INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
58th session
Agenda item 5

71FUND/EXC.58/15
29 April 1998

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

(held from 27 to 29 April 1998)

Chairman: Mr W J G Oosterveen (Netherlands)

Vice-Chairman: Professor L S Chai (Republic of Korea)

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 71FUND/EXC.58/1.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

Algeria
Belgium
Colombia
Denmark
France
Greece
India
Italy
Japan
Netherlands
Poland
Republic of Korea
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:

Australia
Benin
Canada
China (Hong Kong Special Administrative Region)
Côte d'Ivoire
Cyprus
Estonia
Fiji
Finland
Gabon
Germany
Ireland
Kenya
Liberia
Marshall Islands
Mexico
Monaco
New Zealand
Nigeria
Norway
Russian Federation
Slovenia
Spain
Sri Lanka
Sweden
Switzerland
Syrian Arab Republic
Tunisia
United Arab Emirates
Venezuela

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

Argentina
Brazil
Chile
Ecuador
Egypt
Grenada
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)
United Nations
International Maritime Organization (IMO)

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

3 Incidents involving the 1971 Fund

3.1 *Haven* incident

3.1.1 The Executive Committee took note of the information contained in document 71FUND/EXC.58/2. In particular, the Committee noted the information given by the Italian delegation that on 2 April 1998, the Senate of the Italian Republic had approved the Bill concerning the global settlement of the *Haven* incident and that from 7 April the Bill would be before the Chamber of Deputies for final approval.

3.1.2 The Committee also noted that the Director was reporting the developments in respect of the *Haven* incident directly to the 1971 Fund Assembly, which was holding its 4th extraordinary session during the same week as the Committee's 58th session (document 71FUND/A/ES.4/7).

3.2 *Aegean Sea* incident

General background

3.2.1 The Director introduced document 71FUND/EXC.58/3 which set out the developments which had taken place in respect of the *Aegean Sea* incident since the Committee's 57th session.

3.2.2 It was recalled that the Criminal Court of first instance in La Coruña had rendered a judgement in April 1996 dealing with the criminal liability of the master of the *Aegean Sea* and the pilot in charge of the ship's entry into La Coruña and with a number of claims for compensation. It was also recalled that the Court of Appeal in La Coruña had rendered a judgement in June 1997, that this judgement was final but that a number of claims for compensation had been referred to the procedure for the execution of the judgement.

3.2.3 The Executive Committee recalled the discussions at its previous sessions concerning the claims situation, the distribution of liabilities and questions of recourse, the enforcement of the Court of Appeal's judgement and the issue of time bar, as summarised in document 71FUND/EXC.58/3, as well as the Spanish Government's position on these issues, as set out in that document.

Establishment of Consultation Group

3.2.4 It was recalled that, at its 57th session, the Executive Committee had considered it necessary to find a mechanism which would enable progress to be made towards solving the outstanding issues so that claimants could be paid as soon as possible, respecting the basic principles of the Conventions and the principles of the admissibility of claims laid down by the Assembly and the Executive Committee, including the requirement for the claimant to submit evidence to substantiate his losses. The Committee recalled that, to this end and within the framework of these principles, a Consultation Group had been set up to assist the Director in his search for solutions (document 71FUND/EXC.57/15, paragraph 3.2.25).

Meeting with a representative of the Spanish Government

3.2.5 The Executive Committee noted that, at the Director's initiative, a meeting had been held in Madrid on 6 April 1998 with the Director of the Minister's Office (Director del Gabinete del Ministro) of the Ministry of Public Administration, at which there had been a constructive exchange of views concerning the main problems which had prevented progress from being made.

3.2.6 It was noted that the Director had explained to the representative of the Spanish Government that he had no mandate from the Executive Committee or from the Assembly of the 1971 Fund to make formal proposals to the Spanish Government, but that the 1971 Fund organs had instructed him to investigate the possibility of making progress in respect of the *Aegean Sea* case. It was also noted that the Director had presented certain ideas on how, in his view, progress could be made on a number of issues.

3.2.7 The Executive Committee was pleased to note that, after the meeting, the representative of the Spanish Government had informed the Director that he believed that progress could be made along the lines envisaged by the Director.

Exchange of opinions

3.2.8 The Executive Committee noted with satisfaction that the Spanish Government had on 27 April 1998 presented to the Director legal opinions on the distribution of liabilities and on the time bar issue. The Committee also noted that the Director had made available to the Spanish Government a legal opinion which the 1971 Fund had obtained from a former judge of the Spanish Supreme Court, Mr Santos Briz, and which dealt with the interpretation of the judgement referred to in paragraph 3.2.2 as regards the distribution of liabilities between the parties concerned.

Proposal by the Director

3.2.9 The Director informed the Committee that, in the light of the positive reaction from the Spanish Government on the ideas presented by the Director at the recent meeting in Madrid, and after discussions within the Consultation Group, the Director considered that progress could be made along the following lines.

A There was a disagreement between the 1971 Fund and the Spanish State concerning the distribution of liability, as set out in section 3 of document 71FUND/EXC.58/3. If the 1971 Fund wished to recover from the Spanish State any amount which the 1971 Fund had paid or might have to pay in excess of 50% of the total amount of the established claims, the Fund would have to bring an action for recovery against the Spanish State within one year of the judgement of the Court of Appeal, ie before 18 June 1998. It was suggested that the Spanish Government would make a binding commitment to extend this time period to the effect that the Spanish State would not invoke this time bar in any action for recovery which the 1971 Fund might bring against the Spanish State at a later stage. Such an agreement would have to be concluded well in advance of that date. The agreement would have to be signed by somebody who, under Spanish constitutional law, would have the capacity to bind the State in this regard. If such an agreement could be reached, it would not be necessary for the 1971 Fund to take legal action against the Spanish State before that date, and further discussions could be held between the Spanish State and the 1971 Fund on the issues involved, in the light of the various legal opinions which the parties had obtained.

B The Spanish State had accepted that, pursuant to the judgement of the Court of Appeal, the State was in any event liable to pay the total amount of the established claims in excess of 60 million SDR. If the State were to confirm, in a binding way, its obligations in this regard, including its acceptance that the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention was 60 million SDR, the Director took the view that the 1971 Fund could increase its payments to 100% of the established claims, since there would no longer be any risk of overpayment by the 1971 Fund. This would mean that the 1971 Fund would be able to pay 100% of the amounts awarded by the Court of Appeal in respect of individual claims, as well as 100% of the amounts established in final out-of-court settlements. As regards those claims in respect of which payments of 40% had been made on the basis of provisional assessments (in particular those presented by fishermen and shellfish harvesters), the Director believed it would be necessary to consider, in the light of any new evidence, whether further payments could be made.

C The Spanish Government had stated that the loans granted to fishermen and shellfish harvesters were based on evidence of the economic losses actually suffered by them. It was understood that the evidence consists of studies carried out by the Spanish Instituto de Oceanografia. The Director believed that it would be very important for the 1971 Fund to be given access to these studies. After an examination of these studies, the 1971 Fund's experts would be in a position to consider whether a new assessment of the losses actually suffered by these claimants could be made.

D It would be important for the 1971 Fund to learn of the Spanish Government's assessment of the claims of those claimants who had not presented any claims in the criminal court proceedings but who had reserved their right to bring their claims in a civil court action at a later stage, and of those claimants who had presented "conciliation acts" in respect of their claims to the Civil Court in La Coruña.

Intervention by the Spanish delegation

3.2.10 The Spanish delegation drew attention to the fact that the assessment of claims, particularly fishing claims, was not an exact science and that on legal matters there were no black and white issues.

3.2.11 The Spanish delegation stated that the legal opinions provided by the Spanish Government were in line with the information provided in the two documents presented by the Spanish delegation at previous sessions (documents 71FUND/EXC.55/4/1 and 71FUND/EXC.57/3/1). The delegation further stated that the two legal opinions had been prepared by the "Legal Services of the Spanish Government" and by a Spanish law firm specialised in international, civil and procedural law.

