



**INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992**

ADMINISTRATIVE COUNCIL
1st session
ASSEMBLY
7th extraordinary session

92FUND/AC.1/A/ES.7/7
9 May 2003
Original: ENGLISH

RECORD OF DECISIONS OF THE FIRST SESSION OF THE ADMINISTRATIVE COUNCIL

ACTING ON BEHALF OF THE 7TH EXTRAORDINARY SESSION OF THE ASSEMBLY

(held on 8 and 9 May 2003)

Chairman: Mr W Oosterveen (Netherlands)

Opening of the session

- 0.1 It was noted that the Assembly's Chairman had attempted to open the 7th extraordinary session of the Assembly at 9.30 am on Thursday 8 May 2003 and again at 10 am that day, but that the Assembly had failed to achieve a quorum.
- 0.2 Only the following 38 1992 Fund Member States were present at that time whereas a quorum required 39 States present:

Algeria	Germany	Panama
Antigua and Barbuda	Greece	Philippines
Bahamas	Ireland	Poland
Belgium	Italy	Portugal
Cameroon	Japan	Republic of Korea
Canada	Latvia	Russian Federation
China (Hong Kong Special Administrative Region)	Liberia	Singapore
Cyprus	Malta	Spain
Denmark	Marshall Islands	Sweden
Dominica	Mexico	Tunisia
Finland	Netherlands	United Arab Emirates
France	Norway	United Kingdom
	Oman	Venezuela

Other States

Chile	Iran, Islamic Republic of	Saudi Arabia
Ecuador	Peru	United States

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

Intergovernmental organisations:

International Oil Pollution Compensation Fund 1971

International non-governmental organisations:

Comité Maritime International

European Chemical Industry Council

Friends of the Earth International

International Association of Independent Tanker Owners (INTERTANKO)

International Tanker Owners Pollution Federation Ltd

Oil Companies International Marine Forum

4 Status of Conventions

The Administrative Council took note of the information in document 92FUND/A/ES.7/2 concerning the situation in respect of ratification of the 1992 Fund Convention. It was noted that there were at present 77 Member States of the 1992 Fund, that another 8 States had deposited instruments of accession to the Conventions and that the 1992 Fund would have 85 Member States by February 2004.

5 Levy of contributions

- 5.1 It was recalled that at its 20th session held in February 2003, the Executive Committee had invited the Director to convene an extraordinary session of the Assembly during the week of 6 May 2003 to consider whether contributions should be levied in respect of the *Prestige* incident, which had occurred off Spain on 13 November 2002, after the 2002 contributions had been decided by the Assembly at its 7th session, held in October 2002, for payment during the second half of 2003 to enable the 1992 Fund to make prompt payments of compensation (document 92FUND/EXC.20/7, paragraph 3.4.41).
- 5.2 It was noted that the Director had estimated that expenditure of some £35 million (both compensation payments and costs) might have to be paid before 1 March 2004 when the 2003 contributions to be decided by the Assembly at its October 2003 session would be due (document 92FUND/A/ES.7/3, paragraph 4.1.2).
- 5.3 The Administrative Council noted that the Executive Committee had on 7 May 2003, at its 21st session, considered the level of payments in respect of the *Prestige* incident and decided that the 1992 Fund's payments for the time being be limited to 15% of the actual loss or damage suffered by the respective claimants as assessed by the 1992 Fund's experts (document 92FUND/EXC.21/5, paragraph 3.2.31).
- 5.4 The Administrative Council noted that a Major Claims Fund would need to be established for the *Prestige* incident since the 1992 Fund's payments in respect of that incident would exceed 4 million SDR payable from the General Fund. The Council considered the possible sources of funding for the *Prestige* Major Claims Fund set out in section 5 of document 92FUND/A/ES.7/3.
- 5.5 The Administrative Council recognised that it would be possible for a loan to be made to the *Prestige* Major Claims Fund from the General Fund. However, it was agreed that a loan of this type should be avoided where possible to ensure that funds were available from the General Fund to meet payments in respect of other new incidents and to avoid depleting the working capital.

