INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
13th session
Agenda item 5

92FUND/EXC.13/7
28 June 2001
Original: ENGLISH

RECORD OF DECISIONS OF THE THIRTEENTH SESSION OF THE EXECUTIVE COMMITTEE

(held on 25 and 28 June 2001)

Chairman: Mr G Sivertsen (Norway)

Vice-Chairman: Captain Luis Díaz-Monclús (Venezuela)

Opening of the session

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 92FUND/EXC.13/1.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

Australia	Japan	Norway
Canada	Latvia	Singapore
France	Marshall Islands	Vanuatu
Germany	Netherlands	Venezuela
Ireland		

2.2 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.

2.3 The following Member States were represented as observers:

Belgium	Liberia	Russian Federation
Cyprus	Malta	Spain
Denmark	Panama	Sweden
Finland	Philippines	Tunisia
Greece	Poland	United Arab Emirates
India	Republic of Korea	United Kingdom
Italy		

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

States which have deposited instruments of ratification, acceptance, approval or accession to the 1992 Fund Convention:

Argentina	Kenya

Other States

Cameroon	Côte d'Ivoire	Malaysia
Chile	Ecuador	Portugal
Colombia	Iran, Islamic Republic of	United States

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

Intergovernmental organisations:

European Commission
International Oil Pollution Compensation Fund 1971

International non-governmental organisations:

Cristal Ltd
International Group of P & I Clubs
International Salvage Union
International Tanker Owners Pollution Federation Limited (ITOPF)
International Union for the Conservation of Nature and Natural Resources (IUCN)
Oil Companies International Marine Forum

3 Incidents involving the 1992 Fund

3.1 *Nakhodka*

3.1.1 The Executive Committee took note of developments in respect of the *Nakhodka* incident contained in document 92/FUND/EXC.13/2.

Claims for compensation

3.1.2 The Committee noted that claims totalling ¥25 445 million (£149 million) had been settled for a total amount of ¥17 914 million (£105 million). It was noted that total payments made to claimants amounted to ¥16 495 million (£88 million), including the payments made by the shipowner and his insurer. The Committee also noted the situation as regards the assessment of the remaining claims, totalling ¥9 695 million (£57 million), in particular that it was expected that the assessments of most of the remaining claims would be completed by October 2001.

Claims relating to the causeway

3.1.3 The Committee took note of the information concerning the claims relating to the construction and removal of a causeway which had been built from the shore to the grounded bow section of

the *Nakhodka*, which had been intended to allow road tankers to be brought close to the wreck, thereby facilitating the removal of the oil (cf document 92FUND/EXC.13/2, paragraph 3). It was noted that these claims were under consideration against the criteria for admissibility laid down by the 1971 and 1992 Fund Assemblies, ie that the operations were reasonable from an objective technical point of view.

3.1.4 The Japanese delegation stated that the claims relating to the causeway were being discussed between the IOPC Funds, the shipowner's insurer and the Japanese Government, and that whilst not wishing to go into any detail, pointed out that the Japanese Coast Guard had made the decision to construct the causeway after taking into consideration the unpredictable and severe weather conditions in the Sea of Japan in winter and other difficulties which were encountered at the time.

3.1.5 Several delegations stated that the shipowner's insurer and the IOPC Funds should make every effort to settle these claims and emphasised the importance of the IOPC Funds keeping an open mind about claims of this type. Some delegations also made the point that the high amount of the claims should not influence the way in which they were treated by the IOPC Funds, although the Funds should exercise great care in the assessment of such big claims.

3.1.6 Some delegations stated that it was important for the IOPC Funds not to consider the building of the causeway as unreasonable with the benefit of hindsight, since this could discourage national authorities from taking innovative preventive measures in future cases.

Legal actions

3.1.7 The Committee noted the developments in the legal proceedings set out in paragraphs 4.1 – 4.13 of document 92FUND/EXC.13/2.

3.1.8 Some delegations expressed the view that the IOPC Fund should pursue vigorously the recourse action against the shipowner, the P & I insurer, the parent company of the shipowner and the Russian Maritime Register of Shipping. It was also suggested that the Funds should consider the possibilities of recourse action in countries other than Japan and should also consider problems relating to 'piercing the corporate veil' and the practical problems of arresting a ship of the parent company in Japan.

Global solution

3.1.9 The Executive Committee instructed the Director to pursue discussions with the Japanese Government, the shipowner and his insurer on outstanding claims and issues and to explore the possibilities of reaching a global settlement of all outstanding issues.

3.1.10 The Japanese delegation stated that if the outstanding issues could be resolved to the satisfaction of all parties concerned this could lead to an early global settlement.

3.2 *Erika*

3.2.1 The Executive Committee took note of developments in respect of the *Erika* incident contained in documents 92FUND/EXC.13/3, 92FUND/EXC.13/3/Add.1 and 92FUND/EXC.13/3/Add.2.

Claims for compensation

3.2.2 The Committee noted the information given on the claims situation as follows:

> As at 20 June 2001, 4 960 claims for compensation had been submitted for a total of FFr765 million (£71 million). Of these claims 919 (18%) were presented during the period March – June 2001.

Some 3193 claims totalling FFr327 million (£31 million) had been assessed at a total of FFr206 million (£19 million). Assessments had thus been carried out of 64% of the total number of 4 960 claims received.

One hundred and ninety-four claims totalling FFr18 million (£1.7 million) had been rejected. Many of the rejected claims were being reassessed in the light of additional documentation provided by the claimants.

Payments had been made by the shipowner's insurer, the Steamship Mutual Underwriting Association (Bermuda) Ltd ('Steamship Mutual'), in respect of 2 038 claims for a total of FFr82 million (£7.6 million). Most of these payments corresponded to 60% of the approved amounts, but some hardship payments made at an early stage were made in full or at higher percentages.

