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OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
16th session
Agenda item 5

92FUND/EXC.16/6
3 May 2002
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RECORD OF DECISIONS OF THE SIXTEENTH SESSION OF THE EXECUTIVE COMMITTEE

(held on 29 and 30 April and 2 and 3 May 2002)

Chairman: Mr Gaute Sivertsen (Norway)

Vice-Chairman: Dr J Cowley (Vanuatu)

Opening of the session

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 92FUND/EXC.16/1.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

Algeria	Liberia	Republic of Korea
Australia	Mexico	Spain
Ireland	Netherlands	United Kingdom
Italy	Norway	Vanuatu
Japan	Philippines	

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:

Antigua and Barbuda	Greece	Russian Federation
Argentina	Kenya	Singapore
Belgium	Latvia	Sweden
Canada	Lithuania	Trinidad and Tobago
Cyprus	Malta	United Arab Emirates
Denmark	Marshall Islands	Uruguay
Finland	Morocco	Venezuela
France	Oman	
Germany	Poland	

2.3 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:

Cameroon	Colombia	Turkey

Other States

Congo	Iran, Islamic Republic of	Nigeria
Côte d'Ivoire	Malaysia	United States
Ecuador		

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

Intergovernmental organisations:
International Oil Pollution Compensation Fund 1971
European Community

International non-governmental organisations:
Comité Maritime International (CMI)
International Association of Independent Tanker Owners (INTERTANKO)
International Tanker Owners Pollution Federation Limited (ITOPF)
International Union for the Conservation of Nature and Natural Resources (IUCN)
Oil Companies International Marine Forum (OCIMF)

3 Incidents involving the 1992 Fund

3.1 *Nakhodka*

3.1.1 The Committee took note of the developments in respect of the *Nakhodka* incident as contained in document 92FUND/EXC.16/2.

Claims for compensation

3.1.2 The Committee noted that as at 22 April 2002, claims totalling ¥29 030 million (£149 million) had been settled at ¥20 509 million (£105 million), that the payments made by the Funds to claimants amounted to ¥16 919 million (£87 million) and that the payments made by the shipowner and his P & I insurer, the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd (UK Club), totalled US$5 million (£4 million).

3.1.3 The Committee noted that the claims of two electricity power companies had been settled by the IOPC Funds and the UK Club at ¥341 million (£1.7 million) and ¥1 269 million (£6.5 million),

respectively, and that these claims would be paid within a few days at 80% of the settlement amount minus previous provisional payments.

3.1.4 The Committee noted that there remained only a few claims, mainly those submitted by the Japanese Government agencies and the Japan Maritime Disaster Prevention Centre (JMDPC).

Level of payments

3.1.5 The Committee recalled that in accordance with a decision by the Assembly of the 1992 Fund, the total amount available under the 1971 and 1992 Fund Conventions, ie 135 million SDR, equalled ¥23 164 515 000 (£119 million).

3.1.6 It was recalled that, as a result of the developments and as authorised by the governing bodies, the Director had decided in January 2001 to increase the level of payments from 60% to 80% of the amount of the loss or damage actually suffered by the individual claimants.

3.1.7 The Committee noted that, after taking unsettled claims into account, the total exposure of the IOPC Funds could be estimated at ¥27 299 320 000 (£140 million) and that therefore, in the Director's view, the level of payments should be maintained at 80%.

3.1.8 The Committee noted that the present level of payments, ie 80% of the amount of damage actually suffered by the respective claimants, would give a total payment of ¥21 839 456 000 (£112 million), which gave the IOPC Funds a certain margin against overpayment but that an increase of the level to 90% would give ¥24 569 388 000 (£126 million), which would exceed the maximum amount available for compensation.

3.1.9 The Japanese delegation suggested that, in order that claimants would receive as much compensation as possible in the near future, the Director should be given the authority to increase the level of payments to 90% if and to the extent that he considered that this could be done without any risk that the payments would exceed the total amount of compensation available. That delegation considered that, in view of the fact that agreement had been reached to a large extent in respect of the claims by JMDPC relating to the construction and removal of the causeway, an increase in the level of payments was justified.

3.1.10 A number of delegations supported the proposal by the Japanese delegation to give the Director authority to increase the level of payments.

3.1.11 The Director accepted that there were relatively few areas of disagreement remaining as regards the causeway claims (cf paragraphs 3.1.13 – 3.1.26 below). He stated, however, that, until a formal settlement had been reached in respect of these claims, it was in his view the claimed amount that had to be taken into account in order to assess the total exposure of the Funds.

3.1.12 The Committee decided to authorise the Director to increase the level of payments if and to the extent that he was satisfied that there was no risk that the Funds would face an overpayment situation.

Claims relating to construction and removal of a causeway

3.1.13 The Executive Committee took note of the information contained in document 92FUND/EXC.16/2/Add.1.

3.1.14 The Committee recalled that the upturned bow section of the *Nakhodka*, which was thought to have contained 2 800 tonnes of cargo, grounded on rocks some 200 metres from the shore. It was noted that a Japanese salvage company had been contracted by the shipowner to remove the oil remaining in the bow section, but that the operations had been hampered by adverse swell and weather conditions. It was also noted that the Japanese authorities had taken over the operations

using the services of two salvage companies, and that some 2 450 m^3 of oil/water mixture had been removed through these operations.

3.1.15 The Committee noted that due to concerns that the on-water operations might fail as a result of the adverse conditions, the Japanese authorities had ordered the construction of a temporary causeway to the grounded bow section, which had been intended to allow road tankers to be brought close to the wreck, thereby facilitating the removal of the oil. It was also noted that the causeway had extended 175 metres from the shore and that a large crane had been assembled at its seaward end with a sufficiently long arm to reach the bow section. It was further noted that some 380 m^3 of oil/water mixture had been removed from the bow section via the causeway compared with 2 450 m^3 removed by at-sea operations.

3.1.16 It was recalled that JMDPC had submitted claims totalling ¥3 336 million (£17 million) for the costs in respect of the causeway operation and that the majority of these costs related to the construction and removal of the causeway itself.