- 5.6 It was recalled that all claims and expenses in respect of the *Nakhodka* incident had been paid and that the balance on the 1992 Fund *Nakhodka* Major Claims Fund at the end of April 2003 was approximately £37 million. It was noted that it would be possible for a significant loan to be made from that Major Claims Fund to the *Prestige* Major Claims Fund.
- 5.7 The Administrative Council noted that the balance on the *Erika* Major Claims Fund was approximately £83.6 million at 30 April 2003, that the monies on that Major Claims Fund would be used for payments of compensation and expenses in respect of the *Erika* incident although it was difficult to estimate the amount which would be paid from that Major Claims Fund up to 1 March 2004.
- 5.8 The Administrative Council noted that the Director had taken the view that the 1992 Fund should ensure that sufficient funds were available to allow prompt payments of compensation to be made for claims arising from the *Prestige* incident and to pay the expenses relating to the incident. It was also noted that, normally, contributions to the *Prestige* Major Claims Fund would be levied by the Assembly at its October 2003 session and that contributions would be received by 1 March 2004.
- 5.9 The Administrative Council noted that the Director had presented two options to finance payments in respect of the *Prestige* incident for consideration by the Council:
- (a) The *Prestige* Major Claims Fund could take loans from the 1992 Fund *Nakhodka* Major Claims Fund and to some extent from the General Fund; additionally, if the balance on the *Erika* Major Claims Fund were not used in its entirety for payments during the period, loans could be taken from that Major Claims Fund as well.
 - (b) Contributions for £30 million could be levied to the *Prestige* Major Claims Fund for payment during the second half of 2003.
- 5.10 It was recalled that the governing bodies of the 1992 and 1971 Funds had in the past taken the view that further contributions should not be levied if and to the extent that liquid funds were available which could be used for compensation payments by means of loans from other Major Claims Funds or the General Fund, as provided in Financial Regulations 7.1 (c)(iv) and 7.2(d).
- 5.11 The Administrative Council noted the Director's view that, in light of the significant surplus on the 1992 Fund *Nakhodka* Major Claims Fund and in order not to burden contributors with an extra levy of contributions during 2003, payments of compensation and expenses relating to the *Prestige* incident, over and above 4 million SDR payable from the General Fund, should for the period up to 1 March 2004 be financed by loans from the 1992 Fund *Nakhodka* Major Claims Fund and, if required, from the General Fund or the *Erika* Major Claims Fund.
- 5.12 A number of delegations supported the Director's proposal that payments in respect of the *Prestige* incident to be made before 1 March 2004 should be financed by loans from the *Nakhodka* Major Claims Fund, which would be in line with the past practice of the 1992 and 1971 Fund. Some delegations stated that they could accept either of the two options mentioned by the Director. Some other delegations suggested that it would be an advantage from the contributors' point of view if the payments of contributions in respect of a major incident were spread over a number of years.
- 5.13 The French delegation stated that as regards the *Erika* incident the French State would shortly submit its claim, that liquid funds had to be available to meet that claim, and that in view of the magnitude of that claim there would not remain any amount in the *Erika* Major Claims Fund.
- 5.14 In light of the significant surplus on the 1992 Fund *Nakhodka* Major Claims the Administrative Council decided, as proposed by the Director, that payments of compensation and expenses relating to the *Prestige* incident, over and above 4 million SDR payable from the General Fund, should for the period up to 1 March 2004 be financed by loans from the 1992 Fund *Nakhodka* Major Claims Fund and, if required and possible, from the General Fund or the *Erika* Major

Claims Fund. It was noted that such loans would be repaid with interest in accordance with established practice.

6 Preparations for the entry into force of the HNS Convention

- 6.1 It was recalled that at its 7th session, held in October 2002, the Assembly had invited the Director to prepare a document on the administrative preparations for the setting up of the HNS Fund (document 92FUND/A.7/29, paragraph 28.6).
- 6.2 The Administrative Council took note of the information in document 92FUND/A/ES.7/4 which dealt with certain administrative aspects of the preparations for the entry into force of the HNS Convention. It also noted the preparations for the entry into force of the Convention carried out so far as set out in section 3 of that document.
- 6.3 It was noted that three States (Angola, Morocco and the Russian Federation) had acceded to the HNS Convention. It was also noted that at the 86th session of the Legal Committee of the International Maritime Organization, held during the week of 28 April 2003, a number of States had indicated the progress made towards ratification (IMO document LEG/86/1).
- 6.4 It was noted that the first Assembly of the HNS Fund would have to take decisions on a number of issues, *inter alia*:
- (a) Secretariat of the HNS Fund
 - (b) Location of the HNS Fund's Headquarters
 - (c) Financial issues
 - (d) Handling of claims for compensation
- 6.5 It was further noted that the HNS Assembly would have to adopt several documents setting out the framework for the operation of the HNS Fund, for example:
- (a) Headquarters Agreement
 - (b) Rules of Procedure for the Assembly and subsidiary bodies
 - (c) Internal Regulations and Financial Regulations and, possibly, Staff Regulations and Staff Rules
 - (d) Observer Status of intergovernmental and international non-governmental organisations
- 6.6 It was noted that the administrative arrangements would to a large extent depend on the location of the Secretariat of the HNS Fund. A number of delegations expressed the view that the most practical solution would be for the HNS Fund to have a joint secretariat with the IOPC Funds and to be based in London. The point was made that the use of a joint Secretariat would enable the HNS Fund to benefit from the experience gained by the IOPC Funds and would reduce the administrative costs for both the HNS Fund and the IOPC Funds. One delegation expressed the view that since the HNS Fund would have a different membership to the IOPC Funds, it should have a Secretariat separate to the IOPC Funds so as to ensure that there was a clear delineation of its operations and costs.
- 6.7 The Administrative Council recognised that the decision as to the location of the HNS Fund would be taken by the HNS Fund Assembly. However, the Council instructed the Director to continue the preparatory work for the time being on the assumption that the HNS Fund would have a joint Secretariat with the IOPC Funds and would be based in London. It was recognised that the HNS Fund would be a separate legal entity.
- 6.8 The Administrative Council accordingly instructed the Director to study the issues set out in paragraphs 6.4 and 6.5 further and submit draft texts for preliminary examination by the 1992 Fund Assembly at a future session. It was agreed that the forum where further discussion should take place would have to be considered at a later stage.

