INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
55th session
Agenda item 7

71FUND/EXC.55/19
24 October 1997

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

(held from 20 to 22 October 1997)

Chairman: Mr W J G Oosterveen (Netherlands)

Vice-Chairman: Dr M Babangida Aliyu (Nigeria)

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 71FUND/EXC.55/1.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

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

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
Bahamas
Colombia
Côte d'Ivoire
Cyprus
Estonia
France
Gabon
India
Indonesia
Ireland
Italy
Japan
Liberia
Mexico
New Zealand
Norway
Poland
Slovenia
Sweden
Syrian Arab Republic
Tunisia
Venezuela

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

Argentina
Brazil
Chile
China
Ecuador
Egypt
Latvia
Panama
Peru
Philippines
Saudi Arabia
United States
Uruguay

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)
United Nations

International non-governmental organisations:
Comité Maritime International (CMI)
Cristal Limited
International Chamber of Shipping (ICS)
International Group of P & I Clubs
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 Overview

The Executive Committee took note of document 71FUND/EXC.55/2 which contained a summary of the situation in respect of all 30 incidents dealt with by the 1971 Fund since the Committee's 50th session.

3.2 *Haven* incident

The Executive Committee took note of the information contained in document 71FUND/EXC.55/3. In particular, the Committee noted that the Director was reporting the developments in respect of the *Haven* incident directly to the 1971 Fund Assembly which was holding its 20th session during the same week as the Committee's 55th session (cf document 71FUND/A.20/28).

3.3 *Aegean Sea* incident

3.3.1 The Director introduced document 71FUND/EXC.55/4 which set out the developments which had taken place in respect of the *Aegean Sea* incident since the Committee's 50th session.

3.3.2 The Executive Committee recalled that proceedings had been initiated in the Criminal Court of first instance in La Coruña against the master of the *Aegean Sea* and the pilot in charge of the ship's entry into the port of La Coruña. It was also recalled that the Court had rendered its judgement in the *Aegean Sea* case on 30 April 1996. The Committee recalled that the 1971 Fund and other parties had appealed against this judgement.

3.3.3 The Committee noted that the Court of Appeal in La Coruña had rendered its judgement on 18 June 1997 and that the judgement of the Court of Appeal was final. It was noted, however, that a number of claims for compensation had been referred to the procedure for the execution of the judgement.

Issues relating to civil liabilities

3.3.4 The Executive Committee noted that the Court of Appeal had agreed with the assessment made by the Court of first instance on the matter of the criminal liability of the master of the *Aegean Sea* and the pilot and had upheld the judgement of the Court of first instance that the master and the pilot were directly liable for the incident and that they were jointly and severally liable, each of them on a 50% basis, to compensate victims of the incident. The Committee also noted that the Court of Appeal had upheld the judgement that the UK Club and the 1971 Fund were directly liable for the damage caused by the incident and that this liability was joint and several. It was further noted that the Court of Appeal had upheld the position of the Court of first instance that the owner of the *Aegean Sea* and the Spanish State were subsidiarily liable.

3.3.5 It was noted that the Court of Appeal had stated that the contribution to the incident of the master and the pilot was similar and that the master and pilot were therefore held liable in equal shares in civil law, since the accident could have been avoided if each of them had taken those precautions which were incumbent upon them. In respect of the appeal by the shipowner, it was noted that the Court of Appeal had stated that the question raised by the owner, ie the equal attribution of civil liability to the master and the pilot and, by extension, to those deriving dependent civil liability from them, had already been dealt with in the context of the criminal liability of the two accused.

Issues relating to claims for compensation

3.3.6 The Committee recalled that appeals had been lodged against the judgement of the Court of first instance in respect of certain compensation issues and that the 1971 Fund had submitted replies to the appeals of other parties. The Committee noted how these matters had been addressed by the Court of Appeal, as set out in paragraphs 5.13-5.24 of document 71FUND/EXC.55/4.

3.3.7 It was recalled that under Spanish law a claimant must prove the quantum of the damage suffered. It was also recalled that Spanish procedural law provided that, if a claimant had not quantified the damage, such quantification might be deferred to the procedure for the execution of the judgement and that, in such a case, the court was obliged to determine the criteria to be applied for the assessment of the quantum of the damage suffered. It was noted that in the *Aegean Sea* case the Court of first instance had considered that in many cases the evidence presented by the claimant to be insufficient to substantiate the amount of the losses, that the Court of Appeal had endorsed this position and that the Courts thus took the same position as the 1971 Fund in this respect.

3.3.8 It was recalled that on a number of points the 1971 Fund had maintained in the court proceedings that the claims were not admissible since they did not fall within the definitions of "pollution damage" or "preventive measures" laid down in the 1969 Civil Liability Convention. It was noted that the Court of Appeal had rejected the 1971 Fund's appeal in these respects, together with its appeal on all other points where the admissibility was at issue, stating that the strict interpretation of the definitions of "pollution damage" and "preventive measures" which the 1971 Fund wished to adopt was not acceptable because, if it were adopted, a major part of the purpose of the Conventions would not be achieved. It was noted that

the Court had also stated that a more flexible reading of the definitions was necessary and that it was not acceptable that the guidelines or directives established by the organs of the 1971 Fund should have binding effect. The Committee noted that, in its submissions to the Court of first instance, the 1971 Fund had not argued that the criteria for admissibility adopted by the Fund bodies should have binding effect, but had stated that the documents presented (ie the Record of Decisions of the 17th session of the Assembly and the Report of the 7th Intersessional Working Group) were of fundamental importance for the understanding of which claims were admissible under the Conventions. It was also noted that the 1971 Fund had argued 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.

3.3.9 It was noted that in respect of the quantification of the losses allegedly suffered by fishermen, shellfish harvesters and mussel farmers, the Courts had not accepted the conclusions of the study carried out by the University of Santiago de Compostela submitted in support of these claims and that the Courts on this point had taken the same position as the 1971 Fund. It was noted that the Court of Appeal had stated that the right to claim compensation rested with the individuals and not with the fishermen's unions (Cofradias) and that claims should be made individually and not jointly or en bloc. It was also noted that the Court of Appeal had rejected specifically the conclusions in the report by the University of Santiago that the pollution would have long term effects on fishing and shellfish harvesting.

Possible recourse action

3.3.10 The Executive Committee examined the question of possible recourse action, basing its considerations on the Director's analysis as set out in paragraph 6.3 of document 71FUND/EXC.55/4 and on the note presented by the Spanish delegation (document 71FUND/EXC.55/4/1). The Director drew attention to the fact that the Executive Committee had taken the view that the policy of the 1971 Fund was to take recourse action whenever appropriate and that the Fund should in each case consider whether it would be possible to recover any amounts paid by it to victims from the shipowner or from other parties on the basis of the applicable national law. It was recalled that the Committee had stated that if matters of principle were involved, the question of costs should not be the decisive factor for the Fund when considering whether to take legal action. It was further recalled that the Committee had stated that the 1971 Fund's decision of whether or not to take such action should be made on a case by case basis, in the light of the prospect of success within the legal system in question (document FUND/EXC.42/11, paragraph 3.1.4).

3.3.11 It was noted that, in the reasons given by the Court of Appeal, the Court had attributed identical proportions of civil liability to the master and the pilot and, by extension, to those deriving dependent civil liability from them. The Executive Committee noted the Director's view that, as the liability of the State was subsidiary to that of the pilot, the State's liability would be invoked, since the pilot would not be able to make any significant payments.

3.3.12 The Director explained that a plaintiff (claimant) was entitled to request the enforcement of a judgement awarding him compensation against the pilot and, if the latter was unable to pay, against the State, or against the master/UK Club/1971 Fund (and subsidiarily against the shipowner). The Committee noted that when payments were made to plaintiffs (claimants), the defendants who had made these payments could, in the view of the 1971 Fund's Spanish lawyer, take recourse action to claim reimbursement from the other defendants so that ultimately the master/UK Club/1971 Fund would pay 50% of the awarded amounts and the pilot/Spanish State 50% of these amounts.

3.3.13 The Spanish delegation introduced document 71FUND/EXC.55/4/1. This delegation stated that the judgement of the first instance Court, upheld by the Court of Appeal, proved the direct civil liability of the UK Club and the 1971 Fund, and that the liability was joint and several. The delegation mentioned that, in addition to the direct liability of the UK Club and the 1971 Fund, each one within the limits set out in the Conventions, the Court of Appeal had upheld the subsidiary liability of the shipowner and of the Spanish State.