3.2.12 The Spanish delegation stated that it welcomed the setting up of the Consultation Group and confirmed that it was the intention of the Spanish Government to continue to work in close co-operation with the Secretariat of the 1971 Fund and with the Consultation Group to reach a global settlement that would be acceptable to the Spanish claimants, to the 1971 Fund and to the Spanish Government. The delegation stated that it hoped that, with the involvement of the Consultation Group, the determination of the Director and the support of the Executive Committee, the gap between the claimants' expectations and the payments actually made could be bridged.

3.2.13 The Spanish delegation drew attention to the fact that Spanish claimants had waited for almost four years for the judgement of the Spanish Criminal Court on 30 April 1996 and almost five years for the final judgement. The Committee's attention was also drawn to the fact that the Spanish Government had decided on 30 May 1997 to grant low interest loans totalling £52 million to certain claimants. The Spanish delegation stated that the loans granted by the Spanish Government amounted to considerably more than the payments that had been made by the 1971 Fund. That delegation also stated that further loans were to be granted by the Spanish Government in the near future, totalling Pts 6 000 million (£23 million). It was further stated by the Spanish delegation that the Spanish Government had encouraged the 1971 Fund to give priority to private claimants.

3.2.14 The Spanish delegation stressed that, in spite of certain points of disagreement between the Spanish Government and the 1971 Fund in the past, the Spanish Government had consistently supported the 1971 Fund's policy on the admissibility of claims and recognised the need for all claims to be substantiated. The Spanish delegation expressed its concern, as Spain would no longer be a Member of the 1971 Fund after 16 May 1998. It also referred to the fact that the sixth anniversary of the *Aegean Sea* incident was approaching, and that it would be important for a settlement to be reached as soon as possible, since the Spanish Government was anxious to preserve the 1992 Fund's good image in Spain.

3.2.15 The Spanish delegation did not consider the *Aegean Sea* case to be an extraordinary one. The delegation stated that, although new questions of policy had arisen (ie possible recourse action against a Member State and the way of ensuring the execution of a final judgement), the main objectives of the 1971 Fund remained unchanged, ie to achieve out-of-court settlements to fulfil the Organisation's responsibilities vis-à-vis claimants whilst respecting the Conventions, the national law of the country concerned and national judgements.

3.2.16 The Spanish delegation stated that the Spanish Government was in broad terms in agreement with the Director's proposals and that, in accordance with these proposals, the Spanish Government was prepared to make a binding commitment to extend the time period for the recovery action against the Spanish Government. The delegation emphasised that this agreement between the 1971 Fund and the Spanish Government would be without prejudice to the rights of both the Fund and the Spanish Government.

3.2.17 The Spanish delegation stated that it understood the implications of such an agreement to be twofold:

(i) The Spanish Government would not invoke time bar in any action for recovery which the 1971 Fund might bring against the Spanish Government, but that this commitment would not prejudice any other obligation of the Spanish Government, and

(ii) the 1971 Fund would not bring an action for recovery against the Spanish State at this stage and would recognise that further discussion should be held on the issues dealt with in the legal opinions recently exchanged between the two parties.

3.2.18 The Spanish delegation stated that the Spanish Government was still of the opinion that there was no risk of an overpayment situation, since according to the judgement rendered by the Court of Appeal, which was binding on all parties including the Spanish Government, the Government would have to pay any compensation in excess of the maximum amount of compensation available under the 1971 Fund Convention. The Spanish delegation therefore took the view that the caution exercised by the 1971 Fund as regards the level of payments was no longer appropriate and that the Fund's payments should be raised to 100% for all claims.

3.2.19 The Spanish delegation also stated the need for a new assessment of the losses suffered by the Spanish fishery claimants (Cofradías) in the light of the study carried out by the Instituto Oceanográfico which was the basis of the loans granted by the Spanish Government to claimants. Furthermore, the Spanish delegation stated that further progress should be made on the time bar issue. The Spanish delegation also stated that the Spanish Government wished to hold further discussions on this issue before the Director submitted a study to the October 1998 session of the Executive Committee.

Executive Committee's consideration

3.2.20 The Executive Committee noted with satisfaction the positive statement made by the Spanish delegation. The Committee agreed with the Spanish Government that joint efforts should be made to solve all outstanding issues arising out of the *Aegean Sea* incident as soon as possible.

3.2.21 The Executive Committee decided that it was necessary for the 1971 Fund to take measures to protect its right to take recovery action against the Spanish State unless the disagreement between the Spanish State and the Fund as to the distribution of liability were solved out of court. For this reason, the Director was instructed to seek to obtain, well in advance of 18 June 1998, a binding commitment by the Spanish Government to the effect that, if the 1971 Fund were to bring a recovery action against the Spanish State, the Spanish State would not invoke the time bar. The Committee emphasised that such an agreement would have to be signed by somebody who, under Spanish constitutional law, would have the capacity of binding the State in this regard. The Committee further instructed the Director that, should such a commitment not be given by the Government, the Fund should take recovery action against the Spanish State by 18 June 1998 in order to preserve the Fund's rights, pending a solution of the disagreement between the State and the Fund referred to above.

3.2.22 The Executive Committee instructed the Director to study, with the assistance of the 1971 Fund's legal experts, the legal opinions presented by the Spanish Government on the distribution of liabilities, and to report his findings to the Executive Committee's next session.

3.2.23 The Executive Committee noted that the Spanish delegation had stated that the Spanish Government accepted that the Spanish State was in any event liable to pay the total amount of the established claims in excess of the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention, namely 60 million SDR. The Committee noted that the Spanish State was prepared to give a formal binding acceptance on these two points. The Committee considered that, if such an acceptance was given, there would be no risk of overpayment by the 1971 Fund. The Committee decided therefore that, subject to such an acceptance being given, the 1971 Fund should pay 100% of the amounts awarded by the Court of Appeal in respect of individual claims as well as 100% of the amounts established in final out-of-court settlements (to the extent that these claims had not already been paid).

3.2.24 The Executive Committee noted with satisfaction that the Spanish Government would make available to the 1971 Fund in the near future the assessments made by the Instituto Oceanográfico on behalf of the Spanish authorities of the damage suffered by fishermen and shellfish harvesters. The Director was instructed to examine these assessments with the assistance of the 1971 Fund's technical experts and consider whether a new assessment of the losses actually suffered by these claimants could be made by the 1971 Fund. He should also consider whether, in the light of the assessments by the Instituto Oceanográfico, further payments could be made to these claimants. It was emphasised however that, as held by the Spanish Courts, each claimant had to substantiate the losses actually suffered by him and that evidence of the general impact of the incident on the fishing industry as a whole was not sufficient.

3.2.25 The Executive Committee instructed the Director to study the opinion on the time bar issue presented by the Spanish Government and to discuss this issue with the Government. He was instructed to submit this issue to the Committee for consideration at its October 1998 session.

3.2.26 The Executive Committee agreed with the Director that it was important that the Spanish Government informed the 1971 Fund as soon as possible of the Government's assessments of the claims of those claimants who had not presented any claims in the criminal court proceedings but who had reserved their right to bring their claims in a civil court action at a later stage, and of those claimants who had presented "conciliation acts" in respect of their claims to the Civil Court in La Coruña.

3.3 *Sea Prince* incident

General situation

3.3.1 The Executive Committee took note of the developments in respect of the *Sea Prince* incident, as contained in section 1 of document 71FUND/EXC.58/4. It was noted that the claims settled out of court amounted to Won 33 709 million (£14.3 million) and that the claims pending in court totalled Won 20 995 million (£8.9 million).

3.3.2 It was recalled that, at its 53rd session, the Executive Committee had noted that the 1971 Fund and the shipowner's insurer, the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd (UK Club), were holding negotiations with claimants for the purpose of arriving at out-of-court settlements of all outstanding claims on the basis of the assessment made by the International Tanker Owners Pollution Federation Ltd (ITOPF), and that considerable progress had been made. It was recalled that, if the method of assessment used by ITOPF were to be accepted by the claimants, the total admissible amount of all claims arising out of this incident would fall well below the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention. The Committee recalled that it had therefore decided to authorise the Director to pay all settled claims in full (to the extent they had not already been paid), provided that all or most of the outstanding claims in the fishery and tourism sectors were settled on the basis of ITOPF's method of assessment, that any uncertainty was eliminated as to the level of the shipowner's claim relating to the cost of the measures associated with the contract for the removal of the ship and related operations, and that the Director was convinced that the aggregate amount of all claims arising out of this incident would fall below 60 million SDR (£48 million) (document 71FUND/EXC.53/12, paragraph 3.3.9).