A further 1 761 claims, totalling FFr438 million (£41 million), were either in the process of being assessed or were awaiting claimants providing further information necessary for the completion of the assessment.

3.2.3 The Executive Committee noted that due to the volume of claims for compensation, particularly in the tourism sector, the 1992 Fund, with support from the firm of tourism experts engaged in the United Kingdom and France by the Fund and Steamship Mutual, had developed a computer programme to assist the experts in the assessment of claims for compensation. It was further noted that this programme had become operational in May 2001 and that the time spent on the assessment process would in future be substantially reduced.

3.2.4 Several delegations expressed appreciation of the development by the IOPC Funds of the computer programme to speed up the claims handling process, which would undoubtedly be useful for future incidents.

3.2.5 The French delegation expressed satisfaction that the claims handling process was going in the right direction. That delegation stated that despite the complexity of the claims assessment process it was important to increase the rate of assessments, bearing in mind that there were over 2 400 outstanding tourism claims. The French delegation urged the 1992 Fund to continue in its efforts and offered the French Government's assistance in improving the claims handling.

3.2.6 The Committee recalled that the French Government had introduced a scheme to provide emergency payments in the fishery sector, which was administered by OFIMER (Office national interprofessionnel des produits de la mer et de l'aquaculture), a government agency attached to the French Ministry of Agriculture and Fisheries. It was noted that as at 30 May 2001 OFIMER had paid FFr25.3 million (£2.5 million) to claimants in the fishery sector and FFr13.1 million (£1.3 million) to salt producers.

3.2.7 The French delegation stated that since September 2000 all supplementary payments made by OFIMER had been based on the assessments made by the experts engaged by the Steamship Mutual and the 1992 Fund.

3.2.8 Regarding the tourism sector, the French delegation stated that the Government had set up a supplementary compensation system in June 2001, which was also based on the assessments by the experts engaged by the 1992 Fund, and that payments would only be made once agreement had been reached between the claimants and the 1992 Fund as to the admissible quantum of the claims. The French delegation stated that the system would allow the claimants to receive a 100% payment of the approved amount, but emphasised that the efficiency of this system was dependent upon the speed of the assessment process.

3.2.9 The Director informed the Committee that the 899 tourism claims which had been assessed amounted to FFr150 million and that these claims had been assessed at FFr95 million which represented approximately 63% of the claimed amounts.

3.2.10 The Executive Committee expressed its gratitude to the staff of the Claims Handling Office in Lorient and to the experts engaged by the 1992 Fund and Steamship Mutual for the excellent work they had carried out, often in difficult circumstances, and its appreciation of the progress which had been made in the handling of claims.

Claim submitted to the Executive Committee for consideration

3.2.11 The Executive Committee recalled that, at its 9th session, it had considered a claim by a company producing oysters at a farm in Cancale (Northern Brittany) some 100 kilometres outside the area affected by the oil from the *Erika*, but which carried out its trading activity in Crach (Morbihan), inside the affected area, for losses allegedly caused by a reduction in sales due to market resistance as a result of the *Erika* incident. The Committee recalled that it had decided that the information available was insufficient to enable it to take a position on the admissibility of the claim. It was further recalled that the Committee had instructed the Director to obtain further details of the claimant's business, in particular the extent to which the business was dependent on the affected area and whether it had opportunities to find alternative markets (document 92FUND/EXC.9/12, paragraph 3.6.39).

3.2.12 The Committee noted that the Director had carried out further investigation, which showed that the claimant purchased seed oysters originating from the Gulf of Morbihan, within the affected area, that these seed oysters were then taken to Cancale (outside the affected area) where they were grown to market size, that the harvested oysters were returned to Crach (Morbihan) where they were cleaned, graded and put into ponds for depuration and that after depuration a label was attached to the packaging, identifying the place of origin of the product as Morbihan. It was noted that according to the claimant, 80% of the depurated produce was sold to wholesalers in Brittany, 15% to buyers in other parts of France and 5% to purchasers outside the country. It was further noted that although all the production was normally processed and marketed at Crach, a part could have been processed and sold locally at Cancale.

3.2.13 The Executive Committee agreed with the Director that the criterion of geographic proximity between the claimant's activity and the contamination was fulfilled. The Committee also agreed that the claimant's business should be considered as forming an integral part of the economic activity within the area affected by the spill. The Committee therefore considered that there was a reasonable degree of proximity between the contamination and any loss actually suffered by the claimant and decided that the claim was admissible in principle.

Court proceedings

3.2.14 The Executive Committee took note of the developments in the various court proceedings.

3.2.15 One delegation stated that the prospects of success in recourse actions against classification societies were very small and expressed the view that it was wrong to take recourse action for a significant amount against a classification society which only received a very small fee from the shipowner for its work.

Studies carried out within the French Ministry of Economy, Finance and Industry

3.2.16 The Committee recalled that extensive studies had been carried out within the French Ministry of Economy, Finance and Industry in June 2000, in October 2000 and in January 2001 on the extent of the damage caused by the *Erika* incident in respect of the tourism industry.

3.2.17 It was recalled that at its 8th session, in view of the uncertainty as to the total amount of the claims arising from the *Erika* incident, the Executive Committee had decided that the payments by the 1992 Fund should for the time being be limited to 50% of the amount of the loss or damage actually suffered by the respective claimants, as assessed by the 1992 Fund's experts (document 92FUND/EXC.8/8, paragraph 3.3.38).

3.2.18 It was further recalled that, at its 11th session, the Executive Committee had decided to increase the level of the 1992 Fund's payments from 50% to 60% of the amount of the damage actually suffered by the respective claimants (document 92FUND/EXC.11/6, paragraph 3.58).

3.2.19 The Committee noted that the Director had received a further study ('the June 2001 study') on the losses in the tourism industry carried out within the Ministry of Economy, Finance and Industry.