3.1.17 It was recalled that at the June 2001 sessions of the IOPC Funds governing bodies several delegations had 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. It was also recalled that some delegations had 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. It was further recalled that some delegations had 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.

3.1.18 The Committee noted that the claims by JMDPC had been assessed against the criteria for admissibility laid down by the Assemblies, ie whether and up to what point the construction of the causeway was reasonable from an objective technical point of view.

3.1.19 The Committee noted that the decision by JMDPC to proceed with the construction of the causeway was taken after examining historical records of sea conditions between 1985 and 1993 off the coast of Fukui Prefecture. It was noted that JMDPC had been advised that salvage operations at sea could only take place in wave conditions of less than one metre, and that during the months of January and February such conditions could only be expected for about three days per month. It was further noted that JMDPC had been advised that the oil removal operations via the causeway could be carried out in wave conditions of less than two metres, and that these conditions could be expected for about 20 days per month during January and February. It was further noted that the construction companies had estimated that the causeway would require 15 working days to complete at a cost of ¥1 000 million (£5 million), but that in the event it took 27 days to complete the work at twice the estimated costs.

3.1.20 It was noted that in their examination of the claims the Funds had found that on occasions both the at-sea operations and the causeway operations had required the assistance of divers who were only able to work when waves were less than one metre. It was also noted that both operations had therefore been subjected to the same restrictions with regard to sea conditions and the extra potential days said to have been available for causeway operations had not been as great as indicated by JMDPC. The Committee noted, however, that the Funds had acknowledged that down time due to bad weather had been greater for the at-sea operations due to the fact that the salvage vessels had to return to Fukui port on these occasions, which involved demobilisation/remobilisation times of several hours, compared with the causeway operations which could be suspended and resumed very quickly.

3.1.21 It was also noted from the chronology of events that the construction of the causeway had proved less straightforward than had been anticipated, and that significant sections had been washed away on 22, 26 and 29 January 1997. The Committee noted that the Director considered that

JMDPC should have reappraised its decision to construct the causeway in light of these set-backs, since it should have become apparent that the construction companies had underestimated both the time to complete the causeway and the costs involved.

3.1.22 It was noted that at the time of the damage to the causeway on 26 January only 709 m³ out of a total of 2 450 m³ had been removed from the bow section by the at-sea operation. Furthermore, it was noted that JMDPC had decided to modify the causeway design following the damage on 26 January. However, it was also noted that in the Director's view following the damage to the causeway on 29 January 1997 the construction work should have been terminated, and that the claims had therefore been assessed on the basis of the construction costs that would have been incurred up to that date and the subsequent removal costs after that date.

3.1.23 The Committee noted that in order to assess the claims the Funds had engaged Japanese civil engineering experts to estimate the costs of construction up to and including 29 January 1997 and the subsequent removal costs after that date. It was noted that the experts had estimated the costs on the basis of information recorded in the daily work reports on the quantities of foundation stones, wave-absorbing blocks and other materials used in the construction of the causeway up to 29 January 1997. It was also noted that the claim in respect of the construction and removal of the causeway had been assessed at ¥1 587million (£8.1 million), which represented 68% of the total construction and removal costs. It was further noted that as regards the other components of the claim, ie oil removal operations via the causeway, subsequent clean-up of the site and JMDPC's own expenses, the Director had assessed these amounts for a total of ¥393 million (£2 million). It was finally noted that the Director considered that the claims should be accepted for ¥2 043 million (£10.4 million), including interest, compared with the claimed amount of ¥3 336 million (£17 million).

3.1.24 Several delegations noted with satisfaction the detailed technical explanation given in document 92FUND/EXC.16/2/Add.1 setting out the basis of the assessment of the claim in respect of the causeway. They stated that it was sometimes necessary for governments and public bodies to undertake innovative and expensive measures to deal with serious pollution, and that it was important for the IOPC Funds and their experts to consider claims for the costs of such measures at an early stage, particularly where the question of admissibility was an issue.

3.1.25 The Committee endorsed the Director's view that the serious risk of pollution from the bow section justified the Japanese authorities' decision to commence the construction of the causeway, but that the decision should have been reappraised in the light of the difficulties faced as a result of the adverse weather encountered.

3.1.26 The Committee decided to approve the causeway claims for a total of ¥2 043 million (£10.4 million).

Legal actions

3.1.27 It was recalled that, pursuant to the Executive Committees' decisions, in November 1999 the IOPC Funds brought legal actions in the Fukui District Court against the owner of the Nakhodka (Prisco Traffic Limited), Prisco's parent company (Primorsk Shipping Corporation), the UK Club and the Russian Maritime Register of Shipping, to recover any amounts paid by the Funds in compensation.

3.1.28 The Executive Committee took note of the developments in respect of the legal proceedings as set out in paragraphs 4.1.1 – 4.3.22 of document 92FUND/EXC.16/2 and the position of the parties in the proceedings as set out in paragraphs 5.1.1 – 5.4.5 of that document.

Global solution

3.1.29 The Executive Committee held a session in private, pursuant to Rule 12 of the Rules of Procedure, to consider whether it would be possible to reach a global solution of all outstanding issues in the legal proceedings. During the closed session covered by paragraphs 3.1.29 – 3.1.40, only the representatives of the Member States of the 1992 Fund and 1971 Fund were present.

3.1.30 The Committee recalled that at the October 2001 sessions of the governing bodies, a number of delegations had supported the idea of reaching a global solution and had stressed the need for flexibility, pragmatism and transparency. It was also recalled that at these sessions the Director had been instructed to continue to explore the possibilities of reaching a settlement of all outstanding issues, including those relating to the various recourse actions, that discussions had been held between the UK Club and the IOPC Funds on the possibilities of reaching such a global solution, and that he had been given renewed instructions to this effect at the present sessions. It was noted that discussion had been carried out between the IOPC Funds and the UK Club since the October 2001 sessions and that these discussions had continued during the week of the present sessions.

3.1.31 The Director submitted for consideration by the Committee the following proposal for a global settlement made by the UK Club:

1 The compensation payments would be shared between the UK Club and the IOPC Funds on a 42:58 basis in respect of all settled claims.

