to have bought larger quantities of cockles than they required to satisfy the orders that they had at the time, paying higher than the prevailing price to the gatherers. Although the claimants maintained that there were good commercial reasons for their action, the Committee decided that any loss resulting from this action could not be attributed to the *Sea Empress* incident.

3.6.10 On the second part of the claim, relating to losses incurred as a result of a customer not paying for the cockles delivered to him, it was noted that the claimants had submitted the following information:

> In order to reduce their losses as a result of being unable to sell cockles to the customer in France, the claimants made serious attempts to find alternative markets. This proved very difficult, but they contacted a British businessman operating in Spain who had agreed to accept 10 tonnes of cockles on a trial basis. However, the buyer in Spain did not pay for the quantities received. It emerged later that he was in serious financial difficulties and had proved unreliable also in business dealings with other suppliers. The claimants had still not been paid.

3.6.11 The Executive Committee recalled that it had considered a similar issue at its 40th session in the context of the *Braer* incident (document FUND/EXC.40/10, paragraphs 3.5.34 and 3.5.35). In that case, the Executive Committee had rejected the claim, since it was of the view that the loss allegedly suffered by the claimant could not be considered as damage caused by contamination but was a result of normal business risks.

3.6.12 On the basis of the Executive Committee's decision in the *Braer* case, the Committee shared the Director's view that the loss allegedly suffered by the claimants in the *Sea Empress* case, due to the customer in Spain not having paid for the cockles, could not be considered as damage caused by contamination, but was a result of normal business risks. The Executive Committee therefore rejected this part of the claim.

Claim by fish transporter

3.6.13 The Committee considered a claim presented by the owner of a haulage company which operated 11 vehicles for general transport throughout the United Kingdom from its base in Narberth, 10 kilometres from Saundersfoot in the area affected by the oil spill (document 71FUND/EXC.52/7/Add.1, paragraph 3). It was noted that the claim related only to loss of income suffered as a result of the claimant not being able to use one of the company's vehicles which had been specifically purchased for the collection of whelks from Saundersfoot and for their transportation to a fish processor in Newquay some 60 kilometres from Narberth. It was also noted that the specialised vehicle could not be used in other areas of the claimant's business.

3.6.14 The Committee recalled that a similar claim had been considered by the Executive Committee at its 37th session in the context of the *Braer* incident, and that that claim had been rejected on the ground that the losses allegedly suffered by the claimant as a result of the reduction in the demand for transport services could not be considered as damage caused by contamination (document FUND/EXC.37/3, paragraphs 4.2.14–4.2.16).

3.6.15 It was noted that the Director had taken the view that the claim by the haulage company referred to in paragraph 3.6.12 above fulfilled the criteria for admissibility in that the claimant's business was an integral part of the economic activity of the area affected by the oil spill, that as regards the particular vehicle the claimant was dependent on the affected resource since it was a specialised vehicle for

transporting whelks from the fishermen to the fish processor, and that both the fishermen and the fish processor had received compensation for losses following the fishing ban.

3.6.16 A number of delegations agreed with the Director's analysis that the loss suffered by the claimant should be considered as damage caused by contamination and that therefore the claim was admissible in principle. Other delegations considered, however, that there was not a sufficient degree of proximity between the loss suffered by the claimant and the contamination.

3.6.17 The Executive Committee instructed the Director to examine this claim further and to submit the claim for renewed consideration at the Committee's 53rd session.

Level of payments

3.6.18 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 1969 Civil Liability Convention and the 1971 Fund Convention. It was also recalled that the Committee had decided at its 49th and 50th sessions to maintain the limit of 75% (documents FUND/EXC.48/6, paragraph 3.4.7, FUND/EXC.49/12, paragraph 3.8.21 and 71FUND/EXC.50/17, paragraph 3.12.16).

3.6.19 The Director informed the Executive Committee that he still considered that uncertainty existed as to whether the total amount of the established claims would exceed the maximum amount available, viz 60 million SDR (equivalent to £51 million at the prevailing rate of exchange).