3.3.14 The Spanish delegation pointed out that the distribution of liability and the question relating to recourse were among the most important and complex legal issues of the *Aegean Sea* case. This delegation maintained that, even if the Court were to hold that the pilot was liable and that the Spanish

State was liable for the acts of the pilots, it was crucial to differentiate the level of liabilities of each party. The Spanish delegation stated that the judgements meant that the UK Club and the 1971 Fund should pay the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention and that the Spanish State would pay compensation only if the total amount of the established claims exceeded that amount.

3.3.15 The Spanish delegation stated that it considered it inappropriate to address the question of recourse against the Spanish State. This delegation maintained that the negligence of a Government was not a case for exoneration of liability for the 1971 Fund and that the liability of the Spanish State was only subsidiary to that of the 1971 Fund. The delegation maintained that the first liabilities to be executed were the joint and direct liabilities and that, if compensation from the persons directly liable was not sufficient, then enforcement should be sought against the persons who were subsidiarily liable. The Spanish delegation took the view that the recognition of the 1971 Fund's subrogation (Articles 9.1 and 9.2 of the 1971 Fund Convention) would be intended to avoid the situation in which those who were directly liable taking advantage of the existence of a fund supplementing their liability. In the Spanish delegation's view, in the *Aegean Sea* case the Fund was not supplementing the liability of the Spanish State which was only subsidiary.

3.3.16 The Spanish delegation drew attention to the fact that the 1971 Fund had not taken recourse action against a State in any other case. The delegation mentioned that in many Fund Member States pilots had no liability for oil pollution damage due to provisions in national law channelling liability to the shipowner, that in a number of Member States the State had no liability for the acts of pilots and that, as a consequence, a recourse action of the type considered by the 1971 Fund in the *Aegean Sea* case would not succeed in States in either of these groups. It was maintained by the Spanish delegation that decisions as to whether the 1971 Fund should take recourse action should not be made on a case by case basis, since it was crucial that the Fund should act uniformly and consistently. The Spanish delegation expressed the view that it would not be acceptable if the Spanish State were treated differently from other States. The Spanish delegation mentioned a possible link between the *Aegean Sea* case and the *Sea Empress* case where the cause of the initial grounding had been found to be due to pilot error.

3.3.17 The Spanish delegation requested the Executive Committee to remove the question of recourse action against the Spanish State from the agenda of future sessions stating that it was factually wrong and inappropriate to say that the 1971 Fund had grounds for recourse action in civil proceedings at a later stage. The Spanish delegation mentioned that, as the recourse was associated with previous payments, and taking into account the fact that the payment made was excessively low to date, this question should not be a top priority item for the 1971 Fund.

3.3.18 The Spanish delegation stated that it had obtained three legal opinions confirming the Government's interpretation of the judgement. In reply to a question, the delegation stated that it would request authorisation to make these opinions available to other delegations.

3.3.19 A number of delegations considered that, in view of the disagreement between the Spanish Government and the 1971 Fund as to the correct interpretation of the judgement in respect of the distribution of liabilities, the 1971 Fund should obtain a second opinion on this point.

3.3.20 The Executive Committee decided to postpone its consideration of the question of recourse until a later session. The Committee instructed the Director to obtain a second opinion in relation to the interpretation of the judgement in respect of the distribution of liabilities between the parties involved.

Negotiations with certain claimants

3.3.21 It was recalled that, at its 54th session, the Executive Committee had decided that the instructions previously given to the Director concerning negotiations with certain claimants should be maintained, ie that the Director should investigate the possibility of reaching out-of-court settlements with claimants covered by the judgement of the Court of first instance on the basis of the requirements for evidence laid down in that judgement.

3.3.22 The Executive Committee noted that the Spanish Government had recently proposed that a meeting should be held between the Government and the 1971 Fund to explore the possibilities of reaching a global agreement in respect of the claims in the fishery sector, but that a date for such a meeting had not yet been fixed.

3.3.23 The Spanish delegation stressed the importance of adhering to the criteria upheld by the Court of Appeal in La Coruña to assess the damage and pay compensation on the basis of the latest judgement. The Spanish delegation stated that it was time to seek an enforcement of the final judgement out of court, even though under Spanish procedural law the quantification could be postponed until the judgement was executed.

Execution of the Court of Appeal's judgement

3.3.24 The Committee noted that, under Spanish law, the Court of Appeal's judgement was not subject to appeal and that, consequently, the judgement was enforceable in respect of the claims for which specific amounts had been awarded in compensation. It was also noted that in July 1997 a claimant had requested payment from the 1971 Fund of the balance of its claim, ie the amount awarded by the Courts minus the amount received from the 1971 Fund as provisional payment.

3.3.25 The Committee noted that the 1971 Fund had been notified in September 1997 of a decision, issued by the judge in charge of the execution of the judgement, ordering the master of the *Aegean Sea* and the pilot to pay the fine in accordance with the judgement of the Court of first instance which had been upheld by the Court of Appeal. It was further noted that this decision ordered the two defendants who had been held directly liable, namely the UK Club and the 1971 Fund, to pay the claimants the amounts of compensation awarded by the judgement as modified by the Court of Appeal, and that claimants were invited to submit evidence to substantiate their losses.

3.3.26 The Executive Committee took note of the various grounds on which the UK Club had appealed against that decision, as set out in paragraph 10.9 of document 71FUND/EXC.55/4.

3.3.27 It was recalled that, most recently at its 46th session, the Executive Committee had decided that, in view of the remaining uncertainty as to the total amount of the established claims, the provisional payment of the 1971 Fund should remain limited to 40% of the damage actually suffered by the claimants as assessed by the Fund's experts.

3.3.28 The Spanish delegation stated that Articles 24 and 117.3 of the Spanish constitution recognised the exclusive jurisdiction of the Spanish Courts as regards the enforcement of judgements rendered by those Courts. The delegation maintained that it would not be acceptable if the organs of the 1971 Fund took decisions to correct the decisions of the Spanish Courts. The Spanish delegation considered that it was not necessary for the Executive Committee to take any decision under Article 18.7 of the 1971 Fund Convention in respect of the distribution between the claimants of the amount of compensation available under the 1971 Fund Convention. This delegation stated that, since the Spanish State would pay compensation in excess of the maximum amount of compensation available under the 1969 Civil Liability Convention and the 1971 Fund Convention, there was no risk of overpayment by the 1971 Fund and that the caution exercised by the 1971 Fund in limiting the level of payments to 40% of the damage was therefore not justified. The Spanish delegation requested that the Committee should instruct the Director to pay in full the claims for which the Courts had awarded a specific amount in compensation.

3.3.29 Although the enforceability of judgements rendered by national courts was recognised in the 1971 Fund Convention, the Executive Committee considered that, in view of the provisions of Article 8, the Court also provided that such enforcement could be subject to a decision by the Assembly or the Executive Committee under Article 18.7 concerning the distribution of the total amount available for compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention.

3.3.30 In view of the high degree of uncertainty as to the total amount of the established claims, both as regards many of the claims covered by the judgements of the Court of first instance and the Court of Appeal, and as regards the claims which might be presented at a later stage in the civil proceedings

(although the 1971 Fund took the view that these claims were time-barred), the Executive Committee decided that payments to the claimants who had been awarded a specific amount in the judgements should be limited to 40% of the respective amounts so awarded.

3.3.31 It was recognised that the question of the 1971 Fund's invoking Articles 8 and 18.7 in respect of a final judgement rendered by a competent national court raised questions of great importance. For this reason, the Executive Committee instructed the Director to make a study of this issue, on the basis of the legal situation in a limited number of Member States.

3.4 *Braer* incident

On-going legal proceedings

3.4.1 The Executive Committee took note of document 71FUND/EXC.55/5 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 £80.3 million to £49.9 million.

3.4.2 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.

Limitation proceedings

3.4.3 The Executive Committee noted that on 25 September 1997 the Court of Session had decided that the shipowner's insurer, the Skuld Club, was entitled to limit its liability in the amount of 5 790 052.50 Special Drawing Rights (SDR) (£4.9 million) and that the Court had ordered that the Sterling equivalent in cash, a bank guarantee or any other security approved by the Court should be lodged within 28 days of the order.

3.4.4 It was noted that the Court had not yet considered the question of whether or not the shipowner was entitled to limit his liability.

Claim by Shetland Islands Council

3.4.5 It was noted that the Shetland Islands Council intended to pursue in court its claim in respect of legal fees, the cost of the Braer Impact Assessment Team and the costs associated with handling the press and monitoring the media.