2 The IOPC Funds would continue to make payments at a level of 80% in respect of all settled claims.

3 The UK Club would pay the 20% balance due to all claimants.

4 The UK Club would reimburse the IOPC Funds approximately ¥5 200 million (£26.7 million), this being the amount payable by the Club to the Funds after payment by the Club of the 20% balance due to claimants.

5 The joint costs incurred by the UK Club and the IOPC Funds would also be apportioned between them on a 42:58 basis.

6 All legal actions arising from the incident would cease.

7 The IOPC Funds, Prisco Traffic Limited, Primorsk Shipping Corporation and the UK Club should each bear their own legal costs.

3.1.32 The Director expressed the view that the proposed global settlement represented a fair compromise taking into account the uncertainty that was inherent in any litigation involving complex issues. He stated that it would have the great advantage that all established claims would be paid in full promptly and would result in the IOPC Funds being reimbursed for a considerable part of their compensation payments. He therefore recommended that the Executive Committee should approve the proposed global settlement and authorise him to conclude a global settlement agreement containing the elements set out in paragraph 3.1.31 and agree with the other parties on the details of such an agreement.

3.1.33 The Committee noted that the proposed global settlement would result in the IOPC Funds recovering approximately ¥5 203 million (£26.7 million) and making a saving of around ¥2 500 million (£13.1 million) as a result of not having to increase their payments over 80% of the settlement amounts, and that the Funds would get a contribution to joint costs of some £3.9 million.

3.1.34 All members of the Executive Committee present and a large number of observer delegations unanimously supported the Director's proposal for a global settlement. It was considered that the proposed global settlement represented a balanced compromise with the main advantages that all claimants would be paid in full, that the IOPC Funds would not have to be involved in protracted legal proceedings and that the Funds would recover a significant portion of the amounts paid in compensation which would benefit the contributors to the Funds. The point was also made that the proposed settlement would facilitate the winding up of the 1971 Fund.

3.1.35 A number of delegations expressed their satisfaction that the Japanese delegation, representing the State affected by the incident, endorsed the Director's proposal.

3.1.36 The Executive Committee approved the proposed global settlement and authorised the Director to conclude a settlement agreement provided it contained the elements set out in paragraph 3.1.31. It also authorised the Director to agree with the other parties on the details of such an agreement.

3.1.37 The Executive Committee emphasised that the acceptance of the proposed settlement should not be interpreted to mean that the IOPC Funds had any doubts as to the strength of their position in the proceedings.

3.1.38 The Executive Committee further decided that the IOPC Funds should withdraw their actions against the Russian Register of Shipping.

3.1.39 The Executive Committee also stated that the acceptance of the proposed settlement and the withdrawal of the action against the Russian Register should not be interpreted in any way as a change in the IOPC Funds' policy in respect of recourse actions, namely that the Funds should take recourse action whenever appropriate to recover any amounts paid by it from shipowners or other parties on the basis of the applicable national law.

3.1.40 The Executive Committee expressed its gratitude to the Director and the Secretariat, to the UK Club and to their respective lawyers and experts who had contributed to the successful outcome of the negotiations.

Geographic terminology

3.1.41 The delegation of the Republic of Korea referred to the naming of the body of water, 'Sea of Japan', in paragraph 5.1.3 of document 92FUND/EXC.16/2. That delegation stated that the geographical name of the sea between the Korean Peninsula and the Japanese archipelagos (the *Nakhodka* incident having occurred in that area) was in dispute and that this issue had not been resolved between the two States concerned. That delegation also stated that it was the strong wish of the Korean Government that the names 'East Sea' and 'Sea of Japan' should be used simultaneously in references to the aforementioned sea area until a final resolution had been concluded between the States concerned, as recommended in Resolution No. III/20(1977) by the United Nations Conference on the Standardisation of Geographical Names. That delegation strongly requested the Director not to cause similar problems in the future.

3.1.42 The Japanese delegation objected to the intervention by the Korean delegation on the grounds that the name 'Sea of Japan' was well established.

3.1.43 The Director stated that this matter had been discussed at the 1971 Executive Committee's 59th and 62nd sessions (documents 71FUND/EXC.59/17, paragraphs 3.8.11 – 3.8.13 and 71FUND/EXC.62/14, paragraphs 3.7.20 – 3.7.22). He also stated that he had investigated the position taken within the United Nations on this point. He mentioned that the policy of the Cartographic Section of the United Nations was that the name 'Sea of Japan' would continue to be used, as the most common and widespread denomination for the body of water in question, until a negotiated solution was found by the parties concerned. He stated that it was for this

reason that that denomination would be used in documents prepared by the IOPC Funds' Secretariat, unless the governing bodies gave instructions to the contrary.

3.2 *Erika*

3.2.1 The Executive Committee took note of the developments in respect of the *Erika* incident as set out in documents 92FUND/EXC.16/3, 92FUND/EXC.16/3/Add.1 and 92FUND/EXC.16/3/Add.2.

Attack on the Claims Handling Office in Lorient

3.2.2 The Committee noted that threats and allegations had been made more or less continually, mainly by one individual, against staff at the Claims Handling Office in Lorient, against experts engaged by the Steamship Mutual and the 1992 Fund and against the Director.

3.2.3 It was noted that early in the morning of Saturday 15 December 2001, a person who had previously caused damage to the 1992 Fund's offices in Lorient and Brest had driven a tractor with a front-end loader into the Claims Handling Office building in Lorient, demolishing a number of windows and destroying the door. It was also noted that the two police officers present outside the office had been unable to prevent the attack, but had arrested the attacker and had taken him into police custody. It was further noted that after being charged by the investigating judge (juge d'instruction) the person had been released on 16 December and that the judge had issued an order prohibiting the person from visiting Lorient except to see his lawyer.

3.2.4 The Committee noted that as a result of the serious damage caused to the Claims Handling Office, the Director had decided to suspend provisionally the operations of the Office until the necessary repairs had been carried out.

