INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
61st session
Agenda item 6

71FUND/EXC.61/14
29 April 1999

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RECORD OF DECISIONS OF THE SIXTY-FIRST SESSION OF THE EXECUTIVE COMMITTEE

(held from 27 to 29 April 1999)

Chairman: Mr A H E Popp QC (Canada)

Vice-Chairman: Mr M Janssen (Belgium)

Opening of the session

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 71FUND/EXC.61/1.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

Algeria	Italy	Poland
Belgium	Malaysia	Russian Federation
Canada	New Zealand	United Arab Emirates
Colombia	Nigeria	Venezuela
Fiji		

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:

China (Hong Kong Special Administrative Region)
Estonia
Gabon
Iceland
Morocco
Portugal
Sierra Leone
Vanuatu

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

Former Member States:
Australia
Bahamas
Cyprus
Denmark
Finland
France
Germany
Greece
Ireland
Japan
Liberia
Marshall Islands
Mexico
Monaco
Netherlands
Norway
Republic of Korea
Spain
Sweden
Tunisia
United Kingdom

Other States:
Panama
Argentina
Brazil
Chile
Ecuador
Georgia
Latvia
Peru
Philippines
Saudi Arabia
Singapore
Uruguay
United States

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

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

International non-governmental organisations:
Comité Maritime International (CMI)
Cristal Limited
International 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 Election of Chairman and Vice-Chairman

The Executive Committee decided to postpone consideration of this item until its 62nd session.

4 Incidents involving the 1971 Fund

4.1 *Haven*

4.1.1 The Executive Committee took note of the information contained in document 71FUND/EXC.61/2. In particular, the Committee noted that on 4 March 1999 the Italian State, the shipowner, the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd (UK Club) and the 1971 Fund had signed an agreement on a global settlement of all outstanding issues. The Committee also noted that in order to become effective the agreement had to be approved by the Corte dei Conti and that payments under the agreement would be made once all legal actions in the Italian courts had been withdrawn. It was further noted that a separate agreement had been concluded between the shipowner/UK Club and the 1971 Fund on the issue of indemnification under Article 5.1 of the 1971 Fund Convention.

4.1.2 The Committee noted that the agreement between the Italian State, the shipowner/UK Club and the 1971 Fund was based on a maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention of 60 million Special Drawing Rights and that the amount to be paid by the 1971 Fund to the Italian State did not relate to environmental damage.

4.1.3 The Italian delegation made the following statement:

> On 4 March 1999 the agreement concerning the *Haven* incident was signed in Rome between the Secretary General of the Presidency of the Council of Ministers, the representative of the 1971 Fund, the UK Club and the shipowner. This agreement puts an end to proceedings that have lasted for many years and that reached a turning-point when the Italian Parliament approved Law N° 239 on 16 July 1998 which authorised the Prime Minister, or his delegate, to close such a dispute by a transaction.
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> On its departure from Rome, the Italian delegation was notified that the agreement had been registered by the Corte dei Conti and had therefore become fully binding and effective. Steps will immediately be taken to make effective, at the earliest date, the provisions of the agreement, ie the withdrawal of the legal actions in the Italian courts and the payment of the agreed amount.
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> The Italian delegation takes this opportunity to convey its thanks to all the delegations that contributed to reaching such an important result, achieved after long and difficult negotiations, and particularly to the Director of the 1971 Fund, Mr Jacobsson, who has always striven for the finalisation of the agreement. Special thanks are also addressed to the UK Club and to its representative, Mr Readman, who has given excellent support and without whose efforts the agreement would not have been possible.
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> The Act that envisages Italy's accession to the 1992 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention has been approved by the Italian Senate and is under consideration by the Chamber of Deputies for final approval which, it is hoped, will be achieved shortly.

4.1.4 The Executive Committee noted with great satisfaction that it had finally been possible to resolve all outstanding issues. The Committee expressed its gratitude especially to the 1971 Fund's lawyer, Professor Nicola Balestra, for his great contribution to the successful outcome of the *Haven* case.

4.2 *Aegean Sea*

4.2.1 The Director introduced document 71FUND/EXC.61/3 which set out the developments which had taken place in respect of the *Aegean Sea* incident since the Committee's 60th session.

Meeting with Spanish Government

4.2.2 It was recalled that at its 59th session the Executive Committee had instructed the Director to continue his discussions with the Spanish Government so as to enable progress to be made towards resolving the outstanding issues. The Committee noted that on 8 April 1999 a meeting had been held between a representative of the Spanish Government and the Director, details of which were given in section 2 of document 71FUND/EXC.61/3. It was noted that at that meeting it had been agreed that in order to facilitate progress efforts should focus on the following matters:

(i) an examination of the documentation to be submitted by the Spanish Government in support of the claims;
(ii) an analysis of the legal issue relating to time bar in respect of certain claimants; and
(iii) the distribution of liabilities between the Spanish State and the shipowner/United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd (UK Club)/1971 Fund.

Statement by Spanish delegation

4.2.3 The Spanish observer delegation made the following statement:

The Spanish Government wishes to reaffirm its determination to complete the current negotiations with the 1971 Fund in respect of all the Spanish claims arising out of the *Aegean Sea* incident. This is the oldest incident which remains unresolved in the 1971 Fund. The Spanish Government is committed to seeking a single out-of-court settlement of all outstanding issues in 1999, and efforts should be made by all the parties involved in this direction.

On the issues which remain unresolved the position of the Spanish Government is as follows:

A As regards the official assessment of the Spanish claims made by the Spanish Administration, the Spanish Government is prepared to present claims for compensation on behalf of national claimants and will submit the technical documentation to support all the pending claims in the fishery and mariculture sectors in the very near future. The Government supports the Director's recommendation to instruct the experts engaged by the 1971 Fund to examine this documentation with very high priority. It is expected that a permanent and bilateral mechanism will be established involving both sides to hold the required meetings with the participation of the Spanish experts and of the 1971 Fund's experts. It is the understanding of the Spanish Government that this group will examine all the Spanish claims without exception.

B As far as the time bar issue is concerned, the Spanish Government made available to the 1971 Fund on 12 April 1999 a third legal opinion which confirms that none of the Spanish claims are time-barred. It is expected that the three legal opinions obtained by the Spanish Government will be submitted to the Civil Court in due course.

C Regarding the question of the distribution of liabilities, the Spanish Government is prepared to extend by one year the agreement reached on 12 June 1998 leaving aside for the time being the question of recourse. It is the opinion of the Spanish Government that this question will have to be resolved at the end of the negotiations, because from a legal point of view the rights of subrogation which the 1971 Fund might have against third parties have to be exercised on the basis of compensation already paid.

The Spanish Government hopes that the four parties involved in these negotiations (ie the 1971 Fund, the shipowner/UK Club, the Spanish Government and the Spanish claimants) can discuss the possible terms of a global settlement of the pending disputes, on the basis of a spirit of transaction, for consideration at the next Assembly of the 1971 Fund to be held in October 1999.