3.3.3 The Committee noted that, by the beginning of March 1998, nearly all the outstanding claims in the fishery sector and all claims in the tourism sector had been settled on the basis of ITOPF's method of assessment, and the amount of the shipowner's claim for the cost of the measures referred to in paragraph 3.3.2 had been clarified. It was noted that, in view of these developments, the Director had decided in March 1998 that the 1971 Fund should pay all settled claims in full (to the extent that they had not already been paid), and the balance of these claims had been paid for a total amount of Won 8 200 million (£3.3 million).

3.3.4 The Executive Committee noted that the limitation amount applicable to the *Sea Prince* was 14 million SDR, corresponding to approximately Won 26 000 million (£11 million), at the exchange rate applicable on 14 April 1998. It was noted that the limitation fund had not yet been constituted, and that the limitation amount in Won had therefore not yet been fixed.

Claims from unlicensed fishermen

3.3.5 The Director introduced document 71FUND/EXC.58/4/Add.1 which dealt with claims totalling Won 850 million (£363 000) which had been received from six Village Fishery Associations (VFAs) whose members had been fishing in common fishery grounds without holding valid licences, although such licences were required under the applicable Korean statute (the Fishery Act).

3.3.6 The Executive Committee recalled that it had considered at its 54th session, in the context of the *Nissos Amorgos* incident, the question of whether claims from unlicensed fishermen were admissible for compensation. It was recalled that the Committee had decided that compensation should not be payable in the *Nissos Amorgos* case to fishermen who, although required under Venezuelan law, did not hold a valid licence, and also that compensation should be payable to fishermen who were not subject to licence requirements under Venezuelan law, provided that the claimant showed that he had suffered an economic loss as a result of the incident (document 71FUND/EXC.54/10, paragraph 3.1.32).

3.3.7 The Committee noted that, at the time of the incident, five VFAs were involved in boundary disputes and that, since it was the policy of the competent local authorities not to issue licences if the area of operation could not be defined, these VFAs had been operating without licences. It was noted that, as regards four of these VFAs, the disputes were between neighbouring VFAs and had not yet been resolved, that the Chief of the local authority (County Council) had confirmed in writing that the authorities intended to grant licences to these VFAs as soon as the border disputes had been resolved, and that the Chief had stated that the members of these VFAs had been engaged in fishing in the common fishery grounds in question for a long period of time without having been prosecuted by the authorities for illegal fishing. The Committee also noted that the border dispute involving the fifth of these VFAs had been resolved and a licence had been granted with effect from 13 March 1996, ie after the incident (which occurred in 1995).

3.3.8 The Executive Committee noted that the sixth VFA had a licence which had expired before the incident and that it was understood that the Chief of this VFA had not renewed the licence since he mistakenly believed that there was no legal requirement to have a licence.

3.3.9 It was noted that the 1971 Fund's Korean lawyer had informed the Fund that the position of the Korean Supreme Court was that illegal income could not form a basis for a claim for compensation, although the Supreme Court had held that income obtained by an act prohibited by law did not necessarily constitute illegal income. The Committee noted that, in considering whether an income was illegal, the Supreme Court had taken into account four factors, viz the purpose of the relevant law, the validity of the contracts for the sale of the catches, the degree of ethical blameworthiness on the part of the claimant and the degree of illegality.

3.3.10 The Committee noted that the 1971 Fund's lawyer had made the following observations on these four factors:

> The main purpose of the Fishery Act was to protect the holders of licences by imposing sanctions on unlicensed fishermen. Since under the Fishery Act only a Fishery Association of villages located close to the common fishery ground could be granted a licence, and the areas in question were isolated and no outsiders went there to fish, the unlicensed VFAs therefore did not contravene the main purpose of the Fishery Act because there was no other VFA to protect. The sales contracts for the catches made by these VFAs were accepted as valid by other fishermen and by the authorities. Most of the members of the six VFAs were earning low incomes from fishing, and did not have equipment such as fishing boats or fish cages, but simply handpicked the marine products. It could be argued that the purpose of the Fishery Act was to punish those who tried to abuse the system by fishing without a licence thereby taking profits from fishermen who held valid licences.

3.3.11 It was further noted that the 1971 Fund's Korean lawyer had expressed the view that it was most likely that the Korean Courts would hold that the claims of these six VFAs were admissible, having considered the four factors set out in paragraph 3.3.9 above.

3.3.12 The Korean delegation explained that while a boundary dispute prevented a licence from being issued, it was not considered illegal for the fishermen affected to operate, since they had the tacit approval of the authorities, provided that they did not enter the area in dispute.

3.3.13 Many delegations made the point that compensation should not be payable in respect of loss of income for activities which were illegal. Some delegations considered that, since the Korean

legislation required a licence for this type of fishing, the claims under consideration should not be admitted. Other delegations took the view that claims such as these should be considered on a case by case basis, taking into account all the circumstances and the relevant national laws. It was also suggested by some delegations that a difference should be made between the five VFAs which had been unable to obtain licences and the sixth VFA which could have obtained a licence. They expressed the view that the former claims were admissible in principle whereas the latter was not.

3.3.14 The Executive Committee noted that the five VFAs involved in border disputes were unable to obtain licences while the boundary disputes were pending. Since it was clear that licences would be granted when these disputes were resolved, and in the light of the explanation provided by the 1971 Fund's Korean lawyer, the Committee decided that the claims of the members of these five VFAs should be considered as admissible in principle.

3.3.15 Concerning the sixth VFA referred to in paragraph 3.3.8, the Executive Committee considered that the lack of a valid licence was due to an oversight by the Chief of the VFA. As it was clear that a licence would have been granted if an application had been made, the Committee decided that also the claims by the members of this VFA should be considered admissible in principle.

3.4 *Yeo Myung* incident

The Executive Committee took note of the developments in respect of the *Yeo Myung* incident, as contained in section 2 of document 71FUND/EXC.58/4. It was noted that the claims settled out of court amounted to Won 1 334 million (£570 000) and that only relatively few claims, all in the fishery sector, totalling Won 3 583 million (£1.5 million) were outstanding, but that these had been assessed at Won 121 million (£51 000).

3.5 *Yuil N°1* and *Osung N°3* incidents

3.5.1 The Executive Committee took note of the developments in respect of the *Yuil N°1* and *Osung N°3* incidents, as contained in document 71FUND/EXC.58/5. With regard to the *Yuil N°1* incident, it was noted that the claims settled out of court amounted to Won 15 628 million (£6.6 million) and that claims totalling Won 60 056 million (£25 million) were outstanding, but that these had been assessed by the 1971 Fund's experts at Won 2 301 million (£1 million). As for the *Osung N°3* case, the claims presented in respect of the Republic of Korea amounted to Won 1 340 million (£570 000), whereas those in respect of Japan totalled ¥944 million (£4.4 million). It was recalled that both ships had sunk at a depth of some 70 metres.

Wrecks of the Yuil N°1 and Osung N°3 and removal of oil on board

3.5.2 The Committee noted that in 1997 the Korean Research Institute of Ships and Ocean Engineering had presented a report on a survey of the *Yuil N°1*. It was noted that the report had stated that some tanks still contained oil, that corrosion to damaged shell plating would cause release of oil from the wreck within ten years, and that the removal of the remaining oil should therefore be carried out as soon as possible. It was also noted that the report had acknowledged that a variety of factors made removal of the oil and the wreck difficult, but had stated that such operations would succeed if they were carried out at the appropriate time and using proper equipment. The Committee noted that according to the report the removal of the oil should precede the wreck removal, since this would reduce the risk of a further oil spill.

3.5.3 In respect of the *Osung N°3* incident, it was recalled that the Korean Research Institute had presented a report in 1997 on a survey of the *Osung N°3*. It was noted that in the report it had been estimated that the wreck of the *Osung N°3* contained about 1 400 tonnes of oil in her tanks, which was not likely to solidify. It was further noted that it had been concluded in the report that oil might escape from the wreck because of further deterioration of the damaged ship, or as a result of a ship or fishing gear coming into contact with the submerged wreck, or if the wreck were to be disturbed by a typhoon. It was also noted that given the risk of a further spill and the potential impact on nearby fishing grounds,

extensive mariculture facilities and tourist beaches, it had been concluded in the report that an oil removal operation should be carried out as soon as possible to reduce the pollution risk, since 60% to 80% of the oil could be recovered, and that the wreck itself should also be removed, with a view to eliminating completely the risk of further pollution.