3.2.5 It was noted that on the day of the attack the 1992 Fund had issued a press communiqué in France condemning the attack in the strongest possible terms. It was also noted that in the communiqué attention had been drawn to the fact that this new attack had been under no circumstances in the interest of the victims of the *Erika* incident but on the contrary had resulted in the suspension of the operations of the Office until the premises and equipment had been repaired. The Committee noted that in the communiqué it had been stated that the Fund, together with the Claims Handling Office and experts involved, would make every effort to continue to carry out the task of the Fund which was to provide compensation to the victims of the *Erika* oil spill. It was also noted that the Préfet of Morbihan had also issued a statement the same day categorically condemning the attack on the Office. It was further noted that on 17 December 2001 a joint Press Conference had been held in Lorient by the Préfet of Morbihan and the Director. It was also noted that at the Press Conference the Préfet and the Director had repeated their condemnation of the attack.

3.2.6 The Committee noted that on 18 December 2001, the Director had visited the Ministry of Foreign Affairs, the Ministry of Economy, Finance and Industry and the Ministry of Interior in Paris to express his concerns. It was also noted that the following day a spokesman of the French Ministry of Foreign Affairs had made a public declaration to the effect that representatives of those three ministries had reiterated the condemnation of the attack against the Office in Lorient.

3.2.7 The Committee noted that the suspension of the operations of the Claims Handling Office necessitated by the attack had resulted in a delay in the payment of compensation to the victims of the *Erika* incident but that the Claims Handling Office in Lorient had resumed its operation on 2 January 2002.

3.2.8 The Committee also took note that the 1992 Fund and the Steamship Mutual had pressed charges against the attacker.

3.2.9 A large number of delegations and observer delegations condemned the attack on the Claims Handling Office in Lorient. Many delegations emphasised that the safety of the staff at the Office was paramount and that, unless their safety was guaranteed, the 1992 Fund had to close the office.

3.2.10 The Executive Committee condemned the attack against the Claims Handling Office in Lorient in the strongest possible terms. The Committee reiterated that attacks, threats or intimidation against the staff at the Claims Handling Office or persons engaged by the Fund or their families or against the Director were unacceptable. The Committee stated that it would not be possible for the 1992 Fund to continue its operations in France if such behaviour continued, recognising that this would be very detrimental to the victims of the *Erika* incident. The Committee invited the French judicial authorities to take appropriate actions against the person who carried out the attack against the Claims Handling Office. It also emphasised the necessity for the French authorities to provide adequate protection against attacks on the Claims Handling Office, its personnel and other persons working for the Fund.

3.2.11 The Executive Committee endorsed the Director's decision to suspend temporarily the operations of the Claims Handling Office on 16 December 2001 and also endorsed the other actions taken by the Director after the attack. The Committee stated that the safety of the staff of the Office should be paramount and that, if the Director felt that their safety was in danger, he would be entitled to close the Office, however regrettable that would be from the point of view of the claimants.

3.2.12 The Committee expressed its appreciation that the Claims Handling Office had resumed its operations already on 2 January 2002 so as to enable the 1992 Fund to carry out its task, which is to compensate the victims of the *Erika* oil spill. The Committee also expressed its gratitude to the staff of the Claims Handling Office for having continued to carry out this task in spite of the attack.

3.2.13 The French delegation stated that it had noted the unanimous sentiment expressed by the Executive Committee and reaffirmed the French Government's strenuous condemnation of the attack on the Office. That delegation pointed out that it was an isolated individual who had committed the attack and that steps had been taken to prevent such an incident happening again. The delegation also stated that investigations concerning that attack on the Claims Handling Office were continuing in connection with investigations of other offences by the same person.

Claims situation

3.2.14 The Committee took note of the information given on the claims situation as follows:

> As at 23 April 2002, 6 157 claims for compensation had been submitted for a total of FFr1 004 million or €153 million (£94 million). 5 378 claims totalling FFr772million or €117 million (£73 million) had been assessed at a total of FFr406 million or €62 million (£38 million). Assessments had thus been carried out of 87% of the total number of claims received.
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> Six hundred and forty claims totalling FFr107 million or €16 million (£10 million), had been rejected. Eighty-two claimants whose claims total FFr24 million or €3.6 million (£2.2 million) had contested the rejection and their claims were being reassessed in the light of additional documentation provided by the claimants.
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> Payments for compensation had been made in respect of 4 141 claims for a total of FFr259 million or €39 million (£24 million). A further 779 claims, totalling FFr232 million or €35 million (£22 million), were either in the process of being assessed or were awaiting claimants providing further information necessary for the completion of the assessment.

There was a significant difference between the various categories of claims as regards the progress made in the claims assessment. In five of the eight categories over 90% of all claims had been assessed and for most categories payments had been made in respect of over 65% of claims. Although in the tourism sector a major part of the claims had been presented relatively late, 91% of the claims in this sector had been assessed. There was still a delay between the time of approving and the time of paying claims, mainly as a result of claimants not having accepted the approved amounts.

3.2.15 A number of delegations expressed satisfaction at the number of claims that had been assessed and congratulated the Fund Secretariat, its experts and the staff of the Claims Handling Office on the great progress that had been made in the claims assessment.

3.2.16 The French delegation also expressed its global satisfaction with the progress made since September/October 2001, but also voiced its concerns over the apparent decrease in the rate of claims assessments since that date and hoped that this trend would not continue. That delegation also noted that, whilst the rate of assessments was impressive in terms of the number of claims, the percentage of the total claimed amount that had been assessed was lower due to the fact that many large claims had not been assessed or were still under assessment. Whilst recognising that large claims were often more complex and therefore needed more time to assess, the French delegation stressed the importance of completing the assessments before the expiry of the three-year time bar period to prevent the risk of court actions which would result in delaying compensation.

3.2.17 The Director acknowledged that there had been a reduction in the number of claims assessed in early 2002 and stated that this was mainly due to the complexity of the remaining claims and the need to seek additional documentation from claimants in support of the alleged losses.