3.4.6 The Executive Committee recalled the position it had taken in respect of these items at its 46th session (document FUND/EXC.46/12, paragraphs 33.17 - 33.19) and instructed the Director to oppose these items in accordance with the Committee's decision.

Suspension of payments

3.4.7 It was recalled that, at its 44th session, the Executive Committee had instructed the Director to suspend any further payments of compensation until the Committee had re-examined at its 46th session the question of whether the total amount of the established claims would exceed the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention, viz 60 million SDR. The Committee further recalled that it had decided at its 46th and 47th sessions that the suspension of payments should be maintained. It was also recalled that, at its 50th session, the Executive Committee had decided that the suspension of payments should be maintained until developments in the court proceedings allowed the Committee to assess whether the total amount of the established claims would exceed 60 million SDR.

3.4.8 The Executive Committee noted that many claimants whose claims had been agreed as to the quantum but not paid had made representations to the 1971 Fund, maintaining that they were suffering severe financial hardship.

3.4.9 It was noted that, since the suspension of payments was imposed in October 1995, 196 claims for a total amount of £5.2 million had been approved but not paid.

3.5 *Keumdong N°5* incident

The Executive Committee took note of the information concerning the *Keumdong N°5* incident, as set out in section 2 of document 71FUND/EXC.55/6. It was noted that the claims settled out of court amounted to Won 11 763 million (£8 million), and that the claims pending in court totalled Won 22 965 million (£15.7 million).

3.6 *Sea Prince* incident

3.6.1 The Executive Committee took note of the developments in respect of the *Sea Prince* incident, as contained in section 3 of document 71FUND/EXC.55/6. It was noted that the claims settled out of court amounted to Won 31 899 million (£22 million), and that the claims pending in court totalled Won 20 995 million (£14 million).

3.6.2 The Executive Committee recalled that, at its 49th and 50th sessions, it had decided that the 1971 Fund should not challenge the shipowner's right to limit his liability, that the shipowner was entitled to indemnification under Article 5 of the 1971 Fund Convention and that the 1971 Fund should not take recourse action against any third party (documents FUND/EXC.49/12, paragraphs 3.7.9 and 3.7.10 and 71FUND/EXC.50/17, paragraph 3.7.9).

3.6.3 It was also recalled that, at its 53rd session, one delegation had drawn the attention of the Committee to the fact that the master of the *Sea Prince* had been given a prison sentence as a result of the incident and that for this reason, notwithstanding the decisions of the Executive Committee at its 49th and 50th sessions, the involvement of the shipowner in the decision making process leading to the action taken by the master prior to the grounding should be investigated further. It was recalled that the Committee had instructed the Director to investigate further the possibility of challenging the shipowner's right to limit his liability and of the Fund's taking recourse action against any third party, although this investigation would not affect the payment of compensation by the 1971 Fund (document 71FUND/EXC.53/12, paragraph 3.3.6).

3.6.4 The Director referred to the investigation carried out by the 1971 Fund's Korean lawyer. He mentioned that the investigation had revealed that the master had communicated with the charterer of the ship about taking refuge at sea, and that no third party, including the staff of the oil terminal where the *Sea Prince* was berthed, had influenced the master's decision to take refuge. The Director stated that there was no evidence that any person other than the master had contributed to the incident.

3.6.5 The Director drew the 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, viz that the Convention provided that the shipowner loses this right if the incident occurred as a result of the owner's actual fault or privity (Article V.2), whereas, 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 recalled the advice received from the 1971 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.

3.6.6 In the light of the information set out in paragraphs 3.6.4 and 3.6.5 above, the Executive Committee confirmed its previous position that the 1971 Fund should not challenge the shipowner's right to limit his liability, nor take recourse action against any third party.

3.6.7 During the discussion concerns were expressed that the Korean legislation had not implemented the 1969 Civil Liability Convention properly on the point referred to in paragraph 3.6.5, which could work to the detriment of the 1971 Fund and of the contributors in Fund Member States. It was recognised, however, that this discrepancy between the Korean legislation and the international convention would no longer be an issue from 16 May 1998 when the Republic of Korea ceased to be a Party to the 1969 Civil Liability Convention and instead became a Party to the 1992 Civil Liability Convention.

3.6.8 One delegation asked what measures the 1971 Fund could take to ensure that the legislation in Member States was in conformity with the 1969 Civil Liability Convention and the 1971 Fund Convention. The Director stated that when the Secretariat became aware of discrepancies between such legislation and the Conventions, the discrepancies were drawn to the attention of the Government of the Member State in question.

3.7 *Yeo Myung* incident

3.7.1 The Executive Committee took note of the developments in respect of the *Yeo Myung* incident, as contained in section 4 of document 71FUND/EXC.55/6.

3.7.2 The Executive Committee noted that the investigation of the Korean Marine Accident Inquiry Agency (MAIA) into the cause of the incident had revealed that the incident was caused by an error in navigation by the masters of both vessels involved in the collision, and that the investigation had not given any indication that the incident was caused by the actual fault or privity of the owner of the *Yeo Myung*.

3.7.3 It was recalled that, at its 50th session, the Executive Committee had decided that the 1971 Fund should not challenge the shipowner's right to limit his liability nor oppose a request by the shipowner for indemnification under Article 5 of the 1971 Fund Convention (document FUND/EXC.50/17, paragraph 3.8.2).

3.7.4 The Committee noted that, in the light of the findings of the MAIA, the 1971 Fund's lawyer took the view that the liability for the collision should be apportioned equally between the two vessels. It was noted that the Fund's lawyer had ascertained that the owner of the other vessel involved in the collision (a tug) had no assets against which a judgement in a recourse action could be enforced. The Executive Committee therefore decided that the 1971 Fund should not take recourse action against the tug owner.

3.8 *Yuil N°1* incident

Claims situation

3.8.1 The Executive Committee took note of the developments in respect of the *Yuil N°1* incident, as contained in section 5 of document 71FUND/EXC.55/6 and in document 71FUND/EXC.55/6/Add.1.

3.8.2 It was noted that the claims agreed so far amounted to Won 15 646 million (£11 million), and that the pending claims amounted to Won 60 917 million (£42 million).

Investigation into the cause of the incident and possible recourse action

3.8.3 The Executive Committee noted that the Korean Maritime Accident Inquiry Agency (MAIA) had carried out an investigation into the cause of the incident which revealed that the initial grounding had been caused by the master of the *Yuil N°1* having chosen to navigate through a narrow and dangerous passage between two islands which resulted in the vessel grounding on a small rocky island.

3.8.4 The Committee noted that, as regards the refloating and towing operation which followed the initial grounding and subsequently led to the sinking of the *Yuil N °1*, the MAIA had pointed out that the master of the *Yuil N °1* did not carry out certain checks, nor did he ascertain the situation of the vessel or take emergency measures to minimise the risk of sinking. It was noted, however, that the MAIA had accepted that the sinking was a force majeure and had decided that the action taken by the master after the grounding was inevitable. It was further noted that the MAIA had pointed out that the captain of the naval vessel was reckless because the *Yuil N °1* had sunk up to deck level and that towing by the method envisaged could have resulted in the naval vessel sinking. The Committee noted the MAIA's conclusion that the navigating officer of the tug did not undertake the tow on his own initiative, and that therefore he was not to blame for the incident.

3.8.5 The Executive Committee 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 took part in the refloating and 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 noted that, in its pleadings to the Court, the hull insurer had argued that both the tug and the naval ship were negligent, that the tug was not suitable for the salvage of the *Yuil N °1*, that the tug's master and engineer were not on board the tug during the towing operation, that the Captain of the naval vessel was reckless in instructing the tug to refloat the *Yuil N °1* without seriously considering the potential risk of the vessel's sinking, and that the tug owner and the Korean Government, as employers of the tug and the naval vessel, respectively, and therefore joint tortfeasors, should be jointly and severally liable for the damage to the hull of the *Yuil N °1*.

3.8.6 The Director informed the Executive Committee that the Court of first instance had rendered its judgement on 27 August 1997, rejecting the hull insurer's action. It was noted that the hull insurer had appealed against the judgement.

3.8.7 In the light of the results of the investigation into the cause of the incident, the Executive Committee shared the Director's view that there were no grounds on which the 1971 Fund could oppose the shipowner's right to limit his liability.

3.8.8 The Executive Committee decided to postpone its decision as to whether the 1971 Fund should take recourse action against third parties until the Court of Appeal had rendered its judgement in respect of the action brought by the hull insurer.