6.9 Several delegations stressed the importance of the preparatory work for the entry into force of the HNS Convention and recommended participation in a meeting to be held in Ottawa from 3 to 5 June 2003. It was also pointed out that useful information for States considering ratifying or acceding to the HNS Convention was available at a dedicated website (<http://folk.uio.no/erikro/WWW/HNS/hns.html>).

7 Claims relating to subsistence fishing

7.1 The Administrative Council recalled that at its February 1999 session the 1971 Fund Executive Committee had considered the question of claims in respect of subsistence fishing, ie fishing carried out by individual fishermen mainly for the purpose of providing food for their families. It was also recalled that the Committee had instructed the Director to study further the admissibility of claims relating to subsistence fishing, in consultation with the Fund's experts and the Food and Agriculture Organization (FAO), and to consider whether guidelines on the admissibility of such claims should be developed (document 71FUND/EXC.60/17, paragraph 5.6).

7.2 The Administrative Council noted that a key feature of claims for compensation in respect of small-scale fishing activities, including subsistence fishing, was that they were rarely supported by evidence as to normal levels of income against which to assess claims. It was also noted that in order to assist the 1992 Fund in dealing with such claims in the future the Director had engaged a firm of fishery specialists to prepare Technical Guidelines on methods of assessing losses in fisheries, aquaculture and processing sectors where evidence was likely to be limited or totally lacking.

7.3 The Administrative Council took note of the Table of Contents of the proposed Technical Guidelines set out in the Annex to document 92FUND/A/ES.7/5. It was noted that the Technical Guidelines were aimed primarily at the claims staff of the Funds' Secretariat and the shipowners' insurers as well as their experts working in the field and local claims office staff. It was further noted that the Guidelines were not intended to replace the Claims Manual, although like the Manual, the Guidelines had no legal standing.

7.4 A number of delegations welcomed the development of the Guidelines as a way of increasing transparency. It was also suggested that Guidelines could be developed in respect of other types of claims.

7.5 One delegation considered that, since the instruction to study this matter had been given by the 1971 Fund Executive Committee, any consideration of the Guidelines could only be done in conjunction with the 1971 Fund Administrative Council, and that the publication of the Guidelines would be going beyond the instructions given by that Committee. That delegation also considered that the 1992 Fund Administrative Council could not take a decision on the publication of the Guidelines since it had not seen the whole text of the Guidelines.

7.6 Another delegation considered that the Guidelines should be published by the authors without giving the impression that they had been approved by the IOPC Funds. That delegation also suggested that a more concise version could be produced, which would be useful for fishermen.

7.7 Another delegation suggested that the Guidelines could be published both on the IOPC Funds' website and on the FAO website.

7.8 A number of delegations considered that if the Guidelines were to be published as an IOPC Funds document, they should be examined by the Assembly. Other delegations considered that it would be preferable for the Guidelines to be published by the authors, with an introduction by the Fund making it clear that it was not a legal document. Several delegations agreed with the suggestion that they could be published jointly by the Funds and the FAO.

7.9 An observer delegation pointed out that whilst the Guidelines would be useful for the purpose of quantifying damages, it was important not to lose sight of the fact that the burden remained on

claimants to prove their losses. It was suggested that this be made clear in the introduction to the Guidelines.

- 7.10 The Director pointed out that the Guidelines had not been elaborated with the FAO, but that some of the information and models had been obtained from information published by the FAO. He stated that the proposed Guidelines would enable the 1992 Fund to use a wider network of fishery experts.
- 7.11 The Administrative Council instructed the Director to study the matter further and explore the ways in which the Guidelines could be published, as well as the possibilities of producing a more concise version.