Level of payments

3.2.18 It was recalled that the Executive Committee had decided, at its 13th session held in June 2001, to increase the level of payments from 60% to 80% of the amount of the damage actually suffered by each claimant, as assessed by the 1992 Fund (document 92FUND/EXC.13/7, paragraph 3.2.42).

3.2.19 It was further recalled that at its 14th session, held in October 2001, the Committee had decided that, in the light of the uncertainty that remained as to the level of admissible claims arising from the *Erika* incident, the level of payments should be maintained at 80% (document 92FUND/EXC.14/12, paragraph 3.4.49).

3.2.20 The Executive Committee noted that it had again 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.

3.2.21 It was recalled that the claims by Total Fina and the French Government could be disregarded for the purpose of the Executive 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.

3.2.22 The Committee noted the Director's opinion that although the uncertainties in the estimates presented in October 2001 had been reduced, there still remained in his view uncertainties as to the total amount of the admissible claims from the tourism sector. It noted that although the outcome of the 2001 tourism season was not yet known in any detail, it appeared that it had been relatively good. The Committee noted that it was unlikely that the 2001 tourism season had been affected by the *Erika* incident to any significant degree, but that there might nevertheless be admissible claims relating to that season from areas where clean-up was still being carried out. It was noted that a major part of the tourism claims relating to the 2000 tourism season had been submitted during the period April to June 2001, that some claims for losses during the 2001

tourism season had been presented and that it was possible that further claims relating to that session would be presented during late spring/early summer 2002. It was recalled 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, and that the time bar period would expire on 12 December 2002 at the earliest.

3.2.23 It was recalled that the admissible claims in the sectors other than tourism had been estimated at some FFr275 - 325 million or €42– €49 million (£26 - 31 million). It was noted that the Director believed that in the October 2001 study by the French Ministry of Economy, Finance and Industry the estimate for the tourism claims of FFr500 million or €76 million (£47 million) might be on the low side and that he considered that a figure of FFr700 million or €107 million (£66 million) would be prudent. It was further noted that he took the view that it was advisable to include an amount of FFr100 million or €15 million (£9.4 million) for losses in the tourism sector during 2001 and that it was necessary to make an additional allowance for marketing campaigns of some FFr100 million or €15 million (£9.4 million). It was also noted that as had been stated at the Executive Committee's 14th session, the Director believed that it would be prudent to add a general safety margin of FFr200 million or €30 million (£18.8 million), such that the estimated total admissible claims would then be in the region of FFr1 400 million or €213 million (£131 million), ie the same figure as the one given by the Director at the Committee's 14th session. It was further noted that, in the light of the remaining uncertainties, the Director proposed that the level of payments should be maintained at 80% of the amount of the damage actually suffered by the respective claimants as assessed by the experts engaged by the 1992 Fund and Steamship Mutual.

3.2.24 The French delegation agreed with the Director's proposal to maintain the level at 80% as no new elements had become available since the October 2001 session, but expressed the view that enough information should be available by the time of the next session of the Executive Committee in July 2002 to enable a decision to be made on raising the level of payments.

3.2.25 The Executive Committee decided that in the light of the uncertainties that remained as to the level of admissible claims arising out of the *Erika* incident, the level of payments should be maintained at 80% of the amount of the damage actually suffered by the respective claimants as assessed by the experts engaged by the 1992 Fund and Steamship Mutual. It was also decided that the level of payments should be reviewed at the Committee's 17th session.

Claims for reduction in tourism tax revenue

3.2.26 The Committee considered the admissibility of claims submitted by 17 communes for reduction in revenues from tourism tax (taxe de séjour). It was noted that the amounts claimed varied from FFr23 000 or €3 500 (£2 170) to FFr270 000 or €41 000 (£25 500).

3.2.27 It was noted that when the issue was considered at the Executive Committee's 14th session, it was understood that tourism tax was levied by communes that were recognised tourism resorts and destinations, and that the level of the tax was fixed annually by the commune on the basis of a fixed amount per visitor per night of stay, the amount varying dependent on the type of accommodation. It was further noted that the revenue from the tourism tax was used by the commune to support costs of activities and services which were related to tourism in the commune, *inter alia* beach cleaning, rubbish collection, information and local tourism offices.

3.2.28 It was noted that a preliminary examination of the claims indicated that there had been a reduction in tourism tax income from 1999 to 2000 of up to 40% and that for nine claims the reduction was between 9% - 25%, broadly comparable with the estimated levels of decrease in tourism economic activity in areas affected by the *Erika* incident.

3.2.29 The Committee recalled that the 1971 Fund Executive Committee had considered the question as to whether claims for reduction in tourism tax revenue were admissible in relation to some

previous incidents. It was also recalled that in these cases the claims had been rejected mainly on the grounds that the claimants had not shown that the alleged loss of revenue from tourism resulted from the incident.

3.2.30 It was recalled that in his submission to the 1992 Fund Executive Committee's 14th session relating to four of the claims which had been submitted by the French municipalities in the *Erika* case at that time (document 92FUND/EXC.14/5/Add.3), the Director had taken the view that, contrary to the case in respect of claims arising from previous incidents which had been rejected, it was clear that the reduction in tourism tax revenue was largely a result of the reduction in tourism caused by the *Erika* incident. It was further noted that the Director had considered therefore that there was a reasonable degree of proximity between the reduction in tourism tax revenue and the *Erika* incident and that for this reason the Director had taken the view that these claims should be considered admissible in principle.

3.2.31 It was recalled that at the Committee's 14th session the Director had expressed the view that, if the Committee were to agree with the Director's approach, it would be necessary for the purpose of assessing the quantum of the loss to consider to what extent the reduction was greater than normal fluctuations in tourism tax revenue from one year to another and to take into account also any potential savings made by the communes as a result of the decrease in the number of tourists.

3.2.32 It was recalled that at the Committee's 14th session some delegations had expressed the view that the circumstances relating to the claims by the communes for loss of revenue from tourism tax arising from the *Erika* incident were different to those examined in previous cases, and that there was a sufficient degree of proximity between the losses suffered by the communes and the contamination. It was also recalled that other delegations had expressed general reservations concerning the acceptance of claims relating to a reduction in tax revenues. It was further recalled that it had been pointed out that whilst the tourism taxes in question were levied to cover certain specific expenses related to tourism, other countries would rely on their general taxation system or on VAT to cover expenses of this kind. It was also recalled that those delegations had pointed out that different taxation systems could give rise to different treatment between Member States.