Removal of the wreck and the oil

3.8.9 It was recalled that in November 1995 the Marine Police had ordered the shipowner to remove the oil or the wreck. It was also recalled that, on the basis of studies carried out by experts employed by the shipowner, the owner had maintained that it would be unnecessary and unwise to remove the oil or the wreck and had argued that there was a minimal release of oil and that there was no risk of any significant release of oil if the wreck were left where it was, since the wreck was slowly being covered by mud which would help to prevent further significant releases of oil. It was further recalled that the owner had stated that, if an oil removal or wreck removal operation were to be carried out, there would be a significant risk that oil would escape causing further pollution.

3.8.10 The Executive Committee recalled that the Korean Government had stated that there was growing concern that there was a possibility of an oil spill from the wreck which could cause pollution in the nearby coastal area and which could severely affect the livelihood of the local people and had asked whether the 1971 Fund was prepared to carry out further investigation of the condition of the wreck and whether, in the event that the 1971 Fund was not prepared to carry out such an investigation, the Fund would compensate the Korean Government for the cost of carrying out this investigation as a preventive measure against possible oil pollution. It was also recalled that the Government had asked whether the 1971 Fund would fund the costs incurred by the Government for removing the sunken tanker and its cargo.

3.8.11 It was recalled that, at its 47th session, the Executive Committee had taken the view that it was not the task of the 1971 Fund itself to carry out clean-up operations or preventive measures, nor to undertake studies in these fields, and that the 1971 Fund should therefore not undertake the investigation

requested. It was also recalled that the Committee had taken the view that it would be for the Committee to decide, on an objective basis and in the light of all the circumstances of the case, whether the cost of any investigation or of any operation carried out by the Korean Government in respect of the removal of the oil or the removal of the wreck would be admissible for compensation (document FUND/EXC.47/14, paragraph 3.7.7).

3.8.12 It was noted that the Korean Research Institute of Ships and Ocean Engineering had presented a report on a survey of the *Yuil N°1* (cf document 71FUND/EXC.55/6/Add.1). It was also noted that the report concluded *inter alia* that the oil remaining in the wreck should be removed as soon as possible, since the shell plating of the wreck had sustained severe damage and corrosion of the damaged areas would allow oil to be released within ten years. It was further noted that, according to the report, a variety of factors made the removal of the oil and the wreck difficult, but that such operations could nevertheless be successful if they were carried out at the appropriate time and using the proper equipment. The Executive Committee also noted that it was estimated in the report that the operation to remove the oil and the wreck would take four months and cost about £6.2 million.

3.8.13 As regards any operation to remove the oil and the wreck the Executive Committee referred to the position taken at its 47th session a set out in paragraph 3.8.11 above.

Level of the 1971 Fund's payment

3.8.14 It was recalled that, at its 44th session, in view of the uncertainty concerning the total amount of the claims, the Executive Committee had decided that the 1971 Fund's payments should for the time being be limited to 60% of the established damage suffered by each claimant (document FUND/EXC.46/12, paragraph 4.5.6). It was further recalled that the Committee had decided, at its 47th and 50th sessions, to maintain the 60% limit of the 1971 Fund's payments (documents FUND/EXC.47/14, paragraphs 3.7.10 and 71FUND/EXC.50/17, paragraph 3.9.2).

3.8.15 In view of the remaining uncertainty concerning the total amount of the claims, in particular as regards a possible claim relating to the cost of the removal of the wreck and remaining oil on board, the Executive Committee decided to maintain the 60% limit of the 1971 Fund's payments.

3.9 *Honam Sapphire* incident

The Executive Committee took note of the information concerning the *Honam Sapphire* incident, as set out in section 6 of document 71FUND/EXC.55/6. The Committee noted that the settlements reached so far totalled Won 6 100 million (£4.2 million), and that claims totalling Won 53 360 million (£37 million) were being examined.

3.10 *Sea Empress* incident

3.10.1 The Executive Committee took note of the information contained in documents 71FUND/EXC.55/7, 71FUND/EXC.50/7/Add.1 and 71FUND/EXC.55/7/1 concerning the *Sea Empress* incident.

Claims situation

3.10.2 It was noted that as at 16 October 1997, claims had been approved for a total of £12 698 404, that payments had been made to 575 claimants totalling £9 324 964, and that of this amount £6 866 388 had been paid by the Skuld Club and £2 458 576 by the 1971 Fund. 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.

Claims by company selling angling rights and by angling clubs

3.10.3 The Director informed the Executive Committee that claims had been presented by a company that sold angling rights (Hamdden Ltd) and 11 unincorporated associations (angling clubs) which conducted their activities in rivers in Wales covered by the ban on migratory fish imposed by the United Kingdom Government.

3.10.4 The Executive Committee noted that Hamdden Ltd and five of the angling clubs had claimed compensation for loss of income due to a reduction in the sale of day tickets to casual anglers and/or due to club members not having renewed their subscriptions in 1996, both allegedly as a result of the fishing ban. It was noted that the claim by Hamdden Ltd also covered loss of income in other fields of business, such as a fishing school, the provision of accommodation and the sale of food and beverages.

3.10.5 It was recalled that, at its 50th session, the Executive Committee had considered a claim from an angling club which conducted its activities in the Cleddau River some 20 kilometres northeast of Milford Haven, that this river had been covered by the ban on migratory fish, and that the claim related to losses suffered due to a reduction in membership in 1996, allegedly as a result of the *Sea Empress* incident. It was also recalled that the Committee had taken the view that the losses suffered by the angling club should be considered as damage caused by contamination, and that it had decided, therefore, that the claim was admissible in principle (document 71FUND/EXC.50/17, paragraph 3.12.12). In the light of that decision, the Committee decided that the claims for loss of income of the types set out in paragraph 3.10.4 above were admissible in principle.

3.10.6 The Executive Committee noted that Hamdden Ltd had claimed compensation following its decision to make a 20% refund to the anglers who had purchased fishing rights ('rod fees') for the 1996 angling season, and that the refund related to the period during which the fishing ban was in force.

3.10.7 It was noted that, with regard to the claim for the reimbursement of rod fees, the question arose as to whether the loss suffered by Hamdden Ltd was the result of the fulfilment of an obligation to reimburse part of such fees. The Executive Committee noted that the Rules and Regulations issued by Hamdden Ltd provided that "Hamdden Ltd will not be held responsible for any change to the fishing season or further prohibitions beyond their control" and that, in the Director's view, this provision made it clear that Hamdden Ltd was not under any legal obligation to reimburse the rod fees for the part of the year when the fishing ban was in force. The Committee noted the Director's opinion that this provision also precluded the application of the doctrine of frustration of contracts, and that, even in the absence of such a provision, this doctrine would not have been applicable in this case. It was noted that the individuals concerned were not deprived of the entire benefits of the contracts with Hamdden Ltd, since fishing was prohibited during only part of the season. The Executive Committee decided, therefore, that Hamdden Ltd was not entitled to compensation for losses suffered as a result of the reimbursement of rod fees.

3.10.8 The Committee also noted that eight angling clubs had claimed compensation on behalf of their members for the part of their membership fees for the 1996 angling season which related to the period of the fishing ban.

3.10.9 As regards the claims referred to in paragraph 3.10.8, the Executive Committee shared the Director's view that the individual members should be considered as the claimants, and that the loss suffered by them was one of loss of enjoyment. The Committee decided that such claims for loss of enjoyment were not admissible for compensation.

3.10.10 The Director informed the Executive Committee that the angling clubs had presented claims relating to certain expenses for the period of the fishing ban, namely the lease of fishing rights, insurance premiums, maintenance, bailiff fees, water rates and other standing charges.

3.10.11 The Executive Committee shared the Director's view that the costs covered by the claims referred to in paragraph 3.10.10 were not admissible for compensation, since the costs would have been incurred whether or not there had been a fishing ban. The Committee therefore decided that these parts of the claims should be rejected.

Claim by an exporter of processed shellfish

3.10.12 The Executive Committee recalled that, at its 49th session, it had considered a claim submitted by an exporter of processed shellfish for losses as a result of the ban on fishing for whelks. It was recalled that the Committee had concluded that this claim was admissible in principle since there was a reasonable degree of proximity between the contamination caused by the *Sea Empress* incident and the losses allegedly suffered by the claimant (document FUND/EXC.49/12, paragraphs 3.8.12). The Director informed the Committee that an interim assessment of the losses had been made on the basis of the prices and quantities actually invoiced, and that the claimant had received interim payments corresponding to 75% of the assessed amount.