3.6.20 The United Kingdom delegation introduced document 71FUND/EXC.52/7/1 which contained two estimates of the total level of the claims, one low estimate of £34 million and one high estimate of £49 million. The delegation noted that, as virtually all fishing bans had been lifted and the clean-up operations were nearly completed, there was now little uncertainty as to the level of claims in these sectors. With regard to the tourism claims, the delegation had been advised by the Wales Tourist Board and by the claimants' advisers that the total of those claims was likely to be well below £9 million. The delegation noted that many claimants were concerned at the lack of progress towards payments at 100% of approved losses, especially as claims had been approved for a total of only £8.5 million. It was stated that while little use had yet been made of the special arrangement for payments at 100% of the approved claims in cases of financial hardship, an arrangement which was 'underwritten' by the United Kingdom Government, it did not follow that individuals and small businesses were not suffering financial difficulties due to the reduced level of payments. It was further stated that few small businesses could afford to lose 25% of their income. The United Kingdom delegation urged the Executive Committee to increase the payment of approved claims to 100%.

3.6.21 A number of delegations considered, in view of the uncertainty as to the total amount of the claims, that an increase of the percentage payable was inappropriate at this stage.

3.6.22 The Executive Committee decided that the 1971 Fund's payments should for the time being remain limited to 75% of the damage actually suffered by the respective claimants as assessed by the experts engaged by the 1971 Fund and the Skuld Club. It was further decided that this matter should be reviewed at the Committee's 53rd session, to be held in April 1997. The Committee instructed the Director to obtain as much information as possible about the total amount of the claims and in particular the amount of the salvage claim.

3.6.23 In response to this decision the United Kingdom delegation stated that it understood the concern regarding the salvage claim and supported the view that the Director should endeavour to obtain more information on this potential claim. The delegation also urged the Director to try to quantify the total level of the claims for the Committee's next session. It was stated that if, after such a quantification, it appeared that there was still an apparent risk of the 1971 Fund limit being exceeded, CRISTAL should be notified of the possible need for additional funding. The United Kingdom delegation also invited delegations to consider the consequences for claimants of fluctuations in the value of the SDR.

3.7 *Nakhodka* incident

3.7.1 The Executive Committee took note of the information contained in documents 71FUND/EXC.52/8, 71FUND/EXC.52/8/Add.1 and 71FUND/EXC.52/8/Add.2 on the *Nakhodka* incident, which had occurred in Japan on 2 January 1997.

3.7.2 Speaking at the invitation of the Chairman, the Japanese delegation confirmed its policy of not intervening in the discussion concerning incidents in Japan. The delegation expressed its hope that the payment of claims could be made promptly and smoothly, as had been done in previous cases in Japan.

3.7.3 The Director informed the Executive Committee that he had received a letter from the Japanese Ministry of Foreign Affairs and Ministry of Transport expressing their gratitude to the 1971 Fund for various actions taken in the context of this incident. He mentioned that they had expressed the hope that compensation would be paid promptly to claimants.

Applicability of the 1969 and 1992 Civil Liability Conventions and of the 1971 and 1992 Fund Conventions

3.7.4 The Executive Committee noted that the 1992 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention had entered into force in respect of Japan on 30 May 1996, and that the 1992 Civil Liability Convention and the 1992 Fund Convention were therefore in principle applicable to this incident.

3.7.5 It was noted that the *Nakhodka* was registered in the Russian Federation, which had not ratified the 1992 Protocols but which was Party to the 1969 Civil Liability Convention and the 1971 Fund Convention. The Committee endorsed the Director's view that the shipowner's right of limitation should be governed by the 1969 Civil Liability Convention, to which both Japan and the Russian Federation were Parties. It was further noted that the limitation amount applicable to the *Nakhodka* was estimated at 1 588 000 SDR (£1.7 million) under the 1969 Civil Liability Convention. The Committee confirmed that compensation would be available as follows:

	SDR
Shipowner under the 1969 Civil Liability Convention	1 588 000
1971 Fund	58 412 000
Shipowner under the 1992 Civil Liability Convention	0
1992 Fund, in excess of 60 million SDR	75 000 000
Total compensation available under the Conventions	135 000 000

Settlement of claims

3.7.6 It was noted that no formal claims for compensation had yet been received, although some clean-up contractors had made requests for provisional payments to mitigate financial hardship.

3.7.7 The Executive Committee authorised the Director to make final settlements on behalf of the 1971 Fund of all claims arising out of this incident, to the extent that the claims did not give rise to questions of principle which had not previously been decided by the Committee.

3.7.8 The Committee expressed the view that the 1971 Fund and the 1992 Fund should endeavour to ensure consistency in respect of the admissibility of claims for compensation, in accordance with 1971 Fund Resolution N°9 and 1992 Fund Resolution N°3.