3.2.33 It was recalled that at the Committee's 14th session some delegations had expressed concerns that, in assessing claims in respect of losses due to reduction in revenue from tourism tax, it would be difficult to determine any potential savings that might have resulted from a downturn in tourism.

3.2.34 It was also recalled that the Committee, at its 14th session, had decided to postpone its decision on the admissibility of the claims for reduction in tourism tax revenue to its 16th session.

3.2.35 When reconsidering that issue at the present session the Committee took note of the information contained in document 92FUND/EXC.16/5 submitted by the French delegation, which provided further details on the main features of tourism tax. It was noted that the tourism tax took two forms, namely traditional tourism tax (taxe de séjour), which was paid by tourists on the basis of a fixed amount per night, and the so called 'flat-rate' tourism tax (taxe forfaitaire de séjour), which was paid by businesses such as hotels and campsites on the basis of the number of rooms or tent pitches available. It was noted that most communes had adopted the traditional tourist tax, where the revenue was dependent on tourist numbers, rather than the flat rate tax, where the revenue was not. It was also noted that during a financial year the communes could not increase the rates of direct taxes in order to compensate a reduction in revenue from the tourism tax.

3.2.36 The Executive Committee decided that claims relating to the reduction in revenue from the 'flat-rate' tourism tax (taxe forfaitaire de séjour) were not admissible, since the revenue did not depend on the number of tourists visiting the area.

3.2.37 As regards the most common tourism tax (taxe de séjour), some delegations were not convinced that the communes were dependent on tourism tax, bearing in mind the low amounts claimed. Another delegation expressed misgivings as it felt such payments were too remote.

3.2.38 One delegation referred to the CMI Guidelines on Oil Pollution Damage, which stated that recovery of economic losses would not normally extend to taxes and similar revenues by public bodies. The CMI observer delegation stated that the CMI Guidelines, which were drafted in 1994, reflected the decisions of the Fund Assembly on questions of principle. That delegation stated that the acceptance of claims by communes for tourism tax would not be inconsistent with the Guidelines in the particular circumstances and drew attention to paragraph 7(b)(ii) of the Guidelines which reads:

> Whilst the result in practice of applying the foregoing principles will always depend on the circumstances of the individual case, recovery will not normally extend to losses of taxes and similar revenue by public authorities.

3.2.39 The French delegation drew attention to the fact that the Conventions did not make any distinction between private claimants and public bodies as regards eligibility for compensation. In that delegation's view there was, in respect of the claims for reduction in tourism tax revenue, a clear link of causation between the loss and the contamination since the loss was directly proportional to the reduction in the number of tourists.

3.2.40 One delegation expressed the view that although claims for loss of revenue of public bodies were generally secondary claims, which would not normally be admissible for compensation, the tourism tax was unique in that it was not a true tax as such but more akin to a charge or due. That delegation considered that had the claimant been an individual or an association, the claim would have been deemed admissible, and that therefore claims by public bodies should also be admissible in principle. A number of delegations supported the views expressed by that delegation.

3.2.41 The Executive Committee decided that the commune claims for reduction in revenue from the traditional tourism tax (taxe de séjour) under consideration were admissible in principle in the light of the specific nature of that tax, the direct link between the revenue from that tax and the number of tourists visiting the area and the dependency of the communes in question on beach tourism. The Committee drew attention to the fact that when these claims were examined, it would be necessary to take into account any savings made as a result of the reduction in the number of tourists during the period in question.

Claims from businesses located at some distance from the coast

3.2.42 The Executive Committee noted that a significant number of claims had been submitted by businesses within the tourism industry which alleged a dependence on coastal tourism but which were situated at some distance inland. It was noted that the businesses included campsites, hotels, restaurants, historical buildings, museums and other tourist attractions.

3.2.43 It was recalled that the 1992 Fund had in the *Erika* case (as in some previous cases, eg the *Sea Empress* and *Nakhodka* cases) accepted claims from tourism businesses located some distance from the coast. However, as regards the *Erika* incident, it was noted that the Fund had in general restricted its acceptance to businesses located within approximately 25 kilometres of the coast in the four departments whose coasts had been affected by the oil pollution, namely Finistère, Morbihan, Loire-Atlantique and Vendée, as well as Charente-Maritime where only a minor part of the coastline (Ile de Ré) had been affected by the oil. It was also noted that all claims from businesses located within that distance of the coast had been assessed individually in order to establish whether the reduction in tourism resulting from the oil pollution had affected their business and whether the accounts or other supporting documents showed a downturn resulting from the reduction in tourism. It was further noted that as regards businesses located more than some 25 kilometres from the coast, it had been considered that there was in general not a reasonable degree of proximity between the pollution and the alleged loss or damage.

3.2.44 The Committee noted that an analysis of various types of claims from these businesses showed that the downturn in the economic activity in 2000 compared with 1999 varied from one type of business to another, probably due to the fact that there was a difference in dependency on beach tourism from one category to another. It was also noted that the reduction in revenue in 2000 compared with 1999 was considerably greater for businesses operating camp sites or for rented self-catering holiday cottages (gîtes) than for hotels and that by contrast the reduction in revenue for restaurants was generally much lower, probably due to restaurants benefiting to a large extent from local trade.

3.2.45 The Committee noted that it had been argued by the French tourism industry that the whole region had suffered a reduction in tourism as a result of the *Erika* incident, ie not only the five departments mentioned in paragraph 3.2.43 above but also the Department of Côtes-d'Armor and the Department of Ille-et-Vilaine whose coastlines were not affected by the oil spill. The Committee further noted that it had also been maintained that the repercussions on the tourism industry in the five departments whose coasts were affected had not been limited to the area closest to the coast but had been felt across the whole region.