3.10.13 The Director informed the Executive Committee that the claimant had stated that he had, at the request of some overseas customers, issued invoices for quantities lower than those actually sold and for prices lower than those paid, the customers paying the invoiced amount and later completing the purchase by way of a supplementary payment of the balance. It was noted that the objective of this procedure appeared to be to reduce the amount of import duty payable by the customers. The Committee noted that the claimant had provided accounts and supporting data which showed receipt of payment for the invoices as well as the supplementary payments, but that it had not been possible to reconcile all of these payments with the consignments of whelks shipped. It was further noted that all payments received by the claimant had been included in the annual accounts and appeared to have been declared to the United Kingdom tax authorities. It was noted that the claimant had stated that he had adopted this procedure to the advantage of the customer, without himself obtaining any direct financial benefit.

3.10.14 The Executive Committee noted that the claimant had maintained that some of the invoices presented in support of the claim did not give an accurate picture of the prices obtained in 1996, arguing that the claim should be assessed on the basis of the prices and quantities actually agreed with the foreign customers and not on the basis of the invoiced amounts. It was also noted that, according to the claimant, the practice of under-invoicing ceased during 1996 due to customs investigations in the country concerned.

3.10.15 It was noted that the experts engaged by the Skuld Club and the 1971 Fund had investigated whelk market prices and found from information submitted by another shellfish exporter that in the relevant part of 1996 whelks were being purchased by buyers in the country concerned at higher prices than those invoiced by the claimant on certain occasions.

3.10.16 The Executive Committee considered that it would not be appropriate for the 1971 Fund to disregard written evidence, in the form of invoices, of prices which, on the claimant's own admission, were incorrect in order to enable customers to reduce their import duties. The Committee therefore decided that the claim, as regards the lost sales to these customers, should be assessed on the basis of the prices and quantities actually invoiced to these customers during the period of the claim.

Claim for damage resulting from road traffic accident

3.10.17 The Executive Committee considered a claim for the costs incurred in repairing a car which had been damaged as a result of a traffic accident in the outskirts of Tenby on 11 March 1996. The Committee noted that, according to the claimant, the accident had occurred because the road was covered with a thin film of oil, which had allegedly been building up over a period of about a fortnight as a result of the road having been used by vehicles carrying oil from the beaches contaminated following the *Sea Empress* incident to a disposal area located about ½ mile away from Tenby beach. The Committee also noted that it had been alleged that there were no warning signs indicating the condition of the road and that the thin film of oil had formed an emulsion with the rain water, creating a slippery surface.

3.10.18 The Committee noted that the experts engaged by the 1971 Fund and the Skuld Club to monitor the clean-up operations had stated that there were clean-up operations in Tenby at the time of the road accident and that it was possible that vehicles used in the clean-up operations had passed near the place where the road accident occurred. It was noted, however, that the experts had pointed out that most of the large road tankers had been using a different route that did not pass through the town.

3.10.19 The Director informed the Executive Committee that it had been reported in the minutes of a meeting of the joint response centre held on 29 February 1997 that a problem was developing in Tenby as a result of the oil on the roads causing slippery surfaces, that the minutes recorded that road cleaning would be arranged by the Council and a warning released to the public by the police, and that it was noted in the minutes of a later meeting that road cleaning along the route used by vehicles transporting collected oily waste had taken place during the period 5 to 7 March 1996.

3.10.20 The Executive Committee decided that this claim should be rejected since there was not a sufficiently close link of causation between the contamination resulting from the release of the oil from the *Sea Empress* and the damage suffered by the claimant.

Level of payments

3.10.21 The Executive Committee considered the level of payment of claims arising from the *Sea Empress* incident on the basis of section 5 of document 71FUND/EXC.55/7 and of document 71FUND/EXC.55/7/Add.1, as well as on the basis of a note presented by the United Kingdom delegation (document 71FUND/EXC.55/7/1).

3.10.22 The Executive Committee recalled that it had decided at its 48th session to limit the Director's authority to make payments in the *Sea Empress* case to 75% of the damage actually suffered by the respective claimant, since the total amount of the claims arising out of the 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, 50th, 52nd, 53rd and 54th sessions to maintain the limit of 75% (documents FUND/EXC.48/6, paragraph 3.4.7, FUND/EXC.49/12, paragraph 3.8.21, 71FUND/EXC.50/17, paragraph 3.12.16, 71FUND/EXC.52/11, paragraph 3.6.22, 71FUND/EXC.53/12, paragraph 3.5.8, and 71FUND/EXC.54/10, paragraph 3.2.18).

3.10.23 The Committee recalled that, at its 54th session, it had taken note of the information contained in paragraph 3.4 of document 71FUND/EXC.54/3 as to the possibilities for the victims of the *Sea Empress* incident of obtaining compensation under the Contract Regarding a Supplement to Tanker Liability for Oil Pollution (CRISTAL Contract).

3.10.24 The Director presented the following estimate of the claims arising out of this incident:

> The cost of the clean-up operations is estimated at £25 million out of which some £11-£11.5 million relate to the claim by the United Kingdom Government. Fishery claims have been approved for £5.5 million. Pending or rejected fishery claims amount to £7 million, and further claims in the fishery sector may be submitted. The fishery claims could therefore total £15 million, if rejected claims were upheld by the courts. With regard to the tourism sector, claims have been approved for £1 265 500, and claims for £1 100 100 are being examined. It is estimated that the tourism claims will not exceed £4 million. Property claims have been approved for a total of £277 000, and it is unlikely that there will be further claims for significant amounts in this category. It is not known whether a claim for costs relating to the salvage of the *Sea Empress* and her cargo will be presented and, if so, in what amount. There might be certain payments in respect of interest which, if final settlements are delayed, could be for significant amounts. There might also be payments in respect of fees of advisers and experts engaged by the claimants, but it is not possible to give an estimate of the total amounts of such payments.
>
> These estimates lead to a total amount of approximately £45 million, plus a possible salvage claim, interest and advisers' fees.

3.10.25 It was noted that the United Kingdom delegation had assessed the total amount of the claims at between £33 million and £42 million (document 71FUND/EXC.55/7/1).

3.10.26 The Committee took note of the updated information contained in paragraph 2.2 of document 71FUND/EXC.55/7Add.1 concerning the possibilities for the victims of the *Sea Empress* incident of obtaining compensation under the CRISTAL Contract. It was noted in particular that there would, according to Cristal Ltd (the company which administered the compensation system under the CRISTAL Contract), be at least some 19 million SDR (£16 million) available under the CRISTAL Contract for payment by Cristal Ltd to those claimants who had not been fully compensated under the 1969 Civil Liability Convention and the 1971 Fund Convention. It was noted that the United Kingdom delegation had at previous sessions of the Executive Committee stated that the United Kingdom Government would, whilst not waiving its claim against the 1971 Fund, the shipowner and the Skuld Club, stand last in the queue.

3.10.27 The United Kingdom delegation stated that its undertaking to 'stand last in the queue' meant that if and to the extent that the claim by the United Kingdom Government were to result in the total amount of the established claims exceeding the maximum amount of compensation payable under the 1969 Civil Liability Convention and the 1971 Fund Convention (60 million SDR), the Government would not pursue its claim, in its entirety or in part, against the 1971 Fund and would, instead, pursue it against Cristal Ltd. The United Kingdom delegation accepted that this might mean that the United Kingdom Government's claim would be paid later than those of other claimants. This delegation also stated that the Government would notify Cristal Ltd of its claim before the expiry of the two-year time limit laid down in the CRISTAL Contract.

3.10.28 The observer delegation of Cristal Ltd confirmed that Cristal Ltd was prepared to acknowledge a notification made by the United Kingdom Government of its claim before the expiry of the two-year period as valid for the purpose of preventing its claim from becoming time-barred under the CRISTAL Contract up to the amount so notified. This delegation stated that Cristal Ltd would not invoke against the claim by the United Kingdom Government the fact that, by standing last in the queue as regards the shipowner, the Skuld Club and the 1971 Fund, the Government had prejudiced its claim against Cristal Ltd.

3.10.29 One delegation stated that, although Cristal Ltd would in theory have - by way of subrogation - the right to recover from third parties any amounts it might pay in compensation, that delegation was of the view that Cristal Ltd should waive any such right against the 1971 Fund. The observer delegation of Cristal Ltd informed the Committee that, although the delegation could not waive any rights against the Fund which might be available under the CRISTAL Contract, this situation would not arise since Cristal Ltd, as payer of last resort, could not pay compensation until the 1971 Fund and the Skuld Club had paid up to their respective limits.