Level of payments

3.7.9 As regards the question of whether the Director should be authorised to make payments, the Executive Committee noted that the total amount of the claims arising out of the *Nakhodka* incident would exceed the amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention, ie 60 million SDR (approximately ¥10 200 million or £51 million).

3.7.10 Since the 1992 Fund Convention also applied in the *Nakhodka* case, the Executive Committee considered that the level of the 1971 Fund's payments should be determined by taking into account the amounts available under both the 1971 and the 1992 Fund Conventions, ie a total of 135 million SDR (approximately £114 million).

3.7.11 It was emphasised by a number of delegations that the 1971 Fund and 1992 Fund should endeavour to ensure consistency in respect of not only the admissibility of claims but also the handling of a case involving both Organisations. Many delegations, including seven delegations of States which were also Members of the 1992 Fund, were of the view that the level of payments should be the same for the 1971 Fund as for the 1992 Fund.

3.7.12 The Committee noted that, as regards the 1992 Fund, any decisions in respect of the admissibility or payment of claims could be taken only by the 1992 Fund Assembly, except to the extent that the Director was authorised under the 1992 Fund's Internal Regulations to make final settlements of claims and decide on payments. It was noted that the Director intended to convene an extraordinary session of the 1992 Fund Assembly, to be held during the week of 14-18 April 1997.

3.7.13 The Executive Committee recalled that, in previous cases, it had taken the position that it was necessary to exercise caution in the payment of claims, if there was a risk that the total amount of the claims arising out of the particular incident would exceed the total amount of compensation available under the 1969 Civil Liability Convention and the 1971 Fund Convention, since under Article 4.5 of the 1971 Fund Convention all claimants had to be given equal treatment. It was also recalled that the Committee had expressed the view that it was necessary to strike a balance between the importance of the 1971 Fund's paying compensation as promptly as possible to victims of oil pollution damage and the need to avoid an over-payment situation.

3.7.14 The Executive Committee decided to authorise the Director to make payments on behalf of the 1971 Fund in respect of claims arising from the *Nakhodka* incident. However, in view of the uncertainty as to the level of the total amount of the claims, the Committee decided that the payments to be made by the 1971 Fund should, for the time being, be limited to 60% of the amount of the damage actually suffered by the respective claimants as assessed by the experts engaged by the Funds and the shipowner/his insurer at the time when the payment was made. It was also decided that this percentage should be reviewed at the Executive Committee's 53rd session, to be held in April 1997, in the light of further information as to the likely level of the claims and taking into account the position to be taken by the 1992 Fund Assembly.

Source of funds for the prompt payment of claims

3.7.15 The Executive Committee took the view that it was important to ensure that sufficient funds were available to enable the 1971 Fund to make payments promptly for claims arising from the *Nakhodka* incident. It was recognised that the Committee was not authorised to take decisions on the levy of contributions or other budgetary matters and that such decisions could be taken only by the Assembly. The Committee nevertheless examined the various options set out by the Director in paragraph 4 of document 71FUND/EXC.52/8/Add.1.

3.7.16 The Committee considered that it would be inappropriate to await a decision by the Assembly in October 1997 to levy contributions to a *Nakhodka* Major Claims Fund, since there would not be sufficient funds available for the payment of claims arising from the *Nakhodka* incident until February 1998. It was recognised that it would be necessary at some stage to levy contributions to a *Nakhodka* Major Claims Fund, and it was considered that this should be done at the first opportunity. It was generally considered that the various options set out in paragraphs 4.4 and 4.5 of document 71FUND/EXC.52/8/Add.1 could be combined in order to make available sufficient funds for the payment of claims. Several delegations stated that the deferred levies decided by the Assembly at its 19th session (ie to the *Keumdong N°5*, *Sea Prince/Yeo Myung/Yuil N°1* and *Sea Empress* Major Claims Funds) should be invoiced only to the extent that it was estimated that the monies were required for the incidents for which they were intended.

3.7.17 In the light of the considerations set out in paragraph 3.7.15, the Committee decided to request, in accordance with Article 19.2 of the 1971 Fund Convention, the Director to convene an extraordinary session of the 1971 Assembly.

3.7.18 The Director informed the Committee that he would submit detailed proposals on the financing of the payment of claims arising from the *Nakhodka* incident to the extraordinary session of the 1971 Fund Assembly, which would be held during the week of 14-18 April 1997.