3.2.46 It was noted that in the Director's view it would not be appropriate to lay down a hard and fast rule as to the distance from the affected coast within which a claimant's activity would need to be located in order for the claim to fulfil the criterion of geographic proximity and the other criteria laid down by the Assemblies (cf document 92FUND/EXEC.16/3/Add.2, paragraph 1.3).

3.2.47 It was noted that the statistics available tended to show that businesses in the tourism industry were more dependent on beach tourism the closer to the coast they were located and that businesses situated close to the coast had suffered in general greater decline in tourism trading as a result of the *Erika* incident than businesses located further inland. It was also noted that there were businesses located a considerable distance inland (say 50 - 60 kilometres) which were heavily dependent on beach tourism, as evidenced from their marketing strategy, their client profile and the seasonal pattern of their trade, whereas other businesses in the same area which were located at the same distance from the coast were not, or were much less, dependent on beach tourism.

3.2.48 The Committee noted that the Director took the view that the question under consideration was one of causation rather than one of a particular distance from the coast. It was noted that there appeared to be tourist attractions located some distance inland which were mainly visited by tourists on beach holidays who made excursions to these attractions, especially on days when the weather was less suitable for going to the beach. It was also noted that there appeared to be restaurants which, because of their reputation or their location close to a tourist attraction, were also used to a significant extent by tourists on a beach holiday although they were located some distance from the coast, whereas other restaurants located in the same area were not. It was further noted that some hotels located inland appeared to attract families on beach holidays due to the fact that they had rooms available, their rates were lower than those of hotels closer to the beach or their location allowed easy access to a variety of beaches and attractions and that as a result of the *Erika* incident many families who might normally have used these hotels might have decided not to go to the area at all for summer holidays in 2000 or might have chosen hotels closer to the coast where rooms had become available due to reduced demand in 2000 after the *Erika* incident.

3.2.49 It was noted that the Director considered that the most equitable method would be to examine each claim in detail in order to establish whether there was a link of causation between the reduction in the number of tourists to the coastal areas affected by the pollution and the economic losses allegedly suffered by businesses located somewhat further away from the polluted coast. It was also noted that in the Director's view, when considering the admissibility of these claims, the geographic criterion should not be the primary one and that the other criteria laid down by the Assemblies would also have to be taken into account.

3.2.50 The Executive Committee noted the Director's view that, if the Committee were to agree with the proposed approach set out in paragraph 3.2.49 above, each claim in this category would have to be examined on its own merits, normally after a visit by the 1992 Fund's experts to the claimant's business, in order to establish whether there was such a link of causation.

3.2.51 A number of delegations agreed with the Director's approach to consider claims on their individual merits in order to establish whether there was a link of causation between the alleged loss and the contamination.

3.2.52 Some delegations supported the approach taken by the Fund to accept only claims from businesses located a specific distance from the polluted areas in the first instance since it could be assumed that there was a dependence on beach tourism in those cases. However, it was the view of those delegations that claims from further afield had to be examined against the other Fund criteria in order to establish whether there was a relationship between cause and effect.

3.2.53 The Executive Committee decided that claims by businesses located at some distance from the coast should be assessed on a case-by-case basis in order to establish whether there was a link of causation between the alleged loss or damage and the contamination in accordance with the Fund's normal practice.

Businesses in the Department of Côtes d'Armor

3.2.54 The Executive Committee noted that claims had been received from ten businesses located in the Department of Côtes-d'Armor which had maintained that they had suffered economic losses during 2000 due to a reduction in tourism resulting from the *Erika* incident. It was further noted that six of these claims had been rejected on the ground that there was not a sufficient degree of proximity between the contamination resulting from the *Erika* incident and the loss allegedly suffered by the claimant, mainly due to lack of geographic proximity. It was also noted that the remaining four claims were being examined.

3.2.55 The Committee noted that the Department of Côtes-d'Armor was situated in the northern part of Brittany, east of Brest, and had not been affected by the oil from the *Erika.*

3.2.56 The Committee was informed that in a letter to the 1992 Fund, one of the Vice-Presidents of the Departmental Council (Conseil Général) of Côtes-d'Armor had objected to the rejection of these claims, stating that by accepting only claims from businesses located directly on the polluted beaches the 1992 Fund had interpreted the criterion of a reasonable degree of proximity too restrictively. It was noted that the Vice-President had maintained that it was evident that the image of the whole of Brittany had been affected and that losses in activities had been suffered in the entire region.

3.2.57 As regards the letter from the Vice-President of the Departmental Council of Côtes-d'Armor, the Committee noted that it was not correct that the 1992 Fund had accepted only claims from businesses located directly on the polluted beaches in respect of the Erika incident but that as in previous incidents (eg the *Sea Empress* and the *Nakhodka*), the 1992 Fund had accepted a large number of claims from businesses situated some distance from the polluted beaches.

3.2.58 The Executive Committee endorsed the position taken by the Director that claims from businesses in the Department of Côtes-d'Armor should be considered on the same basis as those from businesses some distance from the coast dealt with in paragraphs 3.2.42 – 3.2.53 above, namely that each claim should be examined individually in order to establish whether there was a link of causation between the losses allegedly suffered by the claimant and the contamination.

Publicity campaign in Charente-Maritime

3.2.59 The Committee considered a claim by the Department of Charente-Maritime for FFr15.5 million or €2.4 million (£1.5 million) in respect of measures undertaken by the General Council (Conseil Général) to restore the image of the department as a tourism destination. It was noted that the major part of the expenditure (FFr15 million or €2.3 million (£1.4 million)) related to promotional campaigns over the periods March/June 2000, Christmas/New Year 2000/2001 and February/March 2001.

3.2.60 The Committee noted that Charente-Maritime was a very important tourism area but that pollution of its coast had been limited to light oiling of four beaches on the northern coast of Ile de Ré, which had been cleaned within the first few days of January 2000. It was further noted that although there had been no contamination of the mainland coast of Charente-Maritime, it had been anticipated in the early stages of the incident that the bulk of the oil would land on its shorelines. It was recalled that as a consequence of these early predictions, the Préfet of Charente-Maritime had been appointed by the French Government to co-ordinate the national contingency plan (Plan Polmar) and that there had been considerable media attention suggesting that the department fell within the area affected by the oil. The Committee noted that the French and foreign media had continued to make reference to the department as having been adversely affected even after it had been established that the oil had not seriously affected Charente-Maritime.