3.5.4 The Executive Committee noted that, at the request of the Korean Government, a marine surveyor engaged by the 1971 Fund had visited the Republic of Korea several times during the period February - March 1998 for discussions concerning the most appropriate method to be used for removing the oil from the *Yuil N°1* and the *Osung N°3*, and that, in the 1971 Fund's view, these discussions had been very constructive. It was also noted that the Director had visited the Republic of Korea in March 1998 and had held useful discussions with the Korean authorities on this matter.

3.5.5 It was noted that the Director had informed the Korean authorities that the 1971 Fund agreed that the oil should be removed from the wrecks of the *Yuil N°1* and the *Osung N°3* as soon as possible, and that this was particularly important as regards the *Osung N°3* which, in the Fund's view, presented the most serious pollution risk. The Committee noted that the Director had also stated that every effort should be made to ensure that the oil removal operations in respect of both wrecks were carried out during the period April - June 1998 when the weather could be expected to be favourable.

3.5.6 The Executive Committee noted that several companies had submitted tenders to carry out the operation to remove the oil from the wrecks of the two vessels, and that the 1971 Fund's opinion had been sought on these tenders. It was noted that the total cost of the operation to remove the oil from both vessels was estimated at some US$8 million (£5 million).

3.5.7 It was noted that, in his discussions with the Korean authorities, the Director had emphasised that the 1971 Fund could not take part in the decisions as to what method should be used and which contractor should be engaged. The Executive Committee noted that he had stated that it was for the Korean authorities alone to take such decisions and to take the responsibility for the terms of the contract with the company or companies engaged to carry out the oil removal, and that the 1971 Fund could only present its views. The Director informed the Committee that he had made it clear that no expert engaged by the 1971 Fund had the authority to make any commitment on behalf of the Fund, and that any such experts acted therefore solely in an advisory capacity to the 1971 Fund. It was noted that the Director had made the point that the 1971 Fund did not act as a guarantor of payment of the cost of any operations or activities, and had stated that claims for the cost of such operations and activities would be examined in the same manner as any other claim. It was further noted that the Director had drawn attention to the fact that the question of whether and, if so, to what extent, the cost of any operations to remove the oil from the wreck of the *Yuil N°1* and that of the *Osung N°3* was admissible for compensation would have to be decided on the basis of the criteria laid down in the 1969 Civil Liability Convention and the 1971 Fund Convention and the Korean legislation implementing these Conventions and adopted by the Assembly of the 1971 Fund, ie that the operations were reasonable from an objective technical point of view and that the relationship between the costs and the benefits derived or expected was reasonable.

3.5.8 The delegation of the Republic of Korea stated that negotiations had been carried out in early April 1998 with a consortium of companies but that these negotiations had not resulted in a contract being concluded for the removal of the oil. That delegation mentioned that negotiations were being held with another potential contractor. It was hoped that a contract would be concluded within the next week for the removal of the oil from both wrecks and that the operations would commence in May 1998, so as to make it possible for the contractors to complete these operations by the end of July 1998.

Level of the 1971 Fund's payments

3.5.9 The Executive Committee recalled that it had decided that the 1971 Fund's payments should for the time being be limited to 60% of the established claims in respect of the *Yuil N°1* incident and to 25% of the established claims in respect of the *Osung N°3* incident.

3.5.10 The Korean delegation informed the Committee that for the time being the operations would be limited to the removal of the oil and that the issue of whether the wrecks should be removed would be

considered at a later stage. That delegation stated that the Korean Government would be prepared to make an undertaking to the effect that, if and to the extent that a claim by the Korean Government for the cost of the removal of the wreck of either vessel were to result in the total amount of the established claims arising out of either incident 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 that claim, in its entirety or in part, against the 1971 Fund.

3.5.11 The Executive Committee considered that if, in the view of the 1971 Fund's experts, the removal of the oil from the *Yuil N°1* were successfully completed without any significant release of oil, and only a minor quantity of oil remained in the wreck, there would no longer be any risk of the total amount of the claims exceeding 60 million SDR. The Committee therefore decided to authorise the Director to increase the payments in respect of the *Yuil N°1* incident to 100% of the established claims, once the Director was satisfied that these conditions had been fulfilled and that the amount laid down in the contract to remove the oil would not create any risk of the total amount of the claims exceeding 60 million SDR, provided that the Korean Government had given an undertaking as set out in paragraph 3.5.10.

3.5.12 The Executive Committee considered that if, in the view of the 1971 Fund's experts, the removal of the oil from the *Osung N°3* were completed successfully without any significant release of oil, and only a minor quantity of oil remained in the wreck, the risk of further pollution would be eliminated and there would no longer be a risk of claims for high amounts. The Committee therefore decided to authorise the Director to increase the limit of the 1971 Fund's payments to 75% of the established claims, once the Director was satisfied that these conditions had been fulfilled and that the amounts laid down in the contract to remove the oil would not create any risk of the total amount of the claims exceeding 60 million SDR, provided that the Korean Government had given an undertaking as set out in paragraph 3.5.10.

3.6 *Sea Empress* incident

3.6.1 The Executive Committee took note of the information contained in documents 71FUND/EXC.58/6 and 71FUND/EXC.58/6/Add.1 concerning the *Sea Empress* incident.

Claims situation

3.6.2 The Executive Committee noted that as at 15 April 1998, 970 claimants had presented claims for compensation to the Claims Handling Office, set up in Milford Haven by the 1971 Fund and the shipowner's insurer, Assuranceföreningen Skuld (Skuld Club), and that claims had been approved for a total of £14.5 million. It was also noted that in all payments had been made to 662 claimants totalling £13.8 million, of which £6.9 million by the Skuld Club and £6.9 million by the 1971 Fund. It was further noted that cheques for £716 000 were awaiting collection by claimants.

3.6.3 It was noted that, since it was the policy of the 1971 Fund that a claimant's right to interest was governed by the applicable national law (documents FUND/A.4/10, paragraph 21 and FUND/WGR.7/3, paragraph 4.5), the Director and the Skuld Club had decided that interest should be paid at a rate of 8% per annum on the agreed amount of the respective claims. The Executive Committee noted that, as at 15 April 1998, payments relating to interest totalling £216 000 had been made to 320 claimants, and that cheques for a further £522 000 were available to claimants. It was noted that the calculation of interest on certain more complicated claims was still being carried out.

3.6.4 It was noted that the United Kingdom delegation had assessed the total amount of the claims at between £32 million and £42 million (document 71FUND/EXC.58/6/1).

Investigations into the cause of the incident and related issues

3.6.5 The Executive Committee recalled that an investigation into the *Sea Empress* incident had been carried out by the Marine Accident Investigation Branch (MAIB) of the United Kingdom Department of Transport, and that the report of the Chief Inspector of Marine Accidents into the grounding and

subsequent salvage of the *Sea Empress* had been published on 27 March 1997. It was also recalled that the Commissioner of Maritime Affairs of the Republic of Liberia had published a report of the investigation into the grounding of the *Sea Empress*. The Committee recalled the conclusions of the reports, as summarised in paragraphs 3.1.2 and 3.2 of document 71FUND/EXC.58/6.

3.6.6 The Executive Committee recalled that it had, at its 57th session, noted an opinion from an eminent expert on maritime law, Mr Geoffrey Brice QC, who had stated that there could be no doubt that the predominant cause of the incident was the pilot's error in the navigation of the *Sea Empress* and that the poor training of the pilot and his lack of experience were relevant to why he had made such an error. It was recalled that, in Mr Brice's view, there were reasons to criticise the master and the chief officer for failing to notice that the *Sea Empress* was not following the leading lights and for not having a proper planned approach to Milford Haven when under pilotage, and that these failures could be said to have contributed to the occurrence of the initial grounding. The Committee recalled, however, that Mr Brice had maintained that there seemed to be no reason to believe that the shipowner himself, ie at board level or at the level to which the board had delegated its function, was at fault. It was recalled that Mr Brice did not believe, therefore, that it was realistic to contemplate breaking the shipowner's limit under the 1969 Civil Liability Convention.