Consultation Group

4.2.4 The Committee noted that the *Aegean Sea* Consultation Group set up to assist the Director in his search for a solution of the outstanding issues had met on 27 April 1999. Mr Charles Coppolani (France) made a statement on behalf of the Consultation Group which can be summarised as follows.

A meeting of the Consultation Group established by the Executive Committee was held on 27 April 1999 and was attended by the Spanish delegation. A frank and useful exchange of views took place in order to clarify the respective positions. The Consultation Group addressed the following three issues.

As regards the 1971 Fund's recourse action against the Spanish State, the members of the Consultation Group were in favour of extending the agreement which had been

concluded on 12 June 1998. However, since the 1971 Fund would have to commence recourse action by 12 June 1999, it was necessary from a practical point of view that agreement on such an extension be signed before 21 May 1999. The Group therefore recommended that, if the agreement was not signed by that date, the Director should commence recourse action to protect the 1971 Fund's interests. The Spanish delegation had indicated that agreement could be reached in time.

The Consultation Group noted that the Spanish Government had made available to the 1971 Fund a legal opinion dealing with the issue of time bar.

The most important issue was that relating to the settlement of the claims. The Consultation Group stated clearly and repeatedly that no progress in this regard could be made until the 1971 Fund had received evidence from the claimants of the damage allegedly suffered. The Group regretted that no progress had been made so far but noted with satisfaction the statement by the Spanish delegation that documentation in support of the claims would be presented to the 1971 Fund in the very near future.

The Consultation Group considered that when this documentation was received, the Fund should examine it as promptly as possible, taking into account the resources and workload of the Secretariat and the availability of experts. The Group believed that it would then be possible to establish a timetable for meetings between experts in order to determine the points on which there was agreement and those in respect of which there was not. The Group emphasised that the task of the experts was only to make recommendations.

The Consultation Group considered that a global settlement would be preferable to protracted litigation. The Group nevertheless took the view that progress towards such a settlement could be made only if the Fund was in a position to examine the evidence and form its own opinion on the admissibility of the claims. The Group also believed that progress towards such an agreement would be possible only if the parties worked in a spirit of compromise.

Executive Committee's consideration

4.2.5 The Executive Committee noted with satisfaction that the Spanish Government had undertaken to make available to the 1971 Fund in the very near future extensive documentation in support of the claims in the fishery and mariculture sectors. The Committee also noted that the Director intended to instruct the experts engaged by the 1971 Fund and the UK Club to examine this documentation with priority. It was further noted that the Director hoped that this examination and the discussions between the Spanish Government's experts and the experts engaged by the 1971 Fund and the UK Club would make it possible to present a report on the assessment of the claims to the Committee's 62nd session.

4.2.6 The Executive Committee noted that the Spanish Government had made available an additional legal opinion given by four professors at Universidad Carlos III in Madrid, dated November 1997, dealing *inter alia* with the issues of time bar and the distribution of liabilities between the Spanish State and the shipowner/UK Club/1971 Fund. It was also noted that the issues dealt with in the opinion would be discussed between the Spanish Government and the Director in due course.

4.2.7 It was noted that the procedure for the execution of the judgement rendered by the Court of Appeal on 18 June 1996 would commence in the near future.

4.2.8 It was recalled that a number of claimants had brought actions against the 1971 Fund in the Civil Court of La Coruña and that the question had arisen whether these claims were time-barred. It was noted that these actions would be served on the 1971 Fund in the near future. It was also noted that, once served, the 1971 Fund had to present all its defences within a short period of time, including any defence that the claims were time-barred, and that it was not possible to raise that defence at a later stage.

4.2.9 In view of the different opinions presented in respect of the time bar issue, the Director was instructed to study further this very complex issue. The Executive Committee confirmed the instructions given at its 60th session that, pending further study, the Director should raise the defence of time bar in the civil proceedings.

4.2.10 The Committee recalled that there existed differences of opinion between the Spanish State and the 1971 Fund as to the interpretation of the judgements by the Criminal Court of first instance and the Court of Appeal in La Coruña in respect of the distribution of liability between the Spanish State and the shipowner/UK Club/1971 Fund. It was also recalled that the Spanish Government maintained that the UK Club and the 1971 Fund should pay up to the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention (60 million SDR) and that the Spanish State would pay compensation only if and to the extent that the total amount of the established claims exceeded that amount. It was further recalled that the Fund maintained that the final distribution of the compensation payments between the various parties declared civilly liable should be: the UK Club and the 1971 Fund 50% of the total compensation for the damage (within their respective limits laid down in the Conventions) and the State the remaining 50%.

4.2.11 The Executive Committee recalled that on 12 June 1998 the Spanish Ambassador in London and the Director had signed an agreement under which the Spanish State undertook not to invoke the time bar if the competent bodies of the 1971 Fund were to decide to take recourse action against the Spanish State to recover 50% of the amounts paid by the Fund, provided that such an action was taken within one year of the date of the agreement. The Committee noted that the Spanish Government had indicated its agreement to extending the period for the 1971 Fund's taking recourse action to 12 June 2000.

4.2.12 The Executive Committee authorised the Director to conclude an agreement with the Spanish State to this effect as soon as possible. The Committee instructed the Director that, if an agreement on such an extension were not signed by 21 May 1999, the Director should make the necessary preparations for taking recourse action against the Spanish State by 12 June 1999 in order to preserve the Fund's rights, pending a resolution to the disagreement between the State and the Fund.

4.2.13 The Director was instructed to continue his study of the issue relating to the distribution of liabilities.

4.2.14 The Executive Committee emphasised that the 1971 Fund could not commence its assessment of the pending claims until the Spanish Government had made available the supporting documentation referred to by the Spanish delegation. It was stated that the longer the presentation of the documents was delayed, the less likely it was that a report on the claims could be presented to the Executive Committee's 62nd session in October 1999.

4.2.15 Some delegations expressed the hope that a settlement of all outstanding issues could be reached as quickly as possible and that it would be most unfortunate if these issues could not be settled out of court. They also suggested that meaningful discussions should take place between the Spanish Government and the 1971 Fund as soon as possible.

Possible suspension of legal proceedings

4.2.16 The Spanish delegation stated that it had consulted the lawyers representing two groups of claimants in the fishery, aquaculture and mariculture sectors and that these lawyers had indicated that their clients were prepared to agree with the 1971 Fund to suspend litigation provisionally before the Spanish courts, both as regards the procedure for the execution of the criminal judgement and as regards the civil proceedings. That delegation expressed the view that such a provisional suspension would facilitate negotiations between the 1971 Fund and the Spanish Government but that it was for the claimants and the 1971 Fund to consider whether to agree to such a provisional suspension.