3.7.19 It was noted that the 1992 Fund Assembly would be able to consider, at an extraordinary session to be held also during the week of 14-18 April 1997, how the 1992 Fund for its part could ensure the prompt payment of claims arising out of the *Nakhodka* incident.

Purchase of Japanese Yen

3.7.20 The Executive Committee considered whether, in view of the estimated level of claims arising out of the *Nakhodka* incident, the 1971 Fund should at this stage purchase Japanese Yen to be used for the payment of these claims. It was recalled that Financial Regulation 10.4 allowed the Director to hold assets in the currencies required to meet claims arising out of a specific incident which have been settled or are likely to be settled in the near future. It was also noted that, under Internal Regulation 3.4, contributors in Japan could be required to pay their contributions to the 1971 Fund in Japanese Yen.

3.7.21 Noting that the Pound was at present very strong in the currency market, whereas the Yen was comparatively weak, the Executive Committee agreed with the Director that it was appropriate for the 1971 Fund to purchase Yen in the next few weeks, in order to protect the 1971 Fund against a strengthening of the Yen vis-à-vis the Pound. It was stressed, however, that since the 1971 Fund was neither a financial institution nor an investment bank, Yen should be purchased only to provide funds for the payment of claims in the *Nakhodka* case, and not for general investment purposes. It was recommended that the Director should seek appropriate expert advice on the matter.

Investigation into the cause of the incident

3.7.22 The Committee noted that the Japanese and Russian authorities had agreed to co-operate in the investigation into the cause of the incident. One delegation stated that in view of the circumstances of the incident, the 1971 Fund should follow closely this investigation.

3.8 Other incidents in the Republic of Korea

3.8.1 The Director informed the Executive Committee of the developments in the *Keumdong N°5*, *Sea Prince* and *Honam Sapphire* incidents.

3.8.2 The delegation of the Republic of Korea explained the structure of the Korean fishing industry. The delegation drew attention to the fact that the fishermen, although belonging to co-operatives, individually sold a significant part of their catches on the free market where no receipts were obtained, and that therefore the fishermen could not provide documentation supporting such sales. The delegation accepted that the claimants had to document the amount of their loss but stated that the 1971 Fund should treat the situation of these claimants as a special case requiring flexibility as regards the degree of proof.

3.8.3 The Director stated that in the past the 1971 Fund's assessment of fishery claims in Korean cases had been based on official statistics since the claimants had not provided supporting documentation. He mentioned that in the *Sea Prince* case the claimants had provided records on consignment sales and that in the Fund's view an assessment based on such records would give a more accurate result than one based on statistics. He added that the 1971 Fund recognised that an allowance for private sales based on national statistics might be appropriate in some fishery sectors.

3.9 New incident

The Committee was notified of the *Tsubame Maru* incident which had occurred in Japan on 25 January 1997.

4 Admissibility of claims relating to salvage operations and similar activities

4.1 The Director introduced document 71FUND/EXC.52/9 on the question of the admissibility of claims relating to salvage operations and similar activities.

4.2 The observer delegation of the International Group of P & I Clubs introduced document 71FUND/EXC.52/9/1. This delegation stated that the distinction between payments to salvors under Article 13 and special compensation under Article 14 of the 1989 International Convention on Salvage had eliminated the need to analyse the purpose for which the operations were undertaken. It was recognised by the International Group that its proposal that payments under Article 13 would not be considered as costs of preventive measures whereas payments of special compensation under Article 14 should be considered as cost of preventive measures could not be applied in every case. It was submitted, however, that this distinction could be used as a working rule in most cases. This delegation maintained that the 'primary purpose test' was no longer relevant since most salvage operations had a dual purpose, ie both the salvage of property and the protection of the environment. The delegation admitted that there might be cases where it would be inappropriate for the 1971 Fund to reimburse amounts paid as special compensation under Article 14.

4.3 A number of delegations supported the analysis made by the Director and in particular that the 'primary purpose test' and the 'dual purpose test' had proved workable. Some delegations stated, however, that the 'primary purpose test' was no longer relevant. Other delegations maintained that although the 'primary purpose test' would still be a useful criterion, it was likely that the developments in the objectives of salvage would lead to the 'dual purpose test' being applied more frequently. It was also stated that the 1971 Fund had to apply the 1969 Civil Liability Convention and the 1971 Fund Convention and that there was no legal link between these Conventions and the 1989 Salvage Convention. A number of delegations also stated that the 1971 Fund should continue its practice of examining each case in the light of its particular circumstances.