3.2.61 The Committee also noted that Charente-Maritime had suffered as a result of the severe storms on the Atlantic coast in late December 1999, which had felled vast numbers of trees leaving many of the department's campsites without shade.

3.2.62 The Committee recalled that at its 9th session, held in October 2000, it had considered a claim by the department of Vendée for FFr10.2 million or €1.6 million (£960 000) in respect of the costs of a publicity campaign to restore the confidence of traditional Vendée tourists in the area following the clean-up of the polluted beaches and in response to extensive negative media coverage of the spill. It was also recalled that the Committee had decided that this claim should be considered admissible in principle (document 92FUND/EXC.9/12, paragraph 3.6.53).

3.2.63 The Committee noted that the impact on tourism in 2000 in the department of Charente-Maritime had been much less than initially feared and that the performance of tourism businesses had been only marginally down on the previous year. It was further noted that a study carried out in January 2001 within the Ministry of Economy, Finance and Industry (document 92FUND/EXC.16/3/Add.1, paragraph 2.1.3) had indicated that there had been an overall loss of 3.2% for all accommodation types and that the report of the study had stated that a distinction needed to be drawn between the impact of the *Erika* and the impact of the heavy storm damage, which had been strongly felt in the camping sector.

3.2.64 The Committee also noted that the coastline of Charente-Maritime had been only slightly affected by oil spilled from the *Erika* and that the publicity campaign had been mounted primarily to prevent or minimise pure economic loss that would have resulted from the media wrongly giving the public the impression that the beaches in Charente-Maritime had been seriously polluted. It was also noted that considerable expenditure had been incurred after it had been established that the tourism industry in Charente-Maritime had not been seriously affected in the summer of 2000. The Committee noted, however, that two elements of the claim totalling FFr203 974 or €31 000 (£19 200) related to measures undertaken by the department to reassure the public that the beaches of Ile de Ré, some of which had been polluted by oil from the *Erika*, were clean and safe to use for amenity purposes. It was also noted that expenditure might have been incurred in the March/June 2000 publicity campaign which related to measures to minimise economic losses on Ile de Ré.

3.2.65 The Executive Committee agreed with the position taken by the Director that most of the claim was inadmissible in principle, since the losses which the publicity campaign had been intended to mitigate had not been caused by contamination but by the media's wrongly giving the public the impression that the beaches in Charente-Maritime had been seriously polluted. The Committee also agreed that the costs incurred for those parts of the campaign in 2000 which related to the Ile de Ré were admissible in principle, since some beaches on the Ile de Ré had in fact been polluted and that there was therefore a link of causation between the expenses and the contamination.

3.3 *Al Jaziah 1*

3.3.1 The Executive Committee took note of the information contained in document 92FUND/EXC.16/4 concerning the *Al Jaziah 1* incident.

Criminal proceedings

3.3.2 The Committee noted that criminal proceedings had been brought against the master of the *Al Jaziah 1* by the Abu Dhabi Public Prosecutor and that at the trial the master stated that the vessel was designed as a water carrier and was in a dangerous and bad condition. It further noted that the Court had held that, *inter alia*, the vessel did not fulfil basic safety requirements, was not fit to sail, had many holes in the bottom and was not authorised by the Ministry of Communications of the United Arab Emirates to carry oil. It also noted that the Court had concluded that the sinking of the vessel was due to these deficiencies and that the master had been fined Dhs 5 000 (£950) for causing damage to the environment.

Possible recourse action by the IOPC Funds

3.3.3 The Executive Committee recalled that the *Al Jaziah 1* held a certificate of provisional registration issued by the registry of Honduras, which had not ratified the 1992 Civil Liability Convention and was Party only to the 1969 Civil Liability Convention. It recalled that for this reason the United Arab Emirates (UAE) would be under a treaty obligation to apply the 1969 Civil Liability Convention in respect of the shipowner's right of limitation of liability (cf document 92FUND/EXC.8/8, paragraph 4.2.8).

3.3.4 The Committee noted that the Funds' legal advisers in the UAE had expressed the view that the findings of the criminal court regarding the vessel's unseaworthiness would be persuasive in any civil action filed against the shipowner in the UAE and that the Director concurred with that view. The Committee further noted that the Director took the view that the shipowner must have known or ought to have known that the ship was unseaworthy and that the sinking of the vessel was due to the fault or privity of the shipowner, that for this reason, pursuant to Article V.2 of the 1969 Civil Liability Convention, the shipowner was not entitled to limit his liability and that any attempt by the shipowner to limit his liability should be opposed by the Funds.

3.3.5 The Committee took note that the registered owner of the *Al Jaziah 1* at the time of the incident was Al Jazya Marine Services, an entity which had been licensed to trade by the authorities in Abu Dhabi (United Arab Emirates) and that the sole proprietor of the entity at the time of the incident was a UAE national living in Abu Dhabi. It noted that under the law of the United Arab Emirates, this type of entity, known as "sole proprietorship", did not have assets or liabilities separate from its owner.

3.3.6 It was noted that the vessel did not have any liability insurance and that it was not known whether the entity registered as owner of the *Al Jaziah 1* or the individual in question had any significant assets against which a judgement could be enforced.

3.3.7 The Committee decided that if the investigations by the 1992 Fund's legal advisers revealed that the entity registered as the owner of the *Al Jaziah 1* or the individual in question had significant

assets, the 1992 Fund should take recourse action against them. The Director was instructed to keep the Committee informed of any developments so as to enable it to reassess the 1992 Fund's position if required.

4 Any other business

Next session

It was noted that it might be necessary for the Committee to hold a session during the week commencing 1 July 2002.

5 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in documents 92FUND/EXC.16/WP.1 and 92FUND/EXC.16/WP.1/Add.1, was adopted, subject to certain amendments.