3.6.7 It was recalled that, at the Committee's 57th session, on the basis of the advice obtained, the Director had expressed the opinion that there were no grounds on which the 1971 Fund could challenge the shipowner's right to limit his liability, and that he had also maintained that there were no grounds on which the 1971 Fund could oppose the shipowner's right to indemnification under Article 5.1 of the 1971 Fund Convention.

3.6.8 The Committee had noted at its 57th session that the Director was considering further whether there was any possibility of the 1971 Fund's taking recourse action against third parties in order to recover amounts paid by it in compensation, and that he would in due course report to the Committee on his findings in this regard.

3.6.9 It was recalled that a number of delegations had taken the view, at the Executive Committee's 57th session, that it was premature to decide whether or not to challenge the shipowner's right to limit his liability while the question of recourse actions against third parties was still under consideration. The Committee recalled that it had been mentioned at that session that the reports of the official investigations had not considered the question of the fault and privity of the shipowner and that it would be appropriate for the 1971 Fund to commission its own investigation on this point. It was also recalled that it had been suggested that, in the legal proceedings leading to the shipowner establishing his limitation fund, it ought to be possible to obtain certain documents from the shipowner which would assist the Fund in deciding whether or not to challenge the shipowner's right to limit his liability.

3.6.10 The Executive Committee recalled that at the Committee's 57th session the United Kingdom delegation had mentioned that the United Kingdom Government had also taken an opinion from a senior counsel and the advice which it had received was the same as that given by Mr Brice, and that the delegation had urged the Committee to take a decision in respect of this matter at its 58th session.

3.6.11 It was recalled that at its 57th session the Executive Committee had instructed the Director to collect as much information as was reasonably possible as to the cause of the incident and the prospects for recourse actions, in order to enable the Committee to decide at its 58th session whether or not the 1971 Fund should challenge the shipowner's right to limit his liability and whether the Fund should take recourse action against any third parties (document 71FUND/EXC.57/15, paragraph 3.7.25).

3.6.12 The Executive Committee noted that, in March 1998, in accordance with the Committee's instructions, the 1971 Fund had written to the shipowner, inviting him to clarify the allegation made in the MAIB report that the master and pilot had failed to discuss and formulate in good time, or at all, a pilotage passage plan which could be agreed and understood prior to entry into Milford Haven. It was noted that the 1971 Fund had mentioned in the letter that, according to the MAIB report, there had also been a failure to keep a strict watch to verify that the pilot was handling and navigating the ship correctly. The Committee noted that in the letter, the 1971 Fund had stated that the provision and implementation of proper procedures to ensure safe entry of a laden VLCC such as the *Sea Empress* into port were

matters which were the personal responsibility of the shipowner. It was noted that the 1971 Fund had also stated that a comprehensive passage plan should have been formulated, discussed and understood by the master, deck officers and the pilot, and that this appeared not to have taken place in this instance. The Committee noted that the 1971 Fund had made the point that, although it appeared that there were standing orders covering such matters, port entry was a matter of particular significance with a large laden tanker and shipowners should have had a system in place to check and ensure that their standing orders were understood and routinely complied with.

3.6.13 It was noted that the 1971 Fund had invited the shipowner to explain the general position in relation to these issues and to provide particular information as set out in paragraph 1.1.2 of document 71FUND/EXC.58/6/Add.1.

3.6.14 The Executive Committee noted that, in response to the letter from the 1971 Fund, the shipowner had maintained that, if there were no good reasons for disputing the right to limit, then there were advantages both to the shipowner and to the 1971 Fund in establishing this sooner rather than later. It was noted that the shipowner had pointed out that it was unclear in which court or courts proceedings relating to disputed claims might be commenced, and that the shipowner was concerned that this gave rise to the risk of inconsistent results and extra costs, a risk which the shipowner considered could be minimised if the shipowner could commence limitation proceedings in London. The Committee noted that the shipowner had maintained that these proceedings had been postponed because the question of whether or not the right to limit would be opposed by the 1971 Fund was of great importance, both to the way in which the proceedings were formulated and to the implications for claimants.

3.6.15 It was noted that the shipowner had made it clear that he did not believe that a breach by the master of the managers' standing orders was the cause of the incident, nor that an error of navigation by the master or pilot could justify a finding of actual fault or privity on the part of the shipowner. The Committee noted that the shipowner therefore did not regard the 1971 Fund's enquiries as relevant, but that despite this, the shipowner had responded at length to the questions raised by the 1971 Fund and had also provided copies of substantial documentation, as set out in paragraph 1.2.2 of document 71FUND/EXC.58/6/Add.1.

3.6.16 The Executive Committee noted that the Director had considered the documentation recently provided by the shipowner and had taken further advice from its London solicitors, from Mr Geoffrey Brice QC, and from a marine consultant. It was noted that the consultant had indicated that both ship and shore management systems were exemplary and that all navigational charts and sailing directions which should have been on board were on board. It was also noted that enquiries had been made of the United Kingdom Hydrographic Office which had confirmed that all working charts and pilot books on board the vessel had been corrected and were up to date at the time of the incident.

3.6.17 It was noted that, according to the 1971 Fund's advisers, the documents provided by the shipowner revealed that the shore administration and the monitoring of the navigation practices on board the vessel were of a high standard, and that the vessel was managed by a company which placed considerable emphasis on the development of quality management systems. The Committee noted that the navigation manual and standing orders issued were comprehensive and that the reports of the marine superintendents had revealed that there was frequent monitoring to ensure that the orders were understood and implemented. It was also noted that, on several occasions prior to the incident, superintendents rode with the vessel into berth whilst she was under pilotage and that they had been able to observe at first hand the interface between the bridge team and the pilots. It was further noted that, according to the 1971 Fund's advisers, the standards of training and competence of the crew also appeared to be high. The Committee noted that the documentation provided included not only copies of the inspection reports of the technical managers' own marine superintendents but also reports issued by external auditors and by several oil companies, and that these reports indicated that inspections were exhaustive and thorough, and confirmed the high standards of bridge procedures and navigation. It was noted in addition that, in the last of the independent audit reports before the incident, dated 12 February 1996, the vessel had achieved the overall top rating of "very good to excellent".

3.6.18 The Executive Committee noted the Director's view that it was important that the 1971 Fund took a position on this issue at the present session, so as to enable the 1971 Fund, the shipowner and the Skuld Club to co-operate fully in considering whether the 1971 Fund and the shipowner/Skuld Club should take recourse action against third parties.

3.6.19 Two delegations questioned whether the 1971 Fund should carry out such in-depth investigations into the cause of incidents as had been done in this case. These delegations stated that such a detailed investigation deliberately negated the conclusive findings of the two separate investigation reports provided by the flag State of the vessel concerned and by the port State. They mentioned that these reports left no doubt as to the cause of the incident; thus the decision to conduct such an extensive investigation of the shipowner called into question the need for Member States to submit casualty investigation reports to the Fund. The Committee was invited to consider how such investigations should be conducted in the future, taking into account that this case had set a precedent for future investigations by the Fund.

3.6.20 The Director stated that, in his view, it was not appropriate to carry out all investigations in the same way, since the extent of an investigation would have to be determined in the light of the particular circumstances of each case.

3.6.21 Many delegations took the view that in general the 1971 Fund's investigation of casualties should be sufficient to enable the Fund to determine whether it was appropriate either to challenge the shipowner's right to limit his liability or to take recourse action against some responsible third party. These delegations considered that the investigations carried out in this case were necessary and reasonable.