4.2.17 The Committee considered that the provisional suspension of the legal proceedings before the courts would benefit the negotiations between the Spanish Government and the 1971 Fund. It was

noted, however, that this issue had not yet been fully discussed with the 1971 Fund's lawyer. The Committee also noted that this issue would have to be discussed with the other parties involved in the proceedings, in particular the shipowner and the UK Club.

4.2.18 The Executive Committee decided to authorise the Director to agree with the claimants to request the court to suspend the legal proceedings before the Spanish courts, provided that the Director, after consultation with the 1971 Fund's lawyer, was of the view that such a suspension would not prejudice the Fund's position.

4.3 *Braer*

4.3.1 The Executive Committee took note of document 71FUND/EXC.61/4 which set out the developments which had taken place in respect of the *Braer* incident since the Committee's 60th session, in particular, that the total amount of the claims in court, originally £80 million, stood at £37 million, after a number of claims had been settled out of court, withdrawn from the court proceedings or reduced in amounts.

4.3.2 The United Kingdom observer delegation invited the Executive Committee to consider authorising the Director to make payments to those claimants whose claims had been approved but not paid as soon as the total amount of claims was known. That delegation stated that even partial payment of agreed settlement amounts would help to relieve the financial hardship being suffered by some claimants.

4.3.3 The Committee noted the request of the United Kingdom delegation and agreed that the issue of partial payments should be considered as soon as there was clarity as to the total amount of the claims.

4.4 *Keumdong N°5*

4.4.1 The Executive Committee took note of the developments in respect of the *Keumdong N°5* incident, as set out in document 71FUND/EXC.61/5. It was noted that the competent Korean Court had rendered judgements in relation to claims by the Yosu Fishery Co-operative and an arkshell fishery co-operative, in both cases awarding for the most part apparently arbitrary amounts, since the Court had considered it impossible, on the basis of the evidence presented by the claimants, to quantify the damage suffered. The Committee noted that the 1971 Fund had appealed against these judgements.

4.4.2 The Executive Committee considered whether to pursue the appeals against the Court's judgements in respect of the Yosu Fishery Co-operative and the arkshell fishery co-operative claims. It examined the reasoning in the judgements as well as the Director's legal analysis of the situation as set out in section 5 of document 71FUND/EXC.61/5.

4.4.3 It was noted that the Court of first instance had held that damage had been caused in respect of both groups of claimants, whereas the 1971 Fund's experts had expressed the view that, apart from business interruptions in respect of common fishery grounds, intertidal culture farms and fishing vessels, there was no evidence that the oil or the dispersants used to combat the spill had in fact caused any damage. The Executive Committee instructed the Director to pursue the appeals in respect of the question of facts.

4.4.4 The Executive Committee recalled that the 1971 Fund had consistently taken the position that compensation was payable under the 1969 Civil Liability Convention and the 1971 Fund Convention only for economic losses actually suffered. The Committee instructed the Director to appeal against the decisions to allow compensation for 'pain and suffering' or 'condolence money' and against the apparently arbitrary methods used by the Court to determine the compensation.

4.4.5 One delegation drew attention to the need to maintain some flexibility as regards the terminology used to describe the compensation awarded, provided that there was pollution damage and that the amount of the losses was not determined on the basis of an abstract quantification.

4.4.6 The Committee noted that the Court had awarded compensation to local fishermen who had operated without the required licence or registration. It was recalled that at its 60th session the Committee had decided to maintain the general policy of not accepting claims from commercial fishermen who carried out their activities in breach of licensing requirements laid down in or based on national legislation (cf document 71FUND/EXC.60/17, paragraphs 5.3 and 5.4). The Committee decided that, since there were no known extenuating circumstances in respect of the claims under consideration in the *Keumdong N°5* case, the claims from the commercial fishermen who carried out their activities without meeting the licensing requirements laid down in or based on Korean law were not admissible and that the appeal should therefore be pursued also on this point.

4.5 *Sea Prince*

4.5.1 The Executive Committee noted that the question had arisen whether certain claims filed in the limitation proceedings had become time-barred *vis-à-vis* the 1971 Fund, namely a subrogated claim by the shipowner's P & I insurer (the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd (UK Club)) for payments made to various contractors, claims by three village fishery associations and a claim by the UK Club for indemnification under Article 5.1 of the 1971 Fund Convention (document 71FUND/EXC.61/6).

UK Club's subrogated claim

4.5.2 The Committee took note of the views expressed by the UK Club and the opinion given by the 1971 Fund's lawyers, as well as of the Director's analysis (document 71FUND/EXC.61/6, sections 6.2, 6.3 and 6.4, respectively).

4.5.3 It was noted that the incident had occurred on 23 July 1995, that the shipowner had commenced limitation proceedings on 30 May 1996, that on 22 August 1996 the Court had served notice of the limitation proceedings on the 1971 Fund at the request of the shipowner and that the 1971 Fund had intervened in those proceedings on 24 August 1996.

4.5.4 The Committee noted the Director's opinion on the issues involved as set out in paragraphs 6.4.6 - 6.4.9 of document 71FUND/EXC.61/6:

> The Executive Committee has consistently taken the view that a uniform interpretation of the provisions of the 1969 Civil Liability Convention and the 1971 Fund Convention is important for the functioning of the international compensation system. However, on certain points the Conventions specifically states that the issue in question should be governed by national law. Under Article 7.6 of the 1971 Fund Convention a notification has certain effects if it "has been made in accordance with the formalities required by the law of the court seized".
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> The UK Club has through its payments to the various contractors acquired their claims by subrogation, and has therefore acquired the same right as these contractors. The contractors had presented their claims against the shipowner/UK Club in the limitation proceedings, and once the shipowner/UK Club had paid these claims, they acquired their rights in these proceedings.
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> It appears that, if as a matter of Korean law the notification of the limitation proceedings to the 1971 Fund made by the shipowner through the Court on 22 August 1996 is sufficient to satisfy the requirements of Articles 6.1 and 7.6 insofar as the UK Club's subrogated claims are concerned, those claims are not time-barred. As the advice received is that the Korean Courts would decide that this notification does suffice, in the

Director's view the 1971 Fund ought not to take the opposite view. This is particularly so since the notification was made in such time and in such manner that the 1971 Fund was able to intervene effectively in the limitation proceedings, and the Fund did in fact present objections in those proceedings to the UK Club's claims.

4.5.5 It was noted that the amounts of a number of items of the UK Club's claims had been approved by the Director before the expiry of the three-year time bar period. The Committee noted that, in accordance with the position taken by the Assembly at its 18th session, if claimants with whom the 1971 Fund had agreed a full settlement of the admissible quantum of their claims but where no payment or only a partial payment had been made did not take legal action, the 1971 Fund would not consider their claims to be time-barred (document FUND/A.18/26, paragraphs 29.1 and 29.2).