Summary of the June 2001 study

3.2.20 The Executive Committee noted that the June 2001 study was based on declarations for VAT for businesses and on the claims actually submitted so far in respect of holiday rentals, in particular self-catering apartments.

3.2.21 The Committee recalled that the previous studies, and in particular the January 2001 study, were based on two methods, the demand approach and the supply approach. It was noted that it was stated in the June 2001 study that the only method which could provide an estimate close to reality was the one based on the declarations by the businesses themselves.

3.2.22 The Executive Committee noted that in the June 2001 study a comparison had been made between the VAT declarations for the calendar years 1999 and 2000 for businesses in the tourism sector in the five departments concerned, which had made it possible to compare the development of the turnover of these businesses. It was further noted however, that although in the case of small businesses liable to pay VAT the VAT declarations were incomplete, it was considered that the declarations submitted from this group of businesses were sufficiently representative.

3.2.23 The Committee noted that as regards self-catering apartments which were not subject to VAT, it was stated in the June 2001 study that - contrary to the approach taken in the January 2001 study – it was unlikely that all those who suffered losses due to a reduction in tourists visiting the area would claim compensation. It was pointed out to the Committee that this sector comprised mainly individuals who were not obliged to keep accounts and had no reason to delay the submission of claims once the tourism season was finished. It was noted that for this reason, it had been assumed that the great majority of the potential claimants in this group would have presented their claims by mid-June 2001 and that those who would submit claims in the future would represent only a small part of the potential claimants in this group. It was further noted that the study had pointed out that by 15 June 2001 less than 500 claims for a total of FFr13.2 million (£1.2 million) had been received from this group of claimants. It was also noted that the following reasons were given in the study for the low number of claims from this sector:

- there were significant variations in the letting of the apartments from year to year which made it difficult to present claims with comparative data for previous years;
- since the individuals in question were not subject to VAT, they had no documents to support the alleged losses;
- many individuals had only let their apartments occasionally which made it difficult to prove an actual loss;
- many individuals in this group might be reluctant to present claims for a few thousand francs.

The Executive Committee noted the study's prediction that the total amount of the claims in this group would not exceed FFr30 million (£2.8 million).

3.2.24 The Committee noted that as in the previous studies, the June 2001 study was based on the IOPC Fund's criteria for the admissibility of claims, in particular as regards the geographical location of the businesses in question. It was noted that the study had indicated that in the five departments affected by the *Erika* incident the major part of the businesses were located in the interior. It was further noted that the study assumed that the major part of the losses admissible for compensation relate to businesses in the coastal areas. It was also noted that the study had used turnover figures

of the businesses whose claims under the Fund's criteria would be admissible and that these had been adjusted to obtain the reduction in profit, which is the basis for the calculation of compensation.

3.2.25 The Executive Committee noted that the June 2001 study had estimated the total amount of the losses admissible for compensation in the tourism sector at between FFr363 million (£34 million) and FFr503 million (£47 million).

3.2.26 It was noted that it was mentioned in the study that the number of claims from the tourism sector had been falling in recent months, that the claims submitted so far only totalled FFr520 million (£49 million) and that claims were rarely accepted at 100% of the claimed amounts.

3.2.27 The Committee noted that the study had also considered the likelihood of claims being submitted for losses incurred in the tourism sector during 2001. It was also noted that the study had pointed out that although in the IOPC Funds' experience it was unusual that losses in the tourism sector related to more than one year, such losses were possible if the contamination continued, and that some claims had already been submitted for losses suffered in 2001. The Committee noted however that the Observatoire national du tourisme had predicted that the tourist season along the Atlantic coast would be good in the year 2001 and that it was suggested that there was no risk of any significant impact of the *Erika* incident in 2001.

Opinion of the 1992 Fund's experts on the June 2001 study

3.2.28 The Executive Committee noted that as the results of the June 2001 study were received only on 18 June 2001, the 1992 Fund's experts had had only very limited time to examine them. The Committee noted the Fund's experts conclusions, which were as follows.

3.2.29 It was noted that the Fund's experts broadly agreed with the overall estimate in the study of the maximum total tourism losses admissible for compensation at around FFr500 million (£47 million) and also agreed that the number of assumptions that had been made in the June 2001 study were minimal. In the view of the Fund's experts, for the first time it had been possible to make a direct comparison between the declared turnover levels of tourism businesses with claims actually received, since a full tourist season had passed and tourism businesses had been able to assess the impact of the *Erika* incident on their trading, and that it could therefore be assumed that the majority of the businesses that had suffered significant economic loss and intended to claim compensation had already done so.

3.2.30 It was noted that the experts pointed out that in previous studies there remained a high level of uncertainty regarding the level of possible losses incurred in the self-catering accommodation sector, but that the estimate in the June 2001 report was based on the knowledge of claims relating to this sector received by the 1992 Fund (currently at around FFr15 million or £1.4 million). It was also noted that the 1992 Fund's experts agreed with the reasons given in the June 2001 study for the relatively low level of claims from this sector. It was further noted that, in the experts' view, on the basis of the assumption that nine months after the end of the 2000 summer season most potential claimants in the self-catering accommodation sector would have presented claims, the estimate of economic losses in this sector had been revised down substantially in comparison with previous studies to FFr30 million (£2.8 million).

3.2.31 It was noted that the Observatoire national du tourisme had also carried out research, which was more comprehensive that the 1992 Fund's experts' own collection of anecdotal evidence from the tourist offices at local, departmental and regional level. It was further noted that the information provided confirmed the Fund's experts' assessment that the prospects were that the 2001 tourism season would be as good as or even better than the 1999 season and that it was only in an isolated number of cases, at locations where there was continued contamination of the shoreline, that claims for the 2001 season were likely to be considered admissible.