3.10.30 The Executive Committee noted that it could not be ruled out that new claims might be submitted to the 1971 Fund after the expiry of the two-year time limit laid down in the CRISTAL Contract and that there was no guarantee that all claimants who had presented claims to the 1971 Fund within that period would in fact notify Cristal Ltd of their claims. The Committee also noted that no payments would be made by Cristal Ltd until final settlements had been reached or final judgements had been rendered in respect of all claims, which meant that, should some claims be subject to court proceedings, it might take many years before Cristal Ltd would make any payments. It was noted that, under the Rules of the CRISTAL Contract, the payment of interest was at the discretion of Cristal Ltd and that Cristal Ltd could reject a claim of which it had been properly notified on the ground that it was not admissible for compensation under the CRISTAL Contract. The Committee noted, however, that Cristal Ltd had in a letter to the Director stated that the Board of Cristal Ltd usually applied the same criteria as the 1971 Fund for determining the admissibility of claims.

3.10.31 A number of delegations took the view that the information given by the Director on the estimated level of claims, the information concerning the CRISTAL Contract and the clarification made by the United Kingdom delegation of the meaning of its undertaking to "stand last in the queue" should enable the 1971 Fund to increase its payments to 100% of the assessed damage.

3.10.32 Two delegations stated that there was still a considerable degree of uncertainty as to the total level of the claims, that the situation in respect of the claims rejected by the 1971 Fund was not clear and that Cristal Ltd might take recourse action against the Fund. For this reason, those delegations stated that they could not accept an increase of the level of payments beyond 75%.

3.10.33 In the light of the clarification of the position by the United Kingdom Government referred to in paragraph 3.10.27, the Executive Committee considered that the amount available under the CRISTAL Contract in respect of the United Kingdom Government's claim would constitute sufficient security against overpayment by the 1971 Fund. For this reason, the Committee authorised the Director to increase the 1971 Fund's payments to 100% of the damage actually suffered by the claimant as assessed by the experts engaged by the 1971 Fund and the Skuld Club.

Investigations into the cause of the incident

3.10.34 The Executive Committee noted that the Director was examining, with the assistance of the 1971 Fund's lawyers, the two reports on the investigations into the cause of the *Sea Empress* incident (the investigations having been carried out by the Marine Accident Investigation Branch of the United Kingdom Department of Transport and by the Commissioner of Maritime Affairs of the Republic of Liberia). It was noted that the Director would inform the Committee of his conclusions in due course.

3.11 *Nakhodka* incident

3.11.1 The Executive Committee took note of the information contained in documents 71FUND/EXC.55/8 and 71FUND/EXC.55/8/Add.1 in respect of the *Nakhodka* incident. It was noted that, as at 20 October 1997, claims totalling ¥31 433 million (£156 million) had been received and payments totalling ¥3 155 million (£16 million) had been made.

Level of payments

3.11.2 The Executive Committee recalled that, at its 52nd session, it had 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. It was also recalled that the Committee had authorised the Director to make payments on behalf of the 1971 Fund in respect of claims arising from the *Nakhodka* incident. It was further recalled that, in view of the uncertainty as to the level of the total amount of the claims, the Committee had 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/UK Club at the time when the payment was made (document 71FUND/EXC.52/11, paragraph 3.7.14). It was also recalled that the Executive Committee had decided at its 53rd session to maintain the percentage fixed by the Committee at its 52nd session (document 71FUND/EXC.53/12, paragraph 8.3.6).

3.11.3 It was noted that, at its 2nd extraordinary session, held in April 1997, the Assembly of the 1992 Fund had authorised the Director to make payments on behalf of the 1992 Fund in respect of claims arising from the *Nakhodka* incident. It was recalled that, in view of the uncertainty as to the level of the total amount of the claims, the 1992 Fund Assembly had decided, however, that the payments to be made by the 1992 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 (document 92FUND/A/ES.2/6, paragraph 3.1.16).

3.11.4 It was noted that, at its 3rd extraordinary session, the 1971 Fund Assembly had endorsed the Director's view that the 1971 Fund should pay 60% of the damage suffered by each claimant up to a total amount of 60 million SDR, before the 1992 Fund commenced payments of compensation (document 71FUND/A/ES.3/7, paragraph 4.5).

3.11.5 In the light of the continuing uncertainty as to the level of the total amount of the claims arising from the *Nakhodka* incident, the Executive Committee decided to maintain the limit of the 1971 Fund's payments at 60% of the amount of the claims actually suffered by the respective claimants. The Director was instructed to obtain as much additional information as possible on the estimated total amount of the claims, so that the percentage could be reviewed at the Committee's next session.

Investigations into the cause of the incident

3.11.6 The Executive Committee noted that the Director, with the assistance of the IOPC Funds' Japanese lawyer and their technical experts, was examining the two reports on the investigations into the cause of the *Nakhodka* incident (the investigations having been carried out by the Japanese Marine Accident Investigation Agency and by the Russian authorities).

3.11.7 It was noted that the conclusions of the Japanese investigation could be summarised as follows:

> If the *Nakhodka* had been properly maintained she would have been capable of withstanding the wind and wave conditions prevailing at the time of the incident. Due to the extensive corrosion weakening the internal structure of the ship, the stresses on the hull as a result of the heavy weather caused the ship to break in two. The weather conditions in the Sea of Japan at the time of the incident were among the worst reported. Also, the unusual distribution of the cargo would have increased the stresses in the ship's hull.

3.11.8 It was understood that the Russian report stated that the *Nakhodka* must have broken due to the bow section having hit a half-submerged object, most probably a Russian trawler that had sunk in the vicinity shortly before the *Nakhodka* incident.

3.11.9 Several delegations noted that the conclusions of the Japanese report suggested that the incident had occurred as a result of the actual fault and privity of the shipowner, and that therefore all steps should be taken to preserve the 1971 Fund's right to take recourse action against the shipowner. It was suggested that a decision on whether the 1971 Fund should challenge the shipowner's right to limit his liability or to take recourse action should be taken by the Executive Committee at an early stage.

3.11.10 The Executive Committee instructed the Director to examine the reports on the cause of the incident and submit his findings to the Committee as soon as possible, so as to enable it to take a decision on issues relating to limitation of liability and recourse.

Purchase of Japanese Yen

3.11.11 The Executive Committee took note of the purchase of Japanese Yen made by the 1971 Fund as set out in paragraph 12.3 of document 71FUND/EXC.55/8. It was noted that, as the major part of the Yen purchased had been used for the payment of compensation, the Director intended to make supplementary purchases of Yen when appropriate in the light of the need for that currency and of the developments in the rate of exchange between the Yen and Pound sterling.

3.12 *Nissos Amorgos* incident

3.12.1 The Executive Committee took note of the information contained in documents 71FUND/EXC.55/9 and 71FUND/EXC.55/9/Add.1 on the *Nissos Amorgos* incident.

Claims situation and level of payments

3.12.2 It was noted that as at 19 September 1997, claims totalling Bs3 835 million (£4.8 million) had been presented to the Claims Agency in Maracaibo established by the 1971 Fund and the shipowner's insurer, Assuranceföreningen Gard (Gard Club). It was also noted that 62 claims had been approved for a total of Bs1 102 million (£1.4 million) and that payments totalling Bs1 088 million (£1.3 million) had been made by the Gard Club.

3.12.3 The Executive Committee recalled that the Republic of Venezuela had presented a claim against the shipowner, the master of the *Nissos Amorgos* and the Gard Club for an estimated US$20 million (£12.3 million) before a first instance Civil Court in Caracas.

3.12.4 The Committee also recalled that a fishermen's trade union (FETRAPESCA) had presented a claim against the shipowner, the Gard Club and the master of the *Nissos Amorgos* for an estimated amount of US$130 million (£79 million) plus legal costs, before the same first instance civil court in Caracas. It was further recalled that FETRAPESCA had obtained an order by the Court in Caracas for the arrest of the shipowner's property, of the vessels which were not his property but which were under associated management, and of assets belonging to the Gard Club, up to a total of US$292.5 million, plus US$32.5 million in respect of legal costs. It was also recalled that, at the request of FETRAPESCA, the Caracas Court had appointed a committee composed of lawyers and technical experts to assess the value of the damage to the environment caused by the spill.