4.5.6 A number of delegations emphasised the importance that the 1971 Fund maintained consistency in its decisions and that there was equal treatment of all claimants, independent of where the incident occurred and the type of claimant involved. It was pointed out, however, that the principles of consistency and equal treatment nevertheless allowed the 1971 Fund to distinguish between cases where the facts were not the same, and the point was made that every incident had its own particular characteristics.

4.5.7 It was recalled that in the *Haven* case, the 1971 Fund had taken the view that in order to prevent a claim from becoming time-barred a claimant had to bring legal action against the 1971 Fund or notify the 1971 Fund under Article 7.6, even if the Fund had intervened in the legal proceedings.

4.5.8 Some delegations considered that there was no difference between the *Haven* case and the claims under consideration in the *Sea Prince* case and that the principle of consistency required that the UK Club's claims should be considered as time-barred. A number of other delegations expressed the view that there was a significant difference between the two cases since in the *Haven* case no notification of the proceedings had been made to the 1971 Fund and the Italian procedural rules on notification were different from those in Korea.

4.5.9 The point was made that since the very clear advice given by the 1971 Fund's Korean lawyer was that the Korean courts would consider the claims as not being time-barred, the 1971 Fund should not get involved in litigation by opposing the UK Club's claims on the ground of their being time-barred. A number of delegations took the view that on matters of principle, however, the 1971 Fund might have to oppose claims and enter into litigation even if the legal advice given by the lawyers of the country concerned was that it was unlikely that the national courts would accept the 1971 Fund's position. One delegation stated that the 1971 Fund should not get involved in litigation in cases where the likelihood of success was very slight. Another delegation expressed the view that the issue could be seen from a pragmatic point of view as pay now or pay later after lengthy and costly court proceedings.

4.5.10 Some delegations expressed the view that Articles 6.1 and 7.6 of the 1971 Fund Convention required separate notification to be made by each claimant and that a general notification of the limitation proceedings was not sufficient under the Convention. In their view, this requirement had not been fulfilled and the UK Club's claims were therefore time-barred.

4.5.11 One delegation made the point that although Articles 6.1 and 7.6 dealt with notification of the 1971 Fund, Article 7.6 allowed Member States to lay down in national law appropriate methods for such notification. That delegation stated that if there was no special method for notification under national law, then each party to the proceedings would have to give notice directly to the 1971 Fund. If notice were given through the court in accordance with national law, however, and if the court notified the 1971 Fund in such time and in such a manner that the Fund could effectively intervene as a party to the proceedings, this notification would be acceptable in that delegation's view. That delegation maintained that this position was not in contradiction with the position taken by the 1971 Fund in the *Haven* case.

4.5.12 A number of delegations referred to the fact that Article 6.1 required claimants to bring legal action or notify the 1971 Fund pursuant to Article 7.6, that under Article 7.6 each party to the proceedings should be entitled under the national law of the State to notify the Fund of the proceedings

and that this notification should be made in accordance with the law of the court seized. Those delegations took the view that the reference to national law in Article 7.6 indicated that the notification was a procedural matter for the law of the State concerned. Those delegations referred to the provision in Article 7.6 which stated that notification should be made "in accordance with the formalities required by the law of the court seized". They took the view that the notification made by the shipowner had been made in accordance with the provisions of Article 37 of the Korean Oil Pollution Act and that therefore the requirements of Article 7.6 had been fulfilled. A number of delegations referred to the fact that Article 7.6 also required that notification should be made in such time and in such a manner that the Fund had in fact been in a position to intervene effectively in the limitation proceedings. In the view of those delegations this requirement had been fulfilled.

4.5.13 Other delegations referred to the advice of the Korean lawyers engaged by the 1971 Fund and of those engaged by the UK Club, noting that under Article 37 of the Korean Oil Pollution Act the court could notify the Fund. They noted that this had been done and that the Fund had responded to the notification by intervening in the limitation proceedings.

4.5.14 The Chairman stressed that the key issue was whether the requirements of Article 7.6 had been fulfilled. He noted that some delegations considered that this had not been the case, emphasising that the question of consistency and equal treatment of victims was paramount. He noted that whilst some delegations saw similarity with the *Haven* case, others were of the view that the situation in the *Sea Prince* case was different and should therefore be treated differently. The Chairman also stated that the issue under consideration was an important question of principle which should not be decided on the basis of expediency or compromise.

4.5.15 In summing up the discussion, the Chairman noted that the views of the Executive Committee members were divided on the question of whether or not the UK Club's subrogated claims were time-barred. He considered, however, that the views of former 1971 Fund Member States should also be taken into consideration, as contributors in those States had paid and would have to pay contributions in respect of the incident, which had occurred whilst those States were Parties to the 1971 Fund Convention, and pointed out that the overwhelming majority of the delegations of those States considered that the UK Club's claims were not time-barred.

4.5.16 The Chairman therefore ruled that the views of the delegations of Executive Committee members and those of delegations of former Member States should be considered together. The Chairman concluded that on that basis there was strong support for the Director's proposal that the 1971 Fund should follow the advice of the Fund's Korean lawyer (which was corroborated by the UK Club's Korean lawyer and by the representative of the observer delegation of the Republic of Korea) that the notification of the limitation proceedings which had been made by the Court to the 1971 Fund on 22 August 1996 fulfilled the requirements of Article 7.6 in accordance with the procedural requirements of Korean law, especially since the 1971 Fund had acted upon that notification and intervened in the limitation proceedings. For this reason the Chairman declared that the Committee had decided that the UK Club's subrogated claim should be considered as not being time-barred.

4.5.17 The Canadian delegation asked that it be noted in the Record of Decisions that Canada did not agree with this decision of the Executive Committee. The Canadian delegation expressed the view that the particular notice referred to in Articles 7.6 and 6 of the 1971 Fund Convention related expressly to an action under the 1969 Civil Liability Convention for compensation for pollution damage brought against an owner or his guarantor and that it did not relate to a limitation action brought by an owner. That delegation considered that it followed that notices of a limitation action did not satisfy the requirements of the 1971 Fund Convention itself in order to preclude extinguishing rights to compensation under Article 4 or indemnification under Article 5. It was the Canadian delegation's view that this interpretation of the Convention itself should be maintained by the Executive Committee notwithstanding that some national courts might decide that claims were not time-barred in some cases.

4.5.18 The question was raised as to the proper procedure for taking decisions in the light of the decreasing number of 1971 Fund Member States and the substantial number of former 1971 Fund Member States which had an interest in the Executive Committee's decisions. The Chairman stated that

he had based the ruling set out in paragraph 4.5.16 on Resolution N°11 which had been adopted by the 1971 Fund Assembly at its 3rd extraordinary session (document 71FUND/A/ES.3/7, section 5.1 and Annex). He referred to the fact that the Resolution provided that "former States Parties which have been affected by incidents covered by the 1971 Fund Convention but in respect of which settlements have not yet been finalised, should be entitled to present their views on pending cases in the competent bodies of the 1971 Fund" and that "to the extent that the provisions of the 1971 Fund Convention relating to the obligations to make contributions under Articles 10 and 12 with respect to incidents which occurred before denunciation of the Convention has taken effect continue to apply, such States Parties shall be heard before further decisions concerning the admissibility of claims arising out of such incidents are taken".