3.2.32 The Committee noted that in the 1992 Fund's experts' view the June 2001 study carried out within the Ministry did not take into consideration a number of other factors. It was noted that the

study had not made any assumptions as to the approach of the French courts and their interpretation of the concept of pollution damage. It was further noted that the study did not take into consideration potential claims from tourism businesses that increased their turnover in 2000 compared with 1999, but not up to the levels they had anticipated. It was also noted that a number of claims of this nature had been received and had been considered admissible where the claimant had proven the negative impact of the *Erika* incident on previous consistent growth trends in business. In the experts' view the study did not take into consideration the additional sums spent by tourism institutions or individual businesses on promotional activity or other efforts to mitigate the impact of the incident. It was further noted that claims from the Department of Vendée tourist board and the Brittany regional tourist board for expenses for such purposes had been received and approved and that further claims had recently been submitted by the Region Pays de la Loire and the Department of Charente Maritime. The Committee also noted that the 1992 Fund's experts had previously estimated that exceptional expenses relating to mitigation campaigns by tourism institutions could amount to some FFr57 million (£5.3 million), that it had been reported that some departmental and regional agencies were increasing their 2001 marketing programmes in an effort to restore the tourist image of the area and reinstate visiting levels from both domestic and overseas visitors and that it was possible that claims for such increased promotional activity in 2001 would be presented.

3.2.33 The Committee also noted the point made by the experts that the study did not take into consideration claims from businesses outside France, for example specialist overseas tour operators relying on sales of holidays to the affected area and potentially able to demonstrate dependency on the affected resource. It was noted that two claims had been received from United Kingdom operators and that a third such claim was expected, but that for such claims the question of admissibility would remain an issue. The Committee noted the experts' view that these factors might have led the study to underestimate the overall level of claims, but that this underestimation might well be offset if a significant proportion of potential claimants decided not to present claims.

Other assessment of the total amount of damage arising from the Erika incident

3.2.34 The Committee recalled that shortly before the Executive Committee's 11th session in January 2001 the French media had reported a study of the damage resulting from the *Erika* incident carried out by a French consulting firm specialising in accounting (Mazars et Guérard) assisted by various groups of experts. It was further recalled that the study had been commissioned by l'Association Ouest Littoral Solidaire (a group of three administrative regions: Bretagne, Pays de La Loire and Poitou-Charentes). It was noted that according to the study the total amount of the damage could be estimated to be in the range of FFr5 460–6 340 million (£528 – 594 million).

3.2.35 The Executive Committee noted that the documentation available did not give any detailed information of the methods used for this assessment. It was further noted that it appeared that for the losses in the tourism sector the assessment is based on a reduction in turnover and not on the loss of profit, the latter being the basis of the assessment of compensation. It was also noted that the Director believed that the amount indicated for the maritime sector was exaggerated and that the estimated losses relating to environmental damage would probably fall outside the definition of 'pollution damage' laid down in the 1992 Conventions.

Executive Committee's considerations

3.2.36 The Committee noted that it again had to consider how to strike a balance between the importance of the 1992 Fund's paying compensation as promptly as possible to victims of oil pollution damage and the need to avoid an over-payment situation.

3.2.37 The Executive Committee recalled that the claims by Total Fina and the French Government could be disregarded for the purpose of the Committee's consideration of the level of payments, since these claims would be pursued only if and to the extent that all other claims had been paid in full.

3.2.38 It was noted by the Executive Committee that the figures for the clean-up operation claims and the claims in the fishery and mariculture sectors had been estimated by the 1992 Fund at FFr150 - 200 million (£14 - 19 million) and FFr125 million (£12 million), respectively, ie at a total of FFr275 - 325 million (£26 - 30 million). It was further noted that the June 2001 study carried out within the Ministry of Economy, Finance and Industry had estimated the total amount of the admissible claims in the tourism sector at some FFr500 million (£47 million). The Committee noted that if this estimate was correct, the total admissible claims would be in the region of FFr 800 million (£75 million) and it would be possible to fix the level of the 1992 Fund's payment at 100% of the proven loss or damage suffered by the individual claimants.

3.2.39 The Executive Committee noted, however, that there remained some significant uncertainties in the estimates made in the June 2001 study, as indicated by the 1992 Fund's experts. It was noted that no allowance had been made in the study for publicity campaigns. It was further noted that the June 2001 study was based on the criteria for admissibility applied by the 1992 Fund. It was noted however that the Director had been advised that the French courts might adopt a more extensive approach in their interpretation of the notion of 'pollution damage' in respect of pure economic loss, and that it was not possible to predict the consequences of such an approach. The Committee further noted that there was also a risk that re-oiling of the coastline would take place, which could cause further losses, in particular in the fishery and mariculture sectors, but in the Director's view this risk had decreased considerably, and that it was in any event highly unlikely that there would be any major re-oiling.

3.2.40 The Executive Committee noted that, in the Director's view, an important element was the claims actually submitted so far. It was noted that the total amount of all claims received in the Claims Handling Office in Lorient as of 20 June 2001 was FFr765 million (£72 million), of which FFr525 million (£49 million) related to tourism. It was recalled that experience had shown that claims were normally not approved at 100% of the claimed amount. It was also noted however that there were also some significant claims from ferry companies and tourism operators outside the affected area which had not been taken into account in the June 2001 study. It was noted that in the Director's view it was doubtful whether such claims were admissible, but that some allowance would nevertheless have to be made for claims of this type. It was further noted that although generally the 2001 tourism season was unlikely to be affected by the *Erika* incident to any significant degree, there might be admissible claims relating to that season from areas where clean-up was still being carried out. The Committee also noted that claims could be brought against the 1992 Fund up to the end of the time bar period, ie within three years of the date when the damage occurred or within six years of the date of the incident.