8 Report of the third intersessional Working Group

- 8.1 The report of the third intersessional Working Group's fifth meeting, held in February 2003 (document 92FUND/A/ES.7/6), was introduced by the Group's Chairman, Mr Alfred Popp QC. In his introduction, he stressed that the coming meetings of the Working Group were of crucial importance in order for progress to be made on a number of important issues. He therefore urged delegations to make concrete written proposals well in advance of future meetings.
- 8.2 The Administrative Council took note of the Working Group's report and considered the text of a draft Resolution on the interpretation and application of the 1992 Conventions prepared by the Working Group as set out in the Annex to document 92FUND/A/ES.7/6.
- 8.3 Some delegations expressed hesitation about the draft Resolution because, in their view, it could be interpreted as an attempt to unduly influence courts. One delegation stated that it was for the Fund's legal representatives to make the case for a uniform application of the Conventions as part of the Fund's pleadings in respect of individual cases. In that delegation's view, the Fund should adopt more subtle ways of persuading jurisdictions to uphold the principles of uniform application of the Conventions, eg through participation in seminars and workshops.
- 8.4 Most delegations stated, however, that the aim of the Resolution was merely to encourage national courts to take into account the Fund decisions on the interpretation and application of the 1992 Conventions, recognising that the courts were the final authorities on such issues. Those delegations pointed out that the Resolution was to be adopted by States not by courts and that it was for the States to decide on the most appropriate way of using it.
- 8.5 It was pointed out that the word 'should' in the last paragraph of the English text of the draft Resolution had been incorrectly translated in the Spanish text. It was therefore agreed that the Spanish text should be amended so as to align it with the English and French texts.
- 8.6 The Administrative Council approved the Resolution on the interpretation and application of the 1992 Civil Liability Convention and the 1992 Fund Convention (1992 Fund Resolution N°8), set out in the Annex.
- 8.7 It was recalled that the Working Group had decided to hold a short meeting during the week of 20 October 2003, in connection with the Assembly's 8th session, to consider the progress made as a result of ongoing informal discussions, as well as a more substantial meeting early in 2004.

9 Any other business

Future sessions

It was recalled that the next session of IOPC Funds' meetings would be held during the week of 20 October 2003. It was decided that meetings would also be held during the weeks of 23 February 2004, 24 May 2004 and 18 October 2004.

10 **Adoption of the Record of Decisions**

The draft Record of Decisions of the Administrative Council, as contained in document 92FUND/AC.1/A/ES.7/WP.1, was adopted, subject to certain amendments.

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ANNEX

RESOLUTION N°8 ON THE INTERPRETATION AND APPLICATION OF THE 1992 CIVIL LIABILITY CONVENTION AND THE 1992 FUND CONVENTION

THE ADMINISTRATIVE COUNCIL, ACTING ON BEHALF OF THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND 1992, set up under the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (1992 Fund Convention),

NOTING that the States Parties to the 1992 Fund Convention are also parties to the International Convention on Civil Liability for Oil Pollution Damage, 1992 (1992 Civil Liability Convention),

RECALLING that the 1992 Conventions were adopted in order to create uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases,

CONSIDERING that it is crucial for the proper and equitable functioning of the regime established by these Conventions that they are implemented and applied uniformly in all States Parties,

CONVINCED of the importance that claimants for oil pollution damage are given equal treatment as regards compensation in all States Parties,

MINDFUL that, under Article 235, paragraph 3, of the United Nations Convention on the Law of the Sea 1982, States shall co-operate in the implementation of existing international law and the further development of international law relating to the liability for and assessment of damage caused by pollution of the marine environment,

RECOGNISING that, under Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties 1969, for the purpose of the interpretation of treaties there shall be taken into account any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions and any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,

DRAWING ATTENTION to the fact that the Assembly, the Executive Committee and the Administrative Council of the International Oil Pollution Compensation Fund 1992 (1992 Fund) and the governing bodies of its predecessor, the International Oil Pollution Compensation Fund 1971 (1971 Fund), composed of representatives of Governments of the States Parties to the respective Conventions, have taken a number of important decisions on the interpretation of the 1992 Conventions and the preceding 1969 and 1971 Conventions and their application, which are published in the Records of Decisions of the sessions of these bodies ^{<1>}, for the purpose of ensuring equal treatment of all those who claim compensation for oil pollution damage in States Parties,

EMPHASISING that it is vital that these decisions are given due consideration when the national courts in the States Parties take decisions on the interpretation and application of the 1992 Conventions,

CONSIDERS that the courts of the States Parties to the 1992 Conventions should take into account the decisions by the governing bodies of the 1992 Fund and the 1971 Fund relating to the interpretation and application of these Conventions.

^{<1>} IOPC Funds' website: www.iopcfund.org