4.5.19 Delegations of Executive Committee members as well as a number of delegations of former 1971 Fund Member States gave their strong support to the Chairman's interpretation of Resolution N°11 and his subsequent ruling which took into account the views of former Member States, and confirmed that his ruling was procedurally correct and that such a procedure should be applied in future decision-making within the Executive Committee. The Committee endorsed the continued application of the consensus approach which in the past had always formed the basis of the Committee's decisions. The Committee emphasised that this was the only way in which the views of former Member States could be taken into account in conformity with Resolution N°11.

Village Fishery Associations

4.5.20 As for the claims by three Village Fishery Associations (document 71FUND/EXC.61/6, section 7), the Executive Committee noted that the 1971 Fund's Korean lawyer had expressed the view that although the three Associations had not themselves made a notification to the 1971 Fund, the fact that the shipowner had notified the Fund of the limitation proceedings under Article 7.6 and that the 1971 Fund had intervened in the limitation proceedings in respect of the claims by those Associations would result in the Korean Courts considering that the Associations had fulfilled the requirements of Article 6.1 and that therefore those claims were not time-barred. It was also noted that, as a result of the 1971 Fund's intervention, the Court had fixed the compensation payable to those Associations at the amounts offered by the 1971 Fund. It was further noted that the Director had taken the view that it should be considered that the 1971 Fund had been notified of the claims in accordance with Article 7.6 and that the claims should therefore be treated as not being time-barred.

4.5.21 The Executive Committee decided that the claims of the three Village Fishery Associations should be treated as not being time-barred.

UK Club's claim for indemnification

4.5.22 With respect to the UK Club's claims for indemnification under Article 5.1 of the 1971 Fund Convention, the Committee noted that in the Director's view there was a difference between a claim for compensation and a claim for indemnification, for the reasons set out in paragraph 8.5 of document 71FUND/EXC.61/6.

4.5.23 The Committee also noted the Director's view that, on the basis of a reasonable interpretation of Articles 6.1 and 7.6, the notification made by the shipowner through the Court on 22 August 1996 had prevented the claim for indemnification from becoming time-barred, since this notification had made it possible for the 1971 Fund to intervene in the proceedings (which the Fund had in fact done on 24 August 1996) and had enabled the Fund to protect its interests in respect of claims paid by the shipowner/UK Club which formed the basis of the Club's claim for indemnification.

4.5.24 A number of delegations agreed with the Director's interpretation.

4.5.25 Some delegations expressed doubts as to whether the Director's analysis was correct, as the basis for indemnification was different to that for compensation, and considered that it was not clear whether Korean procedural rules should govern a claim for indemnification. One delegation was of the view that the 1971 Fund should be notified of a claim for indemnification in accordance with the 1971

Fund Convention unless a specific procedure was laid down in the national law, which did not seem to be the case in respect of the Republic of Korea.

4.5.26 The Executive Committee decided that the UK Club's claim for indemnification under Article 5.1 of the 1971 Fund Convention should be treated as not being time-barred.

4.6 *Sea Empress*

4.6.1 The Executive Committee took note of the information contained in document 71FUND/EXC.61/7 concerning the *Sea Empress* incident.

Claims for compensation

4.6.2 The Committee noted that there had been only a few developments in respect of the claims situation and that legal proceedings had been brought against the shipowner, his insurer (Assuranceföreningen Skuld, Skuld Club) and the 1971 Fund in respect of a number of claims.

4.6.3 The Committee also noted the statement made by the United Kingdom delegation that the claim presented by the United Kingdom Government would continue to stand last in the queue until it was clear that all established claims fell below the amount of compensation available under the 1971 Fund Convention. In the view of that delegation, it was likely that the total of all established claims arising out of the *Sea Empress* incident would fall well below that amount and when that was established the United Kingdom Government would be actively pursuing its claim.

Claims by emergency services

4.6.4 The Executive Committee recalled that it had deferred from its 60th session consideration of a claim by a county fire brigade for expenses incurred in providing fire fighting cover during the salvage operations, including costs for labour and the use of vehicles. It was also recalled that in the document submitted to that session (document 71FUND/EXC.60/8, section 3.3) the Director had concluded that, with the exception of providing lighting units to beach cleaning parties, the fire brigade's activities related mainly to operations which had as their primary purpose the salvage of the *Sea Empress* and her cargo.

4.6.5 The United Kingdom observer delegation presented document 71FUND/EXC.61/7/1 in which it raised the general issue of the admissibility of claims from emergency services. That delegation proposed that where there was a clear purpose or justification for the involvement of relevant emergency services, claims should be admissible, and that when considering such claims the 1971 Fund should have regard to the health and safety law in the State concerned and the role defined for the emergency services in any relevant national counter-pollution plan.

4.6.6 A number of delegations expressed interest in the United Kingdom delegation's proposal and supported it in principle, but a number of questions were raised.

4.6.7 Some other delegations took the view that, although they had sympathy for the United Kingdom delegation's proposal, it was necessary to approach this issue very carefully, since there were risks in extending the scope of application of the Conventions to claims by emergency services.

4.6.8 Some delegations stated that they could not support the United Kingdom delegation's proposal. It was suggested that the emergency services were carrying out a public duty which did not entitle them to compensation.

4.6.9 It was generally accepted that the question was whether and, if so, to what extent the activities of emergency services could be considered as falling within the definition of 'preventive measures'. It was pointed out that when emergency services participated in clean-up operations (eg by making vehicles or pumps available for such operations) or in measures which directly prevented or minimised pollution damage, such operations had always been accepted by the 1971 Fund as preventive

measures, provided that the criterion of reasonableness was fulfilled. It was stated, however, that if fire brigades were employed purely for their fire fighting capability the operations could not be considered as preventive measures.

4.6.10 Some delegations stated that emergency services in their countries were becoming privatised and that their involvement in incidents could be viewed as similar to that of any other contractor that had been engaged. A number of delegations considered that the distinction between private and public services was not relevant, since anyone who had carried out preventive measures was entitled to claim compensation under the Conventions. It was accepted that public authorities were entitled to compensation for an element of fixed costs, provided that those costs corresponded closely to the clean-up period in question and did not include remote overhead charges.

4.6.11 Several delegations made the point that it would be necessary to consider claims by emergency services on a case by case basis, in the light of the particular circumstances. A number of delegations considered, however, that it would be useful if the 1971 Fund could establish criteria for the admissibility of such claims, in order to ensure consistency in the consideration of claims of this type.