3.6.22 One delegation took the view that there was no need for the 1971 Fund to respond at this stage to the shipowner's statement of his intention to make a request for limitation of liability. That delegation stated that while the work of the Secretariat and its advisers was appreciated, certain issues had not been considered in sufficient depth. That delegation agreed with the Director's analysis that the immediate cause of the casualty was pilot error. However, the delegation reminded the Committee that the master was always in charge of his ship and that his actions required further analysis. It was pointed out that it was known that a passage plan had been prepared for the ship's entry into the port of Milford Haven and that this plan was not discussed with the pilot. It was also pointed out that the master had sailed into Milford Haven only once before and that the pilot was not familiar with the piloting of tankers of this size into the port. That delegation took the view that the master's failure to discuss his passage plan with the pilot was not only a matter of poor bridge management but that it was a contravention of the owner's express instructions concerning the agreement of a passage plan with the pilot before entering the port. Further, that delegation stated that it was known that the master had not been required by the shipowner to take a bridge team management course. The delegation maintained that if the master had discussed and agreed the passage plan with the pilot and had known the pilot's intentions, the grounding would not have occurred. The delegation stated that, for this reason, it could not agree with the part of the Director's analysis contained in paragraph 1.3.4 of document 71FUND/EXC.58/6.Add.1. That delegation took the view that the Director should continue to investigate this matter and that it was inappropriate to take a decision at this session in respect of the shipowner's right to limit his liability. The delegation stated that the shipowner, having provided no explanation for the master's failure to comply with the standing instructions, had not satisfied the onus of proving that the casualty occurred without his actual fault or privity and therefore would not be entitled to limit his liability.

3.6.23 A number of delegations stated that the possible negligence of the master did not in this case involve the actual fault and privity of the shipowner.

3.6.24 The Executive Committee noted that the information provided revealed that the immediate cause of the grounding was the pilot's error in navigating too close to a shoal, and that the master and chief officer were also at fault for having failed to discuss with the pilot a detailed plan for entry into the port as they should have done under standing orders, and for having failed to take prompt measures to tell the pilot that he was proceeding on a course other than that indicated by the leading lights and to appreciate the danger of so doing. The Committee agreed with the Director, however, that these errors

were all matters of simple navigation of the vessel which did not form a basis for challenging the shipowner's right to limit his liability, particularly since the shipowner had in place an efficient system and standing orders to prevent such errors from occurring.

3.6.25 The Executive Committee endorsed the Director's conclusion that, in the light of the substantial documentation provided by the shipowner and the advice received from the 1971 Fund's legal and technical advisers, there were no grounds upon which the 1971 Fund could challenge the shipowner's right to limit his liability. The Executive Committee decided, therefore, that the 1971 Fund should not challenge that right. The Committee further decided that there were no grounds on which the 1971 Fund could oppose the shipowner's right of indemnification under Article 5.1 of the 1971 Fund Convention.

3.6.26 The Committee stressed the importance of the policy of the 1971 Fund to investigate incidents so as to enable it to establish whether the Fund should challenge the shipowner's right to limit his liability or take recourse action against third parties, as appropriate.

3.6.27 The Executive Committee instructed the Director to consider further whether there was a possibility for the 1971 Fund of taking recourse action against third parties in order to recover the amounts paid by it in compensation.

3.7 *Nakhodka* incident

3.7.1 The Executive Committee took note of the information contained in document 71FUND/EXC.58/7 in respect of the *Nakhodka* incident. It was noted that, as at 15 April 1998, claims totalling ¥32 370 million (£150 million) had been received by the Claims Handling Office in Kobe, and that payments totalling ¥4 645 million (£22 million) had been made by the 1971 Fund. It was also noted that, in addition, the shipowner's insurer, the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd (UK Club), had made payments totalling US$868 000 (equivalent to ¥112 million, or £525 000).

3.7.2 The Japanese delegation expressed the hope that the 1971 Fund would continue its efforts to achieve prompt settlements of the claims.

Level of payments

3.7.3 The Executive Committee recalled that, at its 52nd session, the Director had been authorised to make payments on behalf of the 1971 Fund in respect of claims arising from the *Nakhodka* incident, but 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. It was also recalled that this position had been maintained by the Committee at its 57th session. It was further recalled that the 1992 Fund Assembly, at its 2nd extraordinary session in April 1997, 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.

3.7.4 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

3.7.5 The Executive Committee noted that, as instructed by the Committee at its 55th session, the Director was examining the reports of the Japanese and Russian authorities on the cause of the incident and would 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

3.7.6 The Executive Committee took note of the purchase of Japanese Yen made by the 1971 Fund as set out in paragraph 6.3 of document 71FUND/EXC.58/7.

3.8 *Nissos Amorgos* incident

3.8.1 The Executive Committee took note of the information contained in document 71FUND/EXC.58/8 on the *Nissos Amorgos* incident.

Clean-up operations and disposal of oily sand

3.8.2 It was recalled that, during the clean-up operations an estimated 40 000 m^3 of contaminated oil were collected and that the oily sand had been provisionally stored immediately inland of the affected beach.

3.8.3 The Executive Committee noted that, in order to determine the best option for treating the oily sand, a meeting had been held in Maracaibo on 30 March and 1 April 1998 between experts appointed by Petroleos de Venezuela SA (PDVSA), which was responsible for implementing oil spill response measures in the area under the Venezuelan National Contingency Plan for Oil Pollution, and experts appointed by the 1971 Fund and the Gard Club. It was noted that since the oily sand had been stored provisionally for some seven months, the experts had agreed as a preliminary step to establish the actual condition of the oily sand and to determine the quantity involved. The Committee noted that various samples of the oily sand would be taken at different locations, and a laboratory commissioned to analyse the hydrocarbon content of the sand, and that a technical and financial assessment of the options for disposal of the contaminated material would be carried out in the light of the results of the analysis, taking into account the quantity of collected oily sand.

Claims situation and court proceedings

3.8.4 It was noted that as at 20 April 1998, claims totalling Bs6 190 million (£7 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 87 claims had been approved for a total of Bs1 133 million (£1.3 million) and that the Gard Club had paid the approved amounts in full.

3.8.5 The Executive Committee recalled that the Gard Club and the 1971 Fund had decided to close the Claims Agency on 30 April 1998, since only relatively few claims were outstanding. It was further noted that the Club and the Fund had decided to maintain the lease of the office in order that it could be used as a channel of communication. It was also noted that the Agency could be reopened in the future if necessary.

3.8.6 The Executive Committee noted the situation in the court proceedings in the Criminal Court of Cabimas and the Civil Court in Caracas, as set out in section 4 of document 71FUND/EXC.58/8.

Level of payments

3.8.7 It was recalled that at its 55th session the Executive Committee had noted that there was great uncertainty as to the total amount of the claims arising out of the *Nissos Amorgos* incident. It was also recalled that 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. It was further recalled that the Committee therefore had 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 (document 71FUND/EXC.55/19, paragraph 3.12.12). It was recalled that, at its 57th session, the Executive Committee had decided that the level of payments should be maintained at 25% (document 71FUND/EXC.57/15, para 3.9.14).

3.8.8 It was noted that claims had been presented in court by the Republic of Venezuela for US$60 million (£36 million), by a fishermen's trade union, FETRAPESCA, for US$130 million (£78 million), by fish and shellfish processors for US$100 million (£60 million) and by a local fishermen's union for US$10 million (£6 million).

3.8.9 In view of the remaining uncertainty as to the total amount of the claims arising out of the *Nissos Amorgos* incident, the Executive Committee decided to maintain the limit of the 1971 Fund's payments at 25% of the loss or damage actually suffered by the respective claimants.

Cause of the incident

3.8.10 It was recalled that, as instructed by the Executive Committee at its 54th session, the Director had engaged a technical expert to investigate the cause of the incident on behalf of the 1971 Fund, so as to enable the 1971 Fund to intervene in future legal proceedings, if appropriate.

3.8.11 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. The Committee noted that, due to lack of information as to the cause of the incident, it had not been possible for the 1971 Fund to take any position as to whether the shipowner would be exonerated from liability.

3.8.12 The Executive Committee recalled that the shipowner and the Gard Club had informed the 1971 Fund that they intended for the time being to continue to pay claims, and to pursue the issue of exoneration at a later date by way of subrogation.

3.8.13 It was noted that the shipowner and the Gard Club had recently notified the 1971 Fund that, in the light of developments in the Venezuelan legal proceedings, they would not plead exoneration under Article III.2(c) of the 1969 Civil Liability Convention until a later date. It was noted that they had also informed the 1971 Fund that, as regards the cause of the incident, they proposed to invoke a defence to the claim by the Republic of Venezuela as set out in Article III.3 of the 1969 Civil Liability Convention, on the basis that the incident was caused at least in part by the negligence of the Instituto Nacional de Canalizaciones (INC), a national body responsible for the maintenance of the channel, and/or by the harbour master (an employee of the Ministry of Transport).