4.4 The Executive Committee decided that the 1971 Fund should continue to examine each claim relating to salvage operations and similar activities on its own merits against the 'primary purpose test' and the 'dual purpose test' as appropriate. It was also confirmed that the test of reasonableness should apply not only to the actions of the shipowner in contracting the salvor but also to the measures carried out under the terms of the relevant contract, ie that the approach should be the same as in respect of clean-up operations.

5 Any other business

5.1 Compulsory denunciation of the 1969 Civil Liability Convention and 1971 Fund Convention by Parties to the 1992 Fund Protocol

5.1.1 The Executive Committee noted that on 15 November 1996 the Netherlands had deposited an instrument of accession to the 1992 Fund Protocol and that with the deposit of this instrument, the requirements in the 1992 Fund Protocol for the compulsory denunciation of the 1969 Civil Liability Convention and 1971 Fund Convention had been fulfilled. It was noted that, as a result, the States which had deposited instruments of ratification, acceptance, approval or accession in respect of the 1992 Fund Protocol (whether or not the Protocol was in force for the State in question), were obliged to deposit instruments of denunciation of the 1969 Civil Liability Convention and the 1971 Fund Convention by 15 May 1997, and that such denunciations would take effect twelve months after that date.

5.1.2 The Director informed the Executive Committee that, as at 10 February 1997, instruments of denunciation of the 1969 Civil Liability Convention and of the 1971 Fund Convention had been deposited by the Netherlands. The Committee noted that if the remaining 19 States which had deposited an instrument of ratification, acceptance, approval or accession to the 1992 Fund Protocol (whether or not the Protocol had entered into force) did not deposit instruments of denunciation of the 1969 and 1971 Conventions by 15 May 1997, they would be deemed to have denounced the 1992 Protocols, with effect twelve months after that date. It was noted that, as a result, such a State would, from 16 May 1998, be Party to the 1969 Civil Liability Convention and 1971 Fund Convention only.

5.1.3 The Executive Committee noted that from 16 May 1998 (the date when the 1992 Fund Member States will be leaving the 1971 Fund), the total quantity of contributing oil in the 1971 Fund Member States would be reduced from 1 183 million tonnes received to 411 million tonnes, and that if, as expected, two further major oil receiving States left the 1971 Fund and joined the 1992 Fund by May 1998, the total quantity of contributing oil would be reduced to 277 million tonnes. It was noted that this could result in a significantly increased cost for the oil industry in those States which remained Members of the 1971 Fund (more than a four-fold increase in their respective share of the total contributions levied), since the financial burden would be spread among fewer contributors.

5.2 Payment of contributions

5.2.1 It was recalled that the Assembly had, at its 19th session, decided to levy contributions to two Major Claims Funds for a total amount of £23 million, payable by 1 February 1997, and to reimburse contributors to the General Fund for a total of £5 million on that date. The Director informed the Executive Committee that 95.46% of the invoiced amounts had been received as at 18 February 1997.

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

5.3 Schedule of meetings

5.3.1 The Executive Committee recalled that, at its 51st session, it had decided to hold a session during the week of 14-18 April 1997 (document 71FUND/EXC.51/3, paragraph 6.2). It was further recalled that sessions of the 1971 Fund Assembly, of the 1992 Fund Assembly and of the 1992 Fund Working Group on alternative dispute settlement procedures would also be held during that week.

5.3.2 The Committee noted the following tentative timetable for the week of 14-18 April 1997, which was proposed by the Director after consultation with the Chairmen of the Executive Committee and Assemblies:

		71 Fund: Executive Committee	71 Fund: Assembly	92 Fund: Assembly	92 Fund: Formal Working Group (Alternative Dispute Settlement)
Monday	10.00 11.30 14.30 16.00				
Tuesday	9.30 11.30 14.30 16.00				
Wednssday	9.30 11.30 14.30 16.00				
Thursday	9.30 11.30 14.30 16.00				
Friday	9.30 11.30 14.30 16.30	*SESSIONS TO BE CONTINUED AS REQUIRED*			

6 Adoption of the Record of Decisions

The draft record of decisions of the Executive Committee's 52nd session, as contained in documents 71FUND/EXC.52/WP.1, 71FUND/EXC.52/WP.1/Add.1 and 71FUND/EXC.52/WP.1/Add.2, was adopted, subject to certain amendments.