4.6.12 Some delegations pointed out that the questions raised in the United Kingdom delegation's document related to matters of principle and that these were for the Assembly to address.

4.6.13 The Director was instructed to study the issues involved and to submit a document for consideration by the 1971 and 1992 Fund Assemblies at their October 1999 sessions.

Claim by angling clubs and associations and private owners of fishing rights

4.6.14 The Committee took note of the information contained in document 71FUND/EXC.61/7/Add.1 which dealt with the issue of whether claims by six angling associations, two angling clubs and two private owners of fishing rights had become time-barred. It was noted that a single writ had been issued by the claimants on 11 February 1999 naming as defendants the shipowner and the Skuld Club and that the 1971 Fund had been notified of the writ which had been attached to a letter dated 26 February 1999 and which had been received by the Fund on 2 March 1999.

4.6.15 The Executive Committee agreed with the Director that the damage allegedly suffered by the claimants had not been sustained until 20 March 1996, the date on which the Parliamentary Order closing river fishing took effect. The Committee took the view that the letter of 26 February 1999, which was received by the 1971 Fund on 2 March 1999, fulfilled the notification requirements under Article 7.6 of the 1971 Fund Convention. For this reason, the Committee decided that the claimants had properly notified the 1971 Fund before the expiry of the three-year period laid down in Article 6.1 of the 1971 Fund Convention and that these claims were not time-barred.

4.6.16 The Executive Committee emphasised that the position taken by the Committee on the time bar issue should not be considered as an acceptance on the part of the 1971 Fund that the claims covered by the writ were admissible.

Recourse action

4.6.17 It was noted that the 1971 Fund's experts were continuing their consideration of the various issues relating to the possibility of the Fund's taking recourse action against third parties.

4.7 *Nakhodka*

4.7.1 The Executive Committee took note of the information contained in document 71FUND/EXC.61/8 in respect of the *Nakhodka* incident, in particular noting that further claims had been settled for significant amounts. It was noted that payments of £5.1 million had been made on 27 April 1999, bringing the total amount of compensation paid by the 1971 Fund to £31 million, and that an additional payment of £2 million would be made shortly.

4.7.2 The observer delegation of Japan drew attention to the fact that the three-year time bar period would expire in eight months' time and asked the Director to endeavour to make prompt settlements of the outstanding claims.

Claim for cost of publicity campaign

4.7.3 The Committee considered a claim by the National Federation of Fishery Co-operative Associations (NFFCA) for the costs of a major publicity campaign aimed at preventing and mitigating losses in sales of fish from the area affected by the spill (document 71FUND/EXC.61/8, section 3.4).

4.7.4 The Committee took the view that the cost of the measures undertaken by NFFCA was reasonable and was not disproportionate to the losses which could have been sustained by fishermen in the affected area if no action had been taken. The Committee also considered that the measures were appropriate in the circumstances and offered a reasonable prospect of success. It was noted that the measures related to targeted markets where the produce from the area was sold and that the costs were in addition to NFFCA's normal marketing activities. The Committee took the view, therefore, that the marketing campaign undertaken by the NFFCA met the criteria for admissibility laid down by the 1971 Fund as set out in paragraph 3.4.4 of document 71FUND/EXC.61/8 and that the claim was therefore admissible in principle.

Level of payments

4.7.5 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 level of the 1971 Fund's payments at 60% of the amount of the damage actually suffered by the respective claimants.

Recourse action

4.7.6 It was noted that the Director would continue his investigation into the cause of the incident with a view to the IOPC Funds' taking recourse action, if appropriate.

4.7.7 The Japanese observer delegation stressed the importance that the Director make preparations for a possible recourse action in the near future.

4.8 *Nissos Amorgos*

4.8.1 The Executive Committee took note of the information contained in documents 71FUND/EXC.61/9, 71FUND/EXC.61/9/Add.1 and 71FUND/EXC.61/9/Add.2 on the *Nissos Amorgos* incident.

Claim by ICLAM

4.8.2 The Committee considered a claim submitted by the Instituto para el Control y la Conservación de la Cuenca del Lago de Maracaibo (ICLAM) (section 2.5 of document 71FUND/EXC.61/9) and decided that, except for the studies referred to in paragraph 2.5.6 of that document, the work undertaken by ICLAM formed an important part of prudent and reasonable preventive measures and that therefore the claim for costs in the amount of Bs 61.1 million (£65 000) was admissible.

Claims in the fishery sector

4.8.3 Several delegations expressed sympathy with the fishermen who had suffered losses as a result of the incident. The Committee noted however that a number of fishermen who had submitted evidence to the Claims Agency in support of their losses had been compensated in full by the shipowner's insurer (Assuranceföreningen Gard, Gard Club). It was also noted that the other claimants in the fishery sector who had submitted claims to the Claims Agency had not presented sufficient evidence to support their claims. Attention was drawn to the fact that a fishermen's union (FETRAPESCA) which had filed a claim

in court for some £81 million had not presented any evidence in support of the claim. It was noted that a meeting had recently been held with FETRAPESCA, at which it had expressed its intention to present its claim together with supporting documentation to the Claims Agency.

Level of payments

4.8.4 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 level of the 1971 Fund's payments at 25% of the loss or damage actually suffered by each claimant.

Cause of the incident

4.8.5 It was noted that the shipowner and the Gard Club had provided the 1971 Fund with a substantial quantity of documentary evidence concerning the cause of the incident, together with a detailed analysis of this evidence.

4.8.6 It was noted that the shipowner and the Gard Club intended to resist any claims by the Republic of Venezuela for pollution damage, on the basis of Article III.3 of the 1969 Civil Liability Convention, on the ground that the damage was substantially caused by negligence imputable to the claimant, namely negligence on the part of the Instituto Nacional de Canalizaciones (INC).

4.8.7 The representative of the Gard Club made the following points:

> The Gard Club and the shipowner had been investigating the cause of the incident from the earliest stages. A large amount of evidence had been gathered and further evidence might yet be obtained.
>
> It was recognised that if the 1971 Fund were to join the shipowner and the Gard Club in maintaining a defence of contributory negligence, it would naturally wish to avoid any prejudice to its position in relation to exoneration of the shipowner under Article III.2(c) of the 1969 Civil Liability Convention. The shipowner and the Club therefore appreciated why the Director had made some preliminary comments to the effect that he was not convinced that such exoneration was established by the evidence so far presented.
>
> The material which the owner and the Club had presented so far to the 1971 Fund, though substantial, was by no means exhaustive. At the present stage the owner and the Club believed that it was premature for the Fund to reach a decision on the question of whether the owner should be exonerated from liability under Article III.2(c). To assist the Fund in deciding whether a common approach should be adopted to the issue of contributory negligence, the shipowner and the Club had supplied preliminary material, which was intended to acquaint the Fund with the main features of the evidence at their disposal, and they would shortly supply further information to the Fund.
>
> In the meantime the shipowner and the Club understood that the 1971 Fund was keeping an open mind with respect to the issue of exoneration of the shipowner and that its present assessment did not involve any suggestion that evidence existed to indicate fault by the owner or by those on board the ship. The proceedings brought against the master, the shipowner and the Gard Club in Venezuela still failed to identify any such fault or to provide any credible explanation for the incident other than the condition of the channel.