3.2.41 The Committee noted that the claims in the sectors other than tourism had been estimated at some FFr300 million (£29 million), that the Director believed that the estimate in the June 2001 study for the tourism claims of FFr500 million (£47 million) might be on the low side and that he considered that a figure of FFr700 million (£66 million) would be prudent. It was noted that the Director took the view that it was necessary to take into account costs for marketing campaigns of some FFr100 million (£9.4 million) and that it would be prudent to include an amount of FFr100 million (£9.4 million) for losses in the tourism sector during 2001 plus a general safety margin of FFr200 million (£18.8 million). The Committee noted that taking the above contingencies into consideration the estimated total of the admissible claims would be in the region of FFr1 400 million (£131 million), which in the Director's view meant that the level of the 1992 Fund's payments could be increased to 80% of the proven loss or damage suffered by the individual claimants, as assessed by the 1992 Fund.

3.2.42 In the light of the foregoing the Executive Committee decided to increase the level of the 1992 Fund's payments to 80% of the amount of the damage actually suffered by the respective claimants, as assessed by the 1992 Fund. It was agreed that the level of payments should be reviewed at the Committee's 14th session.

3.2.43 The French delegation expressed its gratitude to the Director for the work carried out by the 1992 Fund and thanked the delegations for their support. That delegation stated that the increase of the

level of payments to 80% was very important for the claimants and that the increase of the level to 80%, close to 100%, was a positive move *vis-à-vis* the victims.

Statement by the Director

3.2.44 The Director made the following statement:

> The Director informed the Executive Committee at its 11th session held in January 2001 (cf document 92FUND/11/2/Add.1) that a person identifying himself as president of an organisation called 'Confédération Maritime' had during the year 2000 organised various demonstrations against the Claims Handling Office in Lorient as well as against the offices in Brest of the maritime experts engaged by the 1992 Fund and the Steamship Mutual to supervise the clean-up operations. The Director had informed the Committee at that time that this person had, or claimed to have, lodged several complaints with the Public Prosecutor against the persons in charge of the Claims Handling Office.
>
> Since that time this person has continued to make numerous defamatory declarations to the press not only with respect to the persons in charge of the office in Lorient but also with respect to the IOPC Funds. Recently, the 'Confédération Maritime' had announced to the press that it was preparing to lodge a complaint with the Public Prosecutor against the Director who was 'personally responsible for the setting up of the Claims Handling Office, its management and the recruitment of its staff', demanding 'the immediate disbanding' of the office and its replacement by a 'team made up of former fishing or merchant navy captains'.
>
> The Director expressed the hope that the French judicial authorities would urgently take all necessary steps for the complaints to be given the treatment they deserved.

3.2.45 The French delegation stated that it had taken note of the information given by the Director concerning the actions by the 'Confédération Maritime'. That delegation expressed its confidence in the 1992 Fund and its Director. The delegation stated that, according to the information available so far, all the procedures concerning the 'Confédération Maritime' had been attributed to the same jurisdiction and that it would have to be left to the judicial authorities to take the appropriate decisions.

3.3 *Baltic Carrier*

3.3.1 The Committee took note of the information in respect of the *Baltic Carrier* incident contained in documents 92FUND/EXC.13/4 and 92FUND/EXC.13/4/Add.1.

3.3.2 The Committee noted that the *Baltic Carrier* (23 235 GT), registered in the Marshall Islands, was carrying some 30 000 tonnes of heavy fuel oil when on 29 March 2001 it collided with the *Tern* (20 362 GT), a sugar-laden bulk carrier registered in Cyprus, some 30 miles north-east of Rostock (Germany). It was further noted that the collision resulted in the escape of some 2 500 tonnes of heavy fuel oil.

3.3.3 It was noted that the *Baltic Carrier* had remained at anchor near the collision site during the first week in April until lightering operations of the undamaged cargo tanks had been completed and that the vessel had then been escorted to a shipyard in Sczcecin (Poland) for repair.

3.3.4 The Executive Committee noted that the spilled oil drifted north-westwards from the collision point and quickly approached the Danish coast and that the shoreline of several islands was polluted.

3.3.5 It was noted that both the *Baltic Carrier* and the *Tern* were entered in Assuranceforeningen Gard (the Gard Club).

Clean-up operations in Denmark

3.3.6 The Committee noted that the Danish Coast Guard responded to the spill with seven of its oil response vessels and that the Swedish and German authorities despatched three and two response vessels respectively, under the terms of the Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention).

3.3.7 The Committee further noted that specialised oil spill response equipment for the shore-based activities was supplied from Danish emergency stocks, by the Swedish emergency services and from a Danish response equipment manufacturer.

3.3.8 The Danish observer delegation stated that this spill highlighted the importance of a global approach to oil pollution and the benefits of a regional agreement between neighbouring States which facilitated mutual assistance. That delegation expressed in particular its appreciation of the assistance provided by Sweden and Germany.

Claims for compensation for pollution damage in Denmark

3.3.9 The Executive Committee noted that there would be claims for significant amounts for the cost of the offshore and shoreline clean-up in Denmark. It was further noted that commercial fishermen might have sustained some loss due to the closure of some small harbours, the oiling of nets and the rejection of catches due to oiling. It was also noted that a number of floating fish cages of fish farms had been oiled and that at the time of the oiling the fish farms had been in the process of being stocked with young trout. It was further noted that some agricultural areas had been oiled in connection with the loading, transport and transfer of oil to containers. It was further noted that since the incident occurred before the beginning of the tourist season, large claims for losses in the tourism sector were unlikely.

3.3.10 The Committee noted that it was not yet possible to make an evaluation of the total amount of the claims for compensation for pollution damage in Denmark.

3.3.11 The Danish observer delegation stated that it believed that the claims for compensation would exceed the shipowner's limitation amount bearing in mind the extensive clean-up operations undertaken after the spill.

Pollution in Sweden

3.3.12 The Swedish observer delegation stated that oil thought to have originated from the *Baltic Carrier* had been found on the south-west coast of Sweden and that clean-up operations had been undertaken to remove the oil. That delegation further stated that the analysis of the oil had not yet been completed, but that if the polluting oil matched the oil from the *Baltic Carrier*, the Swedish Coast Guard and local authorities intended to file claims in respect of clean-up operations.