3.8.14 The Committee noted that the shipowner and the Gard Club had expressed the view that in principle the question of exoneration under Article III.2(c) should not affect the claimants in Venezuela, and that they had maintained that the substantial claims made in the Venezuelan proceedings raised important issues of common interest to the 1971 Fund and the Club. It was noted that, in the view of the shipowner and the Club, it would be desirable to avoid conflicts of interest between the Club and the Fund in the proceedings, as might occur if the issue of exoneration were to be raised by the shipowner and Club. The Committee noted that they had argued that it would be better for the Club and the 1971 Fund to collaborate in formulating a common defence under Article III.3 of the 1969 Civil Liability Convention and Article 4.3 of the 1971 Fund Convention on the basis that the damage was substantially caused by the negligence of INC, with the result that the claim by the Republic of Venezuela should be correspondingly reduced or rejected.

3.8.15 It was noted that the shipowner and the Gard Club had notified the 1971 Fund that they proposed to provide the Fund with a detailed statement of their position, together with supporting evidence, relating to the prospects of a joint defence. The Committee noted that their position had not yet been finalised pending receipt of further documentation which they were seeking to obtain from INC, but that they had stated that the documentation already obtained indicated that the channel was in an unsatisfactory condition. It was noted that the shipowner had brought proceedings against INC in order to compel it to disclose further relevant documents which were understood to exist and that, according to information received from the shipowner and the Gard Club, INC had not disputed the existence of these documents but had been resisting these proceedings, and had not complied with demands made by the Criminal Court in Maracaibo to hand over documents in its possession.

3.8.16 A number of delegations stated that in general the 1971 Fund should co-operate with the shipowner and the P & I Club concerned, but that in this case there would be a conflict of interest between the shipowner and the Gard Club on the one hand and the 1971 Fund on the other hand, if the shipowner and the Club were to invoke the exoneration under Article III.2(c) of the 1969 Civil Liability Convention.

3.8.17 Some delegations stated that the 1971 Fund should pursue its investigation into the cause of the incident, since the Fund might have to take a position in the near future as to whether the shipowner would be exonerated under Article III.2(c) and whether Article III.3 could be invoked against the claim by the Republic of Venezuela.

3.8.18 The Director stated that the legal issues involved were complex since the question was whether negligence, if any, on the part of INC could be attributable to the Republic of Venezuela.

3.8.19 The Executive Committee instructed the Director to make all efforts to obtain further information as to the cause of the incident and to co-operate with the shipowner and the Club, bearing in mind the possibility of a conflict of interest between the shipowner/Club and the 1971 Fund.

Pro-rating of payments

3.8.20 The Director informed the Committee that the Gard Club had raised the issue as to whether the policy of the 1971 Fund as regards pro-rating was appropriate, ie that the 1971 Fund required the shipowner/P & I Club to pay up to the limitation amount applicable to the ship under the 1969 Civil Liability Convention before the 1971 Fund started any payments. He mentioned that the Club had suggested that it might be more appropriate if the shipowner/Club and the 1971 Fund shared the payments from the beginning. The Director stated that he intended to examine the issue and report his findings to the Executive Committee in due course.

3.9 *Pontoon N°300* incident

3.9.1 The Executive Committee took note of the developments in respect of the *Pontoon N°300* incident, as set out in document 71FUND/EXC.58/9.

3.9.2 A number of delegations expressed concern that the *Pontoon N°300* appeared to be uninsured and that its beneficial owners could not be traced.

3.9.3 One delegation pointed out that, as the *Pontoon N°300* was not designed for the carriage of oil, it was unlikely that the barge would have had insurance for liabilities under the 1969 Civil Liability Convention in any event.

3.9.4 It was generally considered that the relevant flag and port State control authorities in 1971 Fund Member States should be encouraged to check that ships entering their country's ports had liability insurance as required under the 1969 Civil Liability Convention.

3.9.5 Although there was still a degree of uncertainty as to the total amount of the claims arising out of the *Pontoon N°300* incident, the Executive Committee decided to increase the limit of the 1971 Fund's payments to 75% of the loss or damage actually suffered by the respective claimants.

3.9.6 The Director was instructed by the Executive Committee to continue his investigations and explore the possibilities of taking recourse actions.

3.10 *Vistabella* incident

3.10.1 The Executive Committee took note of the developments in respect of the *Vistabella* incident as contained in document 71FUND/EXC.58/10.

3.10.2 It was recalled that the 1971 Fund had paid compensation amounting to FFr8.1 million (£986 500) to the French Government in respect of clean-up operations in the French territories of St Barthélemy and Guadeloupe, and had paid further compensation of FFr110 000 (£11 040) and US$8 100 (£4 200), and that further claims against the 1971 Fund were time-barred.

3.10.3 The Committee recalled that the French Government had brought legal action against the owner of the *Vistabella* and his insurer in the Court of first instance in Basse-Terre (Guadeloupe), claiming compensation for clean-up operations carried out by the French Navy. It was also recalled that the 1971 Fund had intervened in the proceedings and acquired by subrogation the French Government's claim, and that the French Government had subsequently withdrawn from the proceedings.

3.10.4 It was recalled that, in a judgement rendered in 1996, the Court of first instance had held that the 1969 Civil Liability Convention was not applicable, since the *Vistabella* had been flying the flag of a State (Trinidad and Tobago) which was not Party to that Convention, and instead the Court applied French domestic law. It was also recalled that the Court had accepted that, on the basis of subrogation, the 1971 Fund had a right of action against the shipowner and a right of direct action against his insurer. It was further recalled that the Court had held that it was not competent to consider the 1971 Fund's recourse claim for damage caused in the British Virgin Islands, and that it had awarded the Fund the right to recover the total amount which it had paid for damage caused in the French territories.

3.10.5 The Executive Committee recalled that, in October 1996, it had taken the view that the judgement was wrong on two points: firstly, the 1969 Civil Liability Convention which formed part of French law applied to damage caused in a State Party to that Convention, and this was independent of the State of the ship's registry, and secondly, the French courts were competent under that Convention to consider claims for damage in any State Party.

3.10.6 It was recalled that the Executive Committee had decided, however, that the 1971 Fund should not appeal against this judgement as regards the applicability of the 1969 Civil Liability Convention, as it would hardly have any value as a precedent in other cases and the Court had awarded the 1971 Fund the total amount paid by it for damage in the French territories and the amount paid by the Fund for damage outside these territories was, in the Committee's view, insignificant.

3.10.7 The Committee recalled that the insurer had appealed against the judgement on the basis that French courts had no jurisdiction over foreign insurers.

3.10.8 The Committee noted that the Court of Appeal had rendered its judgement on 23 March 1998, and that the Court had held that the 1969 Civil Liability Convention applied to the incident, since the criterion for applicability was the place of the damage and not the flag State of the ship concerned. It was also noted that the Court had further held that the Convention applied to the direct action by the 1971 Fund against the insurer, and that this applied also in respect of an insurer with whom the shipowner had taken out insurance although not having been obliged to do so, since the ship was carrying less than 2 000 tonnes of oil in bulk as cargo.

3.10.9 It was noted that the case had been referred back to the Court of first instance which would have to decide on the merits of the case as regards the direct action taken by the 1971 Fund against the insurer.

3.11 *Irving Whale*

3.11.1 The Executive Committee took note of the developments in respect of the *Irving Whale* incident, as contained in document 71FUND/EXC.58/11.

3.11.2 It was recalled that the Canadian registered oil barge *Irving Whale*, loaded with 4 270 tonnes of heavy fuel oil, had sunk on 7 September 1970 in approximately 67 metres of water in the Gulf of St Lawrence (Canada). The Executive Committee recalled that the 1971 Fund Convention entered into force in respect of Canada in April 1989. The Committee recalled that, in 1991, it had been determined

that there were still over 3 000 tonnes of oil on board, and that the Canadian Government had decided to raise the barge. It was further recalled that the refloating had taken place in the summer of 1996, that the barge had been successfully removed and that a small quantity of oil had been released during the refloating operation. The Committee noted that the cost of the preparations in 1995 and of the refloating operation in 1996 (including clean-up costs) amounted to some Can$42 million (£19 million).