4.8.8 The Venezuelan delegation emphasised that it was natural that the legal proceedings in the Venezuelan courts would take time. That delegation made the point that the incident occurred mainly because the ship had left the dredged part of the buoyed channel as shown on the chart.

4.8.9 The Executive Committee noted that in the Director's view the documents made available to the 1971 Fund indicated that negligence on the part of INC might have been a factor which contributed to

the incident and the ensuing pollution damage and that therefore the shipowner/Gard Club might be partially exonerated from liability to the Venezuelan Government and to other government bodies. It was also noted that, if there was such contributory negligence, in the Director's view the 1971 Fund would also be partially exonerated in respect of claims by the Venezuelan Government, except to the extent that the claims related to the cost of preventive measures. It was further noted that the Director was not convinced that, on the basis of the evidence made available to the 1971 Fund so far, the damage was caused wholly by the negligence or other wrongful act of INC and that therefore the shipowner might not be wholly exonerated from liability in respect of this incident pursuant to Article III.2(c) of the 1969 Civil Liability Convention.

4.8.10 The Executive Committee decided that, since not all the evidence on the cause of the incident had been made available to the 1971 Fund, it was premature for the Committee to take a decision on the issues relating to the cause of the incident and contributory negligence. The Committee instructed the Director to investigate further these issues and took the view that this investigation should be carried out in co-operation with the shipowner/Gard Club to the extent that there was no conflict of interest between them and the Fund.

4.8.11 The Executive Committee also instructed the Director to raise the defence of contributory negligence against the claim submitted by the Venezuelan Government, if this became necessary to protect the interests of the 1971 Fund.

Request by Petroleos de Venezuela for payment against bank guarantee

4.8.12 It was recalled that the Committee had at its 60th session considered a request by Petroleos de Venezuela SA (PDVSA) that the 1971 Fund should pay the balance of the assessed amount of its claim for clean-up costs against a bank guarantee, even though payments for the time being were pro-rated at 25% of the assessed amounts (document 71FUND/EXC.60/10, section 7). It was also recalled that, for the reasons set out in paragraphs 3.9.4 - 3.9.6 of document 71FUND/EXC.60/17, the Executive Committee had decided not to accept PDVSA's request.

4.8.13 The Director informed the Executive Committee that PDVSA had submitted a letter asking that the 1971 Fund should reconsider its request for full payment against a bank guarantee. In support of its request PDVSA had argued that the 1971 Fund's principle of 'equal treatment to all claimants' should be kept in mind in the *Nissos Amorgos* incident, referring in particular to the *Haven* and *Aegean Sea* incidents. It was noted that PDVSA had stated that it would be able to comply in full with the necessary requirements regarding a bank guarantee, that immediate payment of the balance would enable PDVSA to arrange the final disposal of the oily sand and that a delay in payment would mean that, as a result of inflation, the bolivars PDVSA finally received from the 1971 Fund would be worth much less than the bolivars it had spent.

4.8.14 The Venezuelan delegation made the point that PDVSA was not in any way to blame for the incident and that the company had provided material and personnel for the clean-up operations and had also incurred expenses.

4.8.15 A number of delegations noted that the payments by the 1971 Fund against bank guarantees in the *Haven* and *Aegean Sea* incidents had been made in exceptional circumstances and that general principles should not be drawn from those cases.

4.8.16 Several delegations stressed the importance of the equal treatment of cases in different Member States and did not see a distinction between the situation in the *Nissos Amorgos* case and the circumstances in which payment against bank guarantees had been made in the *Haven* and *Aegean Sea* cases.

4.8.17 Other delegations, emphasising the importance of equal treatment of claimants, considered that it would be unfortunate to differentiate those claimants who were in a sufficiently strong financial position to be able to obtain an acceptable bank guarantee, from those who were not. Reference was made to

the principle laid down in Article 4.5 of the 1971 Fund Convention that all claimants should be paid the same proportion of their claims.

4.8.18 It was recognised by some delegations, however, that unless full compensation could be made there was a risk that clean-up operations might not be undertaken without guarantee of payment in advance and that it was important not to create a disincentive for those considering undertaking clean-up activities.

4.8.19 It was pointed out by a number of delegations that the 1971 Fund was not a financing organisation but an organisation set up to provide compensation for oil pollution damage.

4.8.20 Since the majority of delegations did not support PDVSA's request, the Executive Committee maintained the position taken at its 60th session that the 1971 Fund should not make full payment to PDVSA against a bank guarantee.

4.8.21 The Venezuelan delegation expressed the view that the Committee's decision resulted in similar cases being treated differently and reserved the right to request that the issue be reconsidered at a later session.

4.8.22 Recognising that it was likely that the question of payments against bank guarantees would arise in the future, in both the 1971 Fund and the 1992 Fund, a number of delegations considered that it would be valuable if guidelines could be established setting out the criteria to be applied for accepting requests to make payments against guarantees. The Executive Committee invited the Director to study the issues involved and to present a report to the governing bodies of the IOPC Funds for consideration at their October 1999 sessions.

4.9 *N°1 Yung Jung*

4.9.1 The Executive Committee took note of the information contained in document 71FUND/EXC.61/10 on the *N°1 Yung Jung* incident.

4.9.2 It was noted that the *N°1 Yung Jung* had grounded in the Port of Pusan on an uncharted submerged rock. It was also noted that a diving inspection had concluded that the rock was not part of the seabed but had been placed on the seabed at some time. The Committee further noted the advice of the 1971 Fund's Korean lawyer on the position under Korean law in respect of the potential liability of the Republic of Korea. It was noted, in particular, that if the rock in question was not a natural part of the seabed it would be considered to have given rise to a defect in 'public facilities or structures' for which, in the view of the 1971 Fund's Korean lawyer, the Republic of Korea had strict liability for any resulting damage.

4.9.3 The Committee noted that in order to prevent a claim by the 1971 Fund against the Republic of Korea from becoming time-barred, it had to be presented within three years of the date of the incident, ie by 15 August 1999. It was also noted that submission of a claim to the Regional Compensation Committee by that date would have the effect of preventing the claim from becoming time-barred.

4.9.4 The observer delegation of the Republic of Korea stated that it recognised that the Fund had a right to take recourse action, that no distinction should be made in this regard between Governments and individuals and that the applicable law was the domestic law. That delegation observed that the Government of Korea must be given the opportunity to present its defence if a recourse action was taken.