Environmental monitoring in Denmark

3.3.13 The Executive Committee noted that the Danish authorities were considering carrying out a study of the distribution of the oil and to investigate if further clean-up is necessary, possibly through biodegradation.

3.3.14 The Committee noted that the Danish authorities had made available to the 1992 Fund a draft proposal for such a study, the main points of which were as follows:

> Sediment samples would be taken from depths of 0-2, 2-6 and 6-10 cm, two samples at each of 30 locations. Water samples would be taken at 30 locations. About 60 individual mussel samples would be taken at each of 30 locations. The

sampling was expected to take some 14 days. The total cost of the sampling and analysis is estimated at some Dkr 1 190 000 (£96 000).

3.3.15 The Executive Committee noted that the Director had considered that whilst the purpose of the proposed study, which was said to focus on the impact of the spill on recreational and economic resources, appeared to relate to 'pollution damage' as defined in the 1992 Conventions, there seemed to be some degree of overlap with a monitoring programme already being undertaken by the authorities in connection with the damage to fish farms. It was noted that the Director had also expressed doubts to the Danish authorities about the need to measure PAHs in sediment samples in the context of the impact of the spill on recreational activities and had requested further details of the proposal to measure PAHs in mussels. It was further noted that in the light of these comments the Danish authorities had indicated that they intended to submit a revised proposal in the near future.

3.3.16 The Danish observer delegation stated that it would inform the Danish Government of the 1992 Fund's opinion in respect of the planned environmental monitoring.

Settlement of claims for compensation for pollution damage in Denmark and Sweden

3.3.17 The Executive Committee authorised the Director to make final settlement on behalf of the 1992 Fund of all claims for pollution damage in Sweden and Denmark arising from the *Baltic Carrier* incident to the extent that the claims did not give rise to any question of principle which had not been previously been decided by any governing bodies of the 1971 Fund or the 1992 Fund.

Oil pollution in Rostock and Ventspills

3.3.18 The Executive Committee noted the information contained in document 92FUND/EXC.13/4/Add.1 concerning pollution damage in Rostock (Germany) and Ventspills (Latvia) following subsequent spillages of *Baltic Carrier* oil, which had entered the forepeak tank of the *Tern* immediately following the collision. It was noted that the *Tern* had proceeded to Rostock where it was discovered that about 230 tonnes of the *Baltic Carrier* oil was trapped in the *Tern's* forepeak tank. The Committee noted that during the latter vessel's stay in Rostock its bow was cleaned and most of the oil in the forepeak tank was removed. It was further noted that a small oil spill occurred in Rostock, although the cause of the spill was not known.

3.3.19 The Committee noted that about 800 tonnes of the *Tern's* cargo of sugar had been redistributed to trim the vessel by the stern following which Class' approval was obtained for the vessel to proceed with a tug escort to its discharge port of Ventspills. It was further noted that the *Tern* discharged its cargo in Ventspills from 5 to 17 May 2001, during which time a further spillage of *Baltic Carrier* oil occurred.

3.3.20 The Committee noted that some clean-up operations had been undertaken in Rostock and that a local contractor in Ventspills had been contracted by the Gard Club to undertake clean-up operations in Ventspills and remove the remaining *Baltic Carrier* oil from the forepeak tank. It was noted that some 95 tonnes of oil had been removed from the damaged tank. The Committee noted that although claims for pollution damage in both Rostock and Ventspills were anticipated, it was too early to make an evaluation of the total amount involved.

Applicability of the 1992 Conventions to pollution damage in Rostock and Ventspills

3.3.21 The Committee noted that the *Tern* was a bulk carrier and was therefore not a 'ship' for the purpose of the 1992 Civil Liability Convention. The Committee considered the question as to whether the spill of *Baltic Carrier* oil from the *Tern* fell within the scope of application of the 1992 Conventions or, in other words, how far the liability of the ship which originally carried the oil reached.

3.3.22 It was noted that under Article III.1 of the 1992 Civil Liability Convention the owner of the ship carrying the oil was liable for pollution damage caused by his ship as a result of an incident. It

was also noted that 'pollution damage' was defined as loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship (Article I.6). It was further noted that 'incident ' meant any occurrence, or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage (Article I.7).

3.3.23 It was noted that the oil spilled in Rostock and Ventspills originated from the *Baltic Carrier* and caused damage by contamination outside that ship. The Committee noted the Director's view that had the oil from the *Baltic Carrier* which entered the *Tern* spilled on to the sea at the collision point shortly after the collision, there would not be any doubt that the 1992 Conventions would have applied to that spill.

3.3.24 The Committee noted that the *Tern* however had been moved from the collision point to Rostock where some measures had been taken (shifting of its cargo, cleaning of the bow, removal of the major part of the oil in the forepeak) to enable the ship, after having obtained Class' approval, to proceed to Ventspills for discharge of its cargo. The Committee considered the question of whether the fact that the *Tern* had been moved with the *Baltic Carrier* oil in the forepeak tank before this oil spilled into the sea at Rostock should imply that this spill was not caused by a series of occurrences having the same origin, ie the collision. It was noted that since it had been necessary and prudent to bring the *Tern* to Rostock for inspection, the Director considered that there was a sufficiently close link of causation between the collision and the pollution damage caused in Rostock and that this spill fell within the scope of the 1992 Conventions.