3.12.5 It was noted that, in a letter to the Attorney General, the Venezuelan Ministry of Environment and Renewable Natural Resources had given details of the amount of compensation payable to the Republic of Venezuela in respect of oil pollution, and had quantified the damage at US$60 250 396 (£37 million). It was also noted that a claim based on that letter had been presented to the Court in Cabimas. It was further noted that the damage for which compensation was sought had been described in the letter as follows:

(a) damage to the communities of clams living in the intertidal zone affected by the spill, quantified at US$37 301 942 (£23 million);

(b) cost of restoring the quality of the water of the affected coasts, quantified at US$5 million (£3.1 million);

(c) cost of replacing damaged sand, quantified at US$1 million (£620 000);

(d) damage to the beach as a tourist resort, quantified at US$16 948 454 (£10.5 million).

3.12.6 It was recalled that the 1971 Fund Assembly and Executive Committee had consistently taken the view that claims for damage to the environment *per se* were not admissible under the 1969 Civil Liability Convention and the 1971 Fund Convention. Reference was made to the Resolution adopted by the Assembly in 1980 (Resolution N°3) which stated that the assessment of compensation to be paid by the 1971 Fund was not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models.

3.12.7 It was also recalled that 1971 Fund's position in respect of the admissibility of claims relating to damage to the marine environment could be summarised as follows (documents FUND/WGR.7/4, paragraph 7.1 and FUND/A.17/23, paragraphs 7.3.5 and 7.3.6):

(a) The 1971 Fund accepts claims which, in accordance with the terminology used in document FUND/WGR.7/4<1>, relate to "quantifiable elements" of damage to the marine environment, for example:

  (i) reasonable costs of reinstatement of the damaged environment; and

  (ii) loss of profit (income, revenue) resulting from damage to the marine environment suffered by persons who depend directly on earnings from coastal or sea-related activities, eg loss of earnings suffered by fishermen or by hoteliers and restaurateurs at seaside resorts.

(b) (i) The 1971 Fund has consistently taken the position that claims relating to unquantifiable elements of damage to the marine environment cannot be admitted.

<1> For the purpose of that document, the expression "quantifiable elements" was taken to mean damage to the environment in respect of which the value of the damage can be assessed in terms of market prices; the expression "non-quantifiable elements" was taken to mean damage in respect of which the quantum of the damage cannot be assessed according to market prices.

(ii) The Assembly has rejected claims for compensation for damage to the marine environment calculated on the basis of theoretical models.

(iii) Compensation can be granted only if a claimant has suffered quantifiable economic loss.

(c) (i) Damages of a punitive character, calculated on the basis of the degree of the fault of the wrong-doer and/or the profit earned by the wrong-doer, are not admissible.

(ii) Criminal and civil penalties for oil pollution from ships do not constitute compensation and do not therefore fall within the scope of the Civil Liability Convention and the Fund Convention.

3.12.8 The Committee recalled that the admissibility of claims for measures to reinstate the environment was considered by the 7th Intersessional Working Group as follows (document FUND/WGR.7/21, paragraphs 7.3.13, 7.3.16 and 7.3.17):

> The Working Group recognised the importance of environmental issues in general and of the need for measures to be taken to reinstate the environment after certain oil spills. It was generally accepted that the question as to whether the IOPC Fund should pay compensation for the costs of measures to reinstate the marine environment would have to be decided on the basis of the definition of "pollution damage" laid down in the 1992 Protocol to the Civil Liability Convention, viz that the compensation should be limited to the costs of reasonable measures of reinstatement actually undertaken or to be undertaken. It was agreed that the test of reasonableness should be an objective one, ie that the measures should be reasonable from an objective point of view in the light of the information available when the specific measures were taken. It was also noted that the word "actually" in the text of the Protocol referred not only to "undertaken" but also to the expression "to be undertaken". It was considered that payment for reinstatement measures not yet undertaken should be made by the IOPC Fund only if the claimant was unable to finance them and that the claimant would have to present detailed plans of the measures to be undertaken before any payments could be made.
>
> The Working Group agreed that in order to be admissible for compensation measures for reinstatement of the environment would have to fulfil the following criteria:
>
> - the cost of the measures should be reasonable;
> - the cost of the measures should not be disproportionate to the results achieved or the results which could reasonably be expected; and
> - the measures should be appropriate and offer a reasonable prospect of success.
>
> The Working Group considered that it would normally be necessary to carry out an in-depth study before any measures for reinstatement were undertaken.

3.12.9 It was also recalled that the report of the Working Group had been endorsed by the Assembly at its 17th session (document FUND/A.17/35, paragraph 26.6).

3.12.10 The Committee noted that the Director had not yet been able to make an in depth examination of the various items set out in paragraph 3.12.5 above. It was noted however that, in the Director's view, it appeared that items (a) and (d) had been calculated on the basis of theoretical models and did not correspond to losses actually suffered by the claimant. The Committee noted that in his view these items were therefore not admissible for compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention. It was noted that it was not clear whether item (b) in paragraph 3.12.5 above related to costs for reinstatement of the marine environment or to damage to the environment *per se*. It was also

noted that item (c) in paragraph 3.12.5 appeared to relate to measures for reinstating the marine environment. The Committee noted the Director's view that, as for items (b) and (c), it had to be considered whether these measures fulfilled the criteria referred to in paragraph 3.12.8 above.

3.12.11 The Executive Committee agreed with the Director's preliminary analysis as to the admissibility of the items referred to in paragraph 3.12.10 above. It emphasised the importance of the 1971 Fund's adhering to the principles of admissibility in respect of claims for damage to the environment *per se* and claims relating to measures to reinstate the environment. The Committee stated that the Director should make further efforts to explain these principles to Member States.

Level of payments

3.12.12 It was noted that claims had been presented in court by the Republic of Venezuela for US$60 million (£37 million), by FETRAPESCA for US$130 million (£81 million), by fish and shellfish processors for US$100 million (£61 million) and by a local fishermen's union for US$10 million (£6.2 million). It was also noted that there was great uncertainty as to the total amount of the claims arising out of the *Nissos Amorgos* incident. The Committee endorsed the Director's view that it was necessary to strike a balance between the need to exercise caution in the payment of claims and the importance of the 1971 Fund being able to pay claims at an early stage. The Committee therefore decided that the 1971 Fund's payment should at this stage be limited to 25% of the loss or damage actually suffered by each claimant, as assessed by the experts of the Gard Club and the Fund at the time the payment was made.

Cause of the incident

3.12.13 The Executive Committee recalled that the shipowner had notified the Director that he reserved the right to seek exoneration from liability for pollution damage arising from the incident, under Article III.2(c) of the 1969 Civil Liability Convention, on the ground that the damage had been caused wholly by the negligence or other wrongful act of a Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function. It was also recalled that, at its 54th session, the Committee had noted that, due to lack of information as to the cause of the incident, it was not possible to take any position as to whether the shipowner would be exonerated from liability.

3.12.14 The Committee noted that the shipowner and the Gard Club had informed the 1971 Fund that they intended to submit a detailed statement of their position with respect to the cause of the incident, together with supporting evidence, for consideration by the 1971 Fund and its experts, and that they had stated that it was their intention to continue for the time being to pay claims. It was noted that the shipowner and the Club had requested that in the meantime the 1971 Fund should refrain from taking any position as to whether the shipowner should be exonerated from liability.

3.13 *Osung N°3* incident

3.13.1 The Executive Committee took note of the information contained in documents 71FUND/EXC.55/10 and 71FUND/EXC.55/10/Add.1 in respect of the *Osung N°3* incident.

Claims situation

3.13.2 The Committee noted that, as regards the Republic of Korea, claims totalling Won 1 300 million (£890 000) were being examined by the 1971 Fund's experts, and that further claims from the Korean fishery and mariculture sectors were expected.

3.13.3 It was noted that claims would be submitted for clean-up operations carried out in Japan, that claims were also expected from a number of Japanese fishery co-operative associations for loss of income caused by the oil spill and that the 1971 Fund's experts estimated that the Japanese claims might total ¥1 300 million (£6.7 million).

Level of the 1971 Fund's payments

3.13.4 It was recalled that, at its 54th session, in view of the great uncertainty resulting from the fact that a significant quantity of oil remained in the wreck, representing a serious pollution risk, the Executive Committee had considered that it was not possible to make any reasonable estimate as to the total amount of the claims arising out of the *Osung N°3* incident. It was also recalled that the Committee had considered that it was necessary to strike a balance between the need to exercise caution in payment of claims and the importance of the 1971 Fund's being able to make payments at an early stage, noting that the limitation amount applicable to the *Osung N°3* was very low. It was further recalled that the Committee had therefore decided that, for the time being, the Director was authorised to make payments of 25% of the damage or loss actually suffered by each claimant, as assessed by the experts of the 1971 Fund at the time the payment was made.