4.9.5 Assuming that all that had been stated by the Director in document 71FUND/EXC.61/10 was correct and that there was a defect in public facilities or structures, the delegation of the Republic of Korea brought two points to the attention of the Committee, namely that 98% of the claims related to clean-up operations, some of which had been carried out by the Korean Government, and that the ship

had entered the port without permission, with the result that the master had been given a prison sentence for entering an area where tankers were not allowed to berth.

4.9.6 The Korean delegation stated that the Korean Government considered itself to have been a victim of the incident and as such had been paid compensation. That delegation pointed out that most of those claiming compensation were not victims of the incident but were volunteers who had come to assist in the clean-up operations and that they had not suffered any damage as a result of any defect in public facilities or structures if such a defect existed.

4.9.7 The delegation of the Republic of Korea considered that the contributory negligence of the master would affect the Korean Government's liability to the 1971 Fund. That delegation made the point that, if the Korean Government had any liability, it would claim reimbursement from the Fund of any amount paid as a result of a recourse action and that the Fund would then be entitled to claim a reduction based on contributory negligence under Article 4.3.

4.9.8 The Korean delegation took the view that there were no grounds on which the Korean Government could be held solely liable and requested that it be allowed to present its case in writing, in order to facilitate a discussion at the next session of the Executive Committee.

4.9.9 A number of delegations recalled the policy of the 1971 Fund 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 also 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 noted that the Committee had also stated that the 1971 Fund's decision on 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).

4.9.10 The question was raised of whether it would be possible to obtain an extension of the period for presenting a claim against the Republic of Korea so as to enable the Executive Committee to consider the issues at its 62nd session. The Committee noted the advice of the 1971 Fund's Korean lawyer that it would be possible to extend this period by six months by giving notice to the Korean Government of the Fund's claim.

4.9.11 The Executive Committee took the view that if there was any doubt as to the validity of an extension of the period within which a claim had to be presented, then legal action should be taken in order to protect the interests of the 1971 Fund while discussions continued with the Korean Government.

4.9.12 The Committee instructed the Director to continue his investigations into the cause of the incident and to discuss the issues involved with the Korean Government. He was further instructed to present a claim for recovery to the Regional Government Compensation Committee and, if required, to pursue the claim before the competent Korean court to the extent needed to prevent the claim becoming time barred.

4.10 *Pontoon 300*

4.10.1 The Executive Committee recalled that claims for the cost of clean-up operations incurred by Lamnalco (a contractor based in the United Arab Emirates) had been settled in June 1998 and paid at 75% of the agreed amount. The Committee noted that Lamnalco had requested that the 1971 Fund should pay the balance of 25% of its claim and had offered to provide security for repayment of this amount in the event that the total of the admissible claims exceeded the maximum amount available under the 1971 Fund Convention (document 71FUND/EXC.61/13, paragraph 4).

4.10.2 For the reasons set out in paragraphs 4.8.15 - 4.8.20 in relation to the *Nissos Amorgos* incident, the Executive Committee decided not to accept Lamnalco's request for payment against a bank guarantee.

5 Any other business

5.1 Implementation of organisational changes within the Secretariat

The Executive Committee noted the developments in respect of the organisational changes and related issues, as set out in document 71FUND/EXC.61/11.

5.2 Status of the 1971 Fund Convention

5.2.1 The Executive Committee noted the information in document 71FUND/EXC.61/12 regarding the status of the 1971 Fund Convention.

5.2.2 The French observer delegation referred to the efforts being made by the Secretariat to make States which were still Members of the 1971 Fund, particularly those States which were not able to attend meetings of the governing bodies of the 1971 Fund, aware of the consequences of remaining Parties to the 1971 Fund Convention. That delegation recognised, however, that it was not always possible for the Secretariat to make contacts with government representatives of an appropriately high level. The French delegation drew the Executive Committee's attention to the Meeting of the States Parties to the United Nations Convention on the Law of the Sea, to be held in New York from 19 to 28 May 1999. That delegation suggested that many of the 1971 Fund Member States with which it had not yet been possible to discuss the question of denunciation of the 1971 Fund Convention and the winding up of the 1971 Fund would be represented at that Meeting by high level government representatives. It was therefore proposed that the Director should if possible be in the United Nations Headquarters at the time of the Meeting in New York with a view to making contacts and holding discussions with those government representatives outside the formal Meeting.

5.2.3 The Executive Committee welcomed the constructive suggestion of the French delegation and invited the Director to follow the proposed course of action.

5.2.4 The delegation of the Russian Federation informed the Committee that procedures had commenced regarding the denunciation of the 1971 Fund Convention and accession to the 1992 Protocols and that it was hoped that this could be achieved by the end of 1999.

5.3 1998 annual contributions

The Director informed the Executive Committee that approximately 97% of the 1998 annual contributions, due on 1 February 1999, had been paid.

5.4 Chairman's statement

5.4.1 The Chairman made the following statement:

> Since this is the last time that I am chairing the 1971 Fund Executive Committee (Canada will be in the 1992 Fund by October, when we next meet), I would like to share a few thoughts with you.
>
> The IOPC Fund has come a long way. We should not lose sight of the fact that it is one of the most successful international organisations - it was set up to pay compensation for oil pollution in certain cases and over the years it has actually paid out a great deal of money in compensation.
>
> We should not become discouraged by the fact that in certain cases we have become embroiled in litigation. Nor should we be too concerned over the fact that in the 1971 Fund we are going through a difficult period as membership declines and it becomes

increasingly difficult to operate that Fund. I think we need to remember that in spite of the litigation, most claims are settled by negotiation. I feel confident that even in those cases where we are in litigation, negotiated settlements will eventually be found. I am also confident that solutions, based on common sense, will be found to wind up the 1971 Fund in an acceptable manner.

The secret of the IOPC Fund's success, in my view, lies in the fact that it has always operated on the basis of consensus, keeping its objective clearly in mind, namely, that it has been set up to pay compensation as quickly as possible. Let us not forget the basic principle. Litigation, while it is sometimes necessary, is not a good tool for settling claims expeditiously.

I would like to take this opportunity to recognise the fact that we are served by an outstanding Director and an outstanding staff. As delegates we may not always appreciate the high level of dedication that is put into the 'behind the scenes management' of the Fund and its meetings.

I would also like to thank IMO and its staff whose conference facilities we use, as well as our interpreters.

Last but not least I would like to thank delegates for their kindness, co-operation and support during this and previous meetings.

5.4.2 The Director expressed his gratitude to the Chairman for the excellent way in which he had chaired the Executive Committee, for the valuable support he had given the IOPC Funds' Secretariat and for the interest he had shown in the work of the Organisations.

6 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 71FUND/EXC.61/WP.1, was adopted, subject to certain amendments.