3.3.25 The Committee noted that as regards the spill in Ventspills, the situation was, in the Director's view, different, since it had not been a foreseeable consequence of the collision that the oil originating from the *Baltic Carrier* would cause pollution damage in Latvia. The Committee noted that it was known at the time of departure from Rostock that there was *Baltic Carrier* oil remaining on board the *Tern*. The Committee noted the Director's view that the voyage from Rostock to Ventspills would constitute an intervening factor breaking the link of causation between the collision and the pollution damage in Ventspills, and that the spill in Ventspills would therefore constitute a different incident caused by an event, the origin of which was not the collision, nor an occurrence having its origin in the collision, but the failure to remove the oil from the *Tern*. The Committee noted that the Director considered therefore that this latter oil spill did not fall within the scope of the 1992 Conventions and that the liability for the pollution damage in Ventspills would not fall on the owner of the *Baltic Carrier* but would have to be determined under common law.

3.3.26 A number of delegations took the view that it was not foreseeable that the collision between the *Baltic Carrier* and the *Tern* would lead to pollution in Ventspills and that the *Tern*'s voyage from Rostock to Ventspills constituted an intervening factor which broke the link of causation between the collision and the pollution damage in Ventspills.

3.3.27 Some delegations considered that before any decision could be taken on the scope of application of the 1992 Conventions to the spills in Rostock and Ventspills, it would be necessary to establish the precise chain of events that led to the spills.

3.3.28 One delegation considered that there was no clear cut answer to the question, but that it could be argued that the *Tern* was only an agent carrying the oil to a different location and that that vessel was no different to any other agent. In that delegation's view the fact that the ship had been moved from one location to another should not be the deciding factor, but rather whether the pollution in Ventspills was foreseeable, and that the crucial element was whether the subsequent pollution was as a result of ordinary or gross negligence. The delegation considered that gross negligence would be sufficient to break the link of causation, whereas ordinary negligence would not. That delegation considered that there was insufficient information surrounding the spills in Rostock and Ventspills to determine the degree of negligence.

3.3.29 The Executive Committee decided that it was premature to make a decision on the scope of application of the 1992 Conventions beyond the pollution damage that occurred as a result of the

oil spill which took place at the location of the collision and that a decision on the question of whether the Conventions applied also to the spills in Rostock and Ventspills should be deferred to the next session. The Director was instructed to carry out further investigation into the chain of events which led to the spills in Rostock and Ventspills.

3.4 *Zeinab*

3.4.1 The Executive Committee took note of developments in respect of the *Zeinab* incident contained in document 92FUND/EXC.13/5.

The incident

3.4.2 The Committee noted that on 14 April 2001, the Georgian-registered vessel *Zeinab*, suspected of smuggling oil from Iraq, had been arrested by the multi-national Interception Forces. The Committee further noted that the vessel was being escorted to a holding area in international waters when the vessel lost its stability about 16 miles from the Dubai coastline and sank in 25 metres of water. It was further noted that the vessel was reported to have been carrying a cargo of 1500 tonnes of fuel oil, of which it was estimated that some 400 tonnes was spilled at the time of the incident. It was also noted that some 1100 tonnes of cargo remained in the unbreached tanks and that this cargo was successfully removed from the sunken vessel without further significant spillage of oil. The Committee noted that it appeared that the *Zeinab* was not entered with any classification society and was not covered by any liability insurance.

3.4.3 The Committee noted that oil had affected a number of amenity beaches in Dubai and Sharjah and also impacted the Ajman coastline and that some beachside villas had their sea defence walls stained. The Committee further noted that oil also had affected desalination plants in Sharjah and Ajman and that the desalination plant in Sharjah had to be closed down temporarily on a number of occasions, which had led to a shortage of water supply to the city. It was further noted that a number of amenity beaches had been oiled and that oil had entered the port area in Port Rashid causing staining of sea defences and vessels. The Committee further noted that oil might have affected Dubai's tourist industry, although the prompt cleaning of amenity shorelines might have helped to limit losses. The Committee further noted that fishing activities and fish markets had reportedly not been affected.

Definition of 'ship'

3.4.4 The Executive Committee noted that the *Zeinab* appeared to have been built in 1967 in Italy as a two-hatch general cargo vessel of some 4 354 dwt. The Committee further noted that at some stage around 1998, the vessel had been converted to carry oil by installing 12 tanks within the cargo holds, although when the conversion had been undertaken the hatch coamings had been left in place and the tanks covered by a tarpaulin so that the *Zeinab* maintained the outward appearance of a general cargo vessel.

3.4.5 The Committee recalled the definitions of 'ship' set out in Article I.1 of the 1969 Civil Liability Convention and of the 1992 Civil Liability Convention, and which are incorporated in the 1971 and 1992 Fund Conventions, which read:

> *1969 Civil Liability Convention*
>
> 'Ship' means any sea-going vessel and seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo.
>
> *1992 Civil Liability Convention*
>
> 'Ship' means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following

such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.

3.4.6 The Committee noted that since the *Zeinab* was actually carrying oil in bulk as cargo at the time of the incident, it should therefore be considered a ship for the purpose of the 1969 Civil Liability Convention and the 1971 Fund Convention. It was further noted that the *Zeinab* was clearly capable of carrying oil in bulk as cargo, and had been frequently used for carrying oil in the region. The Committee considered that it would be difficult to argue that it was not a ship for the purpose of the 1992 Convention Civil Liability Convention and the 1992 Fund Convention. The Committee therefore took the view that the *Zeinab* fell within the definitions of 'ship' laid down in the 1969 Civil Liability Convention and the 1992 Civil Liability Convention.

Applicability of Conventions

3.4.7 The Committee recalled that at the time of the incident the United Arab Emirates was a Party to both the 1971 Fund Convention and the 1992 Fund Convention, having not denounced the former when acceding to the latter. The Committee also recalled that it had considered the applicability of the two Conventions at its 8th session in the context of the *Al Jaziah 1* incident which occurred in the United Arab Emirates on 27 January 2000 (document 92FUND/EXC.8/4, paragraphs 3.1 – 3.10). The Committee also recalled that the Administrative Council of the 1971 Fund had also considered the matter at its 2nd session (document 71FUND/A.23/14/11, paragraphs 3.1 - 3.10). It was recalled that the Executive Committee and the 1971 Fund Administrative Council had decided that both the 1992 Fund Convention and the 1971 Fund Convention applied to that incident (documents 92FUND/EXC.8/8, paragraph 4.2.11 and 71FUND/AC.2/A.23/22, paragraph 17.12).