3.13.5 The Executive Committee noted that there was still only limited information available as to the cost of the clean-up operations in the Republic of Korea, and that claims might be submitted by the Korean fishery and mariculture sectors. It was noted that it was not possible to make any estimate of the cost of operations which might be undertaken to prevent further release of oil or for wreck removal. The Committee also noted that there was only limited information as to the cost of clean-up operations in Japan and potential fishery claims in Japan.

3.13.6 The delegation of the Republic of Korea stated that, as estimates of the costs associated with removing the oil and the wreck were contained in the report of the Korean Research Institute of Ship and Ocean Engineering, the payments made by the 1971 Fund should be increased to at least 60% of the amount of the established claims.

3.13.7 In view of the continuing uncertainty as to the total amount of the claims arising out of the *Osung N°3* incident, the Executive Committee decided to maintain the limit of the 1971 Fund's payments at 25% of the amount of the claims actually suffered by the respective claimants.

Investigation into the cause of the incident

3.13.8 The Executive Committee noted that, in a judgement rendered on 24 June 1997, the competent Korean Criminal Court had held that the master of the *Osung N°3* had navigated the vessel through a prohibited area in order to save time and had failed to exercise due care in the navigation of the ship, and that the Court had therefore sentenced him to one year's imprisonment.

3.13.9 The Committee shared the Director's view that, in the light of the findings of the Criminal Court, there were no grounds for the 1971 Fund's opposing the shipowner's right to limit his liability, nor for refusing indemnification under Article 5.1 of the 1971 Fund Convention.

Removal of the wreck and removal of the oil

3.13.10 It was recalled that, at its 53rd session, the Executive Committee had noted that it was likely that a significant quantity of oil remained on board the sunken ship, that if this oil were to be released there would be a risk of the oil affecting a large number of aquaculture facilities and that such a release could give rise to substantial claims for compensation.

3.13.11 The Executive Committee recalled that the Director had stated that, subject to any instructions which the Committee might give him, he intended to hold discussions with the Korean authorities concerning the most appropriate way of dealing with the oil remaining in the sunken ship, whilst not involving the 1971 Fund in carrying out such operations. It was recalled that he had emphasised that he would make it clear that the 1971 Fund could assist the Korean authorities only with expert advice and could not become involved in the operations to inspect the ship, make repairs to prevent further escape of oil or remove any oil from the ship and that he had stated that he would also make it clear that the 1971 Fund could not guarantee to pay the costs of any such operations, but that these costs would have to be presented as a claim for compensation which would be subject to an assessment as to admissibility on the basis of the criteria laid down by the Assembly and Executive Committee.

3.13.12 The Executive Committee recalled that it had endorsed the course of action proposed by the Director as set out in paragraph 3.13.11 above (document 71FUND/EXC.53/12, paragraph 3.8.5).

3.13.13 It was noted that the Korean Research Institute of Ships and Ocean Engineering had presented a report on a survey of the *Osung N°3* (cf document 71FUND/EXC.55/10/Add.1). The Committee noted that it was stated in the report that there was a risk that oil would escape from the tanks of the wreck of the *Osung N°3*. It was further noted that the report concluded that an oil removal operation should be carried out as soon as possible and that the wreck itself should also be removed with a view to eliminating the risk of further pollution. It was also noted that, according to the report, a subsequent spill would cause damage to fishing grounds and mariculture farms of about Won 63 000 million (£43 million), as well as considerable losses to the tourism industry and environmental damage. The Committee noted that it was estimated in the report that it would take four months and cost Won 4 000 million (£2.8 million) to remove the oil, whilst the wreck removal was estimated to last three months and cost Won 3 000 million (£2.1 million).

3.13.14 The delegation of the Republic of Korea stated that the Korean Government was attempting to find the most cost effective method of eliminating the risk of pollution by removing both the oil and the wreck. This delegation stated that it would welcome clarification of the criteria for the admissibility of a claim for the cost of removing the oil and the wreck, and that such criteria could be applied in similar cases in the future. The delegation noted that any claim for the costs of removing the oil and the wreck would be assessed in accordance with the criteria for admissibility of claims established by the Assembly, and understood that the Executive Committee would consider such a claim from an objective point of view in the light of all the circumstances in the case.

3.13.15 The Executive Committee reiterated the position taken at its 53rd session concerning operations to remove the oil and the wreck, as reported in paragraph 3.13.11 above.

3.14 *Iliad* incident

The Executive Committee took note of the information concerning the *Iliad* incident, as set out in section 1 of document 71FUND/EXC.55/11.

3.15 *Kriti Sea* incident

The Executive Committee took note of the information concerning the *Kriti Sea* incident, as set out in section 2 of document 71FUND/EXC.55/11.

3.16 *Katja* incident

3.16.1 The Executive Committee took note of the information contained in section 3 of document 71FUND/EXC.55/11 on the *Katja* incident, which had occurred in France on 7 August 1997.

3.16.2 It was noted that it was not yet possible to make an accurate estimate of the total amount of the claims, but that it was unlikely that the established claims would exceed the limitation amount applicable to the *Katja*.

3.17 *N°1 Yung Jung* incident

3.17.1 The Executive Committee took note of the information concerning the *N°1 Yung Jung* incident, as set out in section 2 of document 71FUND/EXC.55/13.

3.17.2 The Committee noted that in the case of barges of this type, the Korean authorities did not carry out an investigation into the cause of the incident. It was noted that in criminal proceedings, although the

barge had grounded on a submerged and uncharted rock, the master of the *N°1 Yung Jung* had received a six month suspended prison sentence for having caused oil pollution by negligence.

3.17.3 In the light of advice received from the 1971 Fund's Korean lawyer, the Executive Committee decided that there were no grounds for the 1971 Fund to oppose the shipowner's right to limit his liability, nor to refuse indemnification under Article 5.1 of the 1971 Fund Convention.

3.18 *Jeong Jin N°101* incident

3.18.1 The Executive Committee took note of the information concerning the *Jeong Jin N°101* incident, as set out in section 3 of document 71FUND/EXC.55/13.

3.18.2 The Committee recalled that the incident had occurred when the *Jeong Jin N° 101* was loading heavy fuel oil at an oil terminal. It was noted that the oil had entered into hold N°2 and then overflowed from the hatch of that hold. It was recalled that some delegations at the Committee's 54th session had reiterated their concern about the large quantity of oil which had been spilled and had questioned whether the oil terminal was at least partly liable for the incident.

3.18.3 The Director informed the Committee that, as instructed at its 54th session, he had investigated further whether there were any grounds on which the 1971 Fund could take recourse action against the oil terminal. The Committee noted that the 1971 Fund's Korean lawyer had informed the Director that it was general practice in Korea that once loading began it was the sole responsibility of the barge crew to load the oil properly, that the staff of the terminal had no obligation in respect of the loading except to check the manifold for any leaks and that there were no problems with the manifold in this case.

3.18.4 One delegation stated that in its view the oil terminal had been negligent and was therefore liable for the incident.

3.18.5 In view of the information set out in paragraph 3.18.3, the Executive Committee decided that there were no grounds on which the 1971 Fund could take recourse action against the oil terminal.

3.19 *Irving Whale* incident

The consideration of this incident was postponed until the Executive Committee's 56th session.

3.20 *Plate Princess* incident

The consideration of this incident was postponed until the Executive Committee's 56th session.

3.21 *Diamond Grace* incident

The consideration of this incident was postponed until the Executive Committee's 56th session.

3.22 *Evoikos* incident

The consideration of this incident was postponed until the Executive Committee's 56th session.

3.23 Other incidents

3.23.1 The Executive Committee took note of the information regarding the *Kihnu, Dae Woong, Shinryu Maru N°8, Senyo Maru, Kugenuma Maru, Tsubame Maru N°31* and *Daiwa Maru N°18* incidents and a spill

from an unknown source in Morocco, as contained in document 71FUND/EXC.55/12, and as regards the *Vistabella* incident in document 71FUND/EXC.55/12/Add.1.

3.23.2 As regards the *Senyo Maru* incident, the Executive Committee noted that the 1971 Fund had recovered ¥279 million (£1.4 million) from the other ship involved in the incident.

4 Amendment of Rules of Procedure of the Executive Committee

The consideration of this agenda item was postponed until the Executive Committee's 56th session.

5 Future sessions

The Executive Committee decided to hold its 56th session on Friday 24 October 1997.

6 Any other business

No items were raised under this agenda item.

7 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 71FUND/EXC.55/WP.1, was adopted, subject to certain amendments.