3.11.3 The Executive Committee recalled that in 1997, the Canadian Government had taken action before the Federal Court of Canada against the owners and operators of the *Irving Whale*, claiming compensation for the above-mentioned expenses of Can$42 million. It was recalled that the Canadian Ship-Source Oil Pollution Fund was a party to the proceedings by statute, and that the defendants had denied liability although not all formal defences had yet been filed. It was noted that the Canadian Government had not claimed compensation for the cost of the clean-up operations incurred in connection with the sinking of the *Irving Whale* in 1970, but that the claim related only to the cost of the preparations in 1995 and the refloating operation (including clean-up) in 1996.

3.11.4 The Committee recalled that the Government of Canada had notified the 1971 Fund of the legal action, and that the Director had informed the Government that, in his view, the 1971 Fund Convention did not apply in this case.

3.11.5 At its 56th session, the Executive Committee shared the Director's view that, although the lifting of the barge was carried out in 1996, these operations should be considered as being part of the incident which had started with the sinking of the barge in 1970. It was noted that 'incident' was defined in the Conventions as any occurrence or series of occurrences having the same origin (Article I.8 of the 1969 Civil Liability Convention and Article 1.1 of the 1971 Fund Convention).

3.11.6 It was recalled that a similar situation had been addressed by the 1971 Fund in the *Czantoria* case (Canada, 1988), when the Executive Committee had decided that the 1969 Civil Liability Convention and the 1971 Fund Convention did not apply to damage sustained in a given State after the entry into force of the respective Convention for that State resulting from an incident occurring before the entry into force (document FUND/EXC.24/6, paragraph 3.4.6).

3.11.7 It was recalled that the Executive Committee had decided at its 56th session, in the light of the Executive Committee's decision in the *Czantoria* case, that the claim presented by the Canadian Government in the *Irving Whale* case did not fall within the scope of application of the 1971 Fund Convention (document 71FUND/EXC.56/2, paragraph 4.1.6).

3.11.8 The Executive Committee noted that, in March 1998, the 1971 Fund had submitted a note to the other parties involved in the court proceedings informing them that, in the Fund's view, the 1971 Fund Convention did not apply to this incident and giving the reasons therefor. It was noted that the 1971 Fund had requested the parties to acknowledge that the Fund had no involvement in this matter, but that the other parties were not prepared to make such an acknowledgement.

3.11.9 It was noted that, in the light of this situation, the 1971 Fund was preparing a submission to the Court requesting the latter to declare that the 1971 Fund had no liability with regard to the *Irving Whale* incident.

3.12 *Daiwa Maru N°18* incident

3.12.1 The Executive Committee took note of the information contained in document 71FUND/EXC.58/12 in respect of the *Daiwa Maru N°18* incident.

3.12.2 It was noted that claims totalling ¥18.3 million (£85 000) had been received from contractors, that these claims had been assessed at ¥15.6 million (£72 000) and that the limitation amount applicable to the ship was estimated at ¥3.5 million (£16 000).

3.12.3 The Committee recalled that, when the *Daiwa Maru N°18* incident was reported to the Executive Committee at its 57th session, the question had been raised whether the Conventions applied to this incident, since it was uncertain whether the spilt oil could be considered as 'cargo'.

3.12.4 It was noted that the Director had investigated further the circumstances of this oil spill and had been informed by the 1971 Fund's surveyors that, after the oil had entered the manifold (part of the cargo system of the *Daiwa Maru N°18*) but before it had entered any cargo tank, the oil leaked from the end of a hose which was connected to the manifold and lying on the deck.

3.12.5 The Executive Committee noted that the shipowner's P & I insurer, the Japan Ship Owners' Mutual Protection & Indemnity Association (JPIA), had informed the 1971 Fund that oil was generally considered as cargo once it entered the pipe of a ship through a loading arm on the port side and that the master of the ship had responsibility for the oil from that moment. It was noted that JPIA had also stated that it intended to cover this incident under its P & I insurance. The Committee also noted that the 1971 Fund's Japanese lawyer agreed with JPIA's view.

3.12.6 The Committee shared the Director's view that, in the light of the explanations set out above, the spilt oil should be considered as 'cargo' and that the incident therefore fell within the scope of application of the 1969 Civil Liability Convention and the 1971 Fund Convention.

3.12.7 The Executive Committee considered a request by JPIA that the 1971 Fund should in this case waive the requirement to establish the limitation fund.

3.12.8 The Executive Committee noted that disproportionately high legal costs would be incurred in establishing the limitation fund in respect of this incident compared with the low limitation amount under the 1969 Civil Liability Convention in this case, and took note of the Committee's decisions at previous sessions in respect of other requests to the same effect. In view of these facts, the Committee agreed to waive the requirement to establish the limitation fund in respect of the *Daiwa Maru N°18* case, so that the 1971 Fund could, as an exception, pay compensation and indemnification without the limitation fund being established.

3.13 *Boyang N°51* incident

3.13.1 The Executive Committee took note of the information contained in document 71FUND/EXC.58/13 on the *Boyang N°51* incident, which had occurred in the Republic of Korea on 25 May 1995. It was noted that the 1971 Fund had been notified of the incident by the P & I insurer of the vessel with which the *Boyang N°51* had collided (the *Ocean Daisy*) on 14 April 1998, ie nearly three years after the incident.

3.13.2 It was noted that the owner of the *Boyang N°51* had commenced limitation proceedings in the competent District Court on the ground that the *Boyang N°51*'s liability for the cost of the clean-up operations incurred by the owner of the *Ocean Daisy* could be limited under the 1969 Civil Liability Convention separately without first having made a set off between the counter claims of the parties. The Committee noted that the owner of the *Ocean Daisy* had maintained that limitation could only apply to claims after the counter claims of the two parties had been set off against each other. It was noted that the District Court had agreed with the position of the owner of the *Boyang N°51* and had granted the request for limitation of liability and determined the limitation amount at 19 817 SDR (£15 000).

3.13.3 The Executive Committee noted that the owner of the *Ocean Daisy* had appealed against the decision, but that the Court of Appeal had upheld the District Court's decision. It was also noted that the owner of the *Ocean Daisy* had appealed to the Supreme Court, where the case was pending, and that, should the Supreme Court uphold the *Boyang N°51*'s right of limitation, the owner of the *Ocean Daisy* would submit a claim to the 1971 Fund, since he would not be fully reimbursed for his payments in respect of clean-up costs.

3.13.4 It was noted that the owner of the *Ocean Daisy* had taken the view that there should be a 50:50 apportionment of liability between the two vessels, and had stated that, if the *Boyang N°51* were entitled

to limit his liability, the payments which the *Ocean Daisy* would receive from the limitation fund would leave an amount of some Won 50 million (£21 000) unpaid. The Committee noted that if the Supreme Court were to reverse the decision of the Court of Appeal, however, the clean-up costs incurred by the owner of the *Ocean Daisy* would be set off in full against the claim of the owner of the *Boyang N°51*.

3.13.5 The Committee noted that the owner of the *Ocean Daisy* had stated that he would like to reach an out-of-court settlement with the 1971 Fund in respect of his claim and had therefore requested that the 1971 Fund should agree to an extension of the time bar period. It was noted that the three-year period laid down in Article 6.1 of the 1971 Fund Convention for the submission of claims against the 1971 Fund expired on or about 25 May 1998, and that it was unlikely that the Supreme Court would make a final decision on the right of limitation before that date.

3.13.6 The Executive Committee decided, in line with the position taken by the 1971 Fund in previous cases, that the three year period laid down in Article 6.1 of the 1971 Fund Convention could not be extended by the parties.

3.14 *Jeong Jin N°101* incident

The Executive Committee took note of the developments in respect of the *Jeong Jin N°101* incident, as contained in document 71FUND/EXC.58/14.

4 Any other business

4.1 It was noted that the Committee would hold its normal autumn session during the week of 26 - 30 October 1998.

4.2 It was agreed that the Director should decide at a later stage, after consultation with the Chairman, whether it would be necessary for the Committee to hold a session during June or July 1998.

5 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 71FUND/EXC.58/WP.1, was adopted, subject to certain amendments.