3.4.8 The Executive Committee decided that since the United Arab Emirates was at the time of the *Zeinab* incident a Party to both the 1969/1971 Conventions and the 1992 Conventions, which had been implemented into national law, both sets of Conventions applied to the incident.

3.4.9 It was noted that the *Zeinab* was reportedly registered in Georgia, which at the time of the incident was a Party to the 1969 Civil Liability Convention but not to the 1992 Civil Liability Convention and that the United Arab Emirates was also a Party to the 1969 Civil Liability Convention. It was noted that therefore the United Arab Emirates would be under a treaty obligation to apply the 1969 Civil Liability Convention in respect of the shipowner's liability (cf Article 30.4(b) of the 1969 Vienna Convention on the Law of Treaties).

Distribution of liabilities between the 1971 Fund and the 1992 Fund

3.4.10 The Executive Committee recalled that the question of the distribution of liabilities between the 1971 and 1992 Funds had in a corresponding situation also been considered by the Committee at its 9th session (document 92FUND/EXC.9/11, paragraphs 4.1 - 4.6) and by the 1971 Fund Administrative Council at its 2nd session (document 71FUND/A.23/14/11, paragraphs 4.1 - 4.6) in the context of the *Al Jaziah 1* incident. The Committee recalled that both bodies had concluded that, since there were neither provisions in the Fund Conventions nor any rules under general treaty law governing the simultaneous application of the two sets of Conventions, a practical and equitable solution should be agreed between the two Funds. It was further recalled that both bodies therefore had decided to distribute the liabilities between the 1992 Fund and the 1971 Fund on a 50:50 basis (documents 92FUND/EXC.9/12, paragraphs 3.8.7 - 3.8.15 and 71FUND/AC.2/A.23/22, paragraphs 17.12.7 - 17.12.15).

3.4.11 The Committee decided that the liabilities arising out of the *Zeinab* incident should be distributed between the 1992 Fund and the 1971 Fund on a 50:50 basis.

3.4.12 It was noted that each claimant had the right to pursue its claim against either the 1992 Fund or the 1971 Fund, that the Fund against which the claim was pursued was liable for the total amount of the damage up to the limit of its liability under the respective Convention and that the distribution of liabilities between the two Funds would have to be negotiated between them.

Claims for compensation

3.4.13 The Executive Committee noted that it appeared that the *Zeinab* was not covered by any liability insurance and that it was unlikely that the shipowner would be able to pay compensation.

3.4.14 It was noted that the Director had requested the Committee to consider whether it was prepared to authorise the Director to make final settlements on behalf of the 1992 Fund of all claims arising out of the *Zeinab* incident to the extent that the claims did not give rise to questions of principle which had not previously been decided by any of the governing bodies of the 1971 Fund or the 1992 Fund.

3.4.15 One delegation raised concerns that the *Zeinab* appeared to have been engaged in oil smuggling and had not been properly classified and certified to carry oil. In that delegation's view if the 1992 Fund were to entertain claims for compensation arising from the incident, the Fund might be seen to be encouraging the operation of sub-standard ships at a time when concerted efforts were being made to improve the quality of shipping. In addition, attention was drawn to the obligations of Contracting States under Article VII.10 of the 1992 Civil Liability Convention.

3.4.16 Another delegation referred to Article 4.2(a) under which the Fund was exonerated from paying compensation for pollution damage resulting from *inter alia* an act of war or hostilities. In that delegation's view it would be worth exploring this defence more closely.

3.4.17 Some delegations considered that the multi-national interception forces were merely carrying out policing duties to ensure that sanctions imposed by the United Nations Security Council were respected. Those delegations considered that even if the sinking of the *Zeinab* had been due to a deliberate act, this would be a matter for a possible recourse action by the Fund rather than constituting a defence under Article 4.2(a).

3.4.18 The United Arab Emirates observer delegation stated that the area in question was no longer under war and that observation of United Nations Resolutions had no bearing on the right to compensation for oil pollution damage.

3.4.19 A number of delegations expressed concerns about authorising the Director to settle claims until the exact circumstances surrounding the sinking of the *Zeinab* were known.

3.4.20 The Executive Committee decided that in view of the reservations expressed by a number of delegations it was premature to authorise the Director to settle claims for compensation arising from the incident and that the matter should be given further consideration at the Committee's next session.

4 Any other business

4.1 Status of Conventions

4.1.1 The Executive Committee took note of the information on the status of Conventions contained in document 92FUND/EXC.13/6.

4.1.2 It was recalled that a Diplomatic Conference, held in September 2000 under the auspices of IMO, had adopted a Protocol to amend Article 43.1 of the 1971 Fund Convention which governs the termination of the Convention and that the Protocol entered into force on 27 June 2001. It was also recalled that under Article 43.1 as amended the 1971 Fund Convention would cease to be in force on the date on which the number of 1971 Fund Member States fell below 25 or 12 months following the date on which the 1971 Fund Assembly (or any other body acting on its behalf) noted that the total quantity of contributing oil received in the remaining Member States fell below 100 million tonnes, whichever was the earliest.

4.1.3 It was noted that the United Arab Emirates had deposited an instrument of denunciation of the 1971 Fund Convention on 24 May 2001. It was also noted that when that denunciation took

effect on 24 May 2002, the number of Member States would fall below 25, that the Convention would cease to be in force on that day and that the Convention would not apply to incidents occurring after that date.

4.1.4 The Executive Committee expressed its satisfaction at this development.

4.2 Next session

It was noted that the governing bodies would hold their next sessions in the week commencing 15 October 2001.

5 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.13/WP.1, was adopted, subject to certain amendments.