INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
17th session
Agenda item 5

92FUND/EXC.17/10
3 July 2002
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RECORD OF DECISIONS OF THE SEVENTEENTH SESSION OF THE EXECUTIVE COMMITTEE

(held on 2 and 3 July 2002)

Chairman: Mr G 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.17/1.

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	Georgia	Poland
Argentina	Germany	Russian Federation
Belgium	Greece	Singapore
Canada	Grenada	Sweden
Cyprus	Malta	Tunisia
Denmark	Marshall Islands	United Arab Emirates
Fiji	Morocco	Venezuela
Finland	Oman	
France	Panama	

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:

Qatar	Turkey

Other States

Chile	Ecuador	Malaysia
Colombia	Iran, Islamic	
Congo	Republic of	

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

Intergovernmental organisations

1971 Fund
European Communities

International non-governmental organisations

Conference of Peripheral Maritime Regions (CPRM)
European Chemical Industry Council (CEFIC)
International Group of P & I Clubs
International Union for the Conservation of Nature and Natural Resources
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.17/2 (cf document 71FUND/AC.8/3).

Claims for compensation

3.1.2 The Committee noted that as at 12 June 2002, claims totalling ¥30 947 million (£167 million) had been settled at ¥221 199 million (£119 million), that the payments made by the 1971 and 1992 Funds to claimants amounted to ¥17 184 million (£93 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 claims by 11 Japanese government agencies in respect of clean-up operations totalling ¥1 519 million (£8.2 million) had been assessed by the IOPC Funds at ¥1 488 million (£8.0 million), and that the Funds and the UK Club had offered settlements at this amount.

3.1.4 The Committee recalled that the IOPC Funds' governing bodies had decided, at their April/May 2002 sessions, to approve claims totalling ¥3 354 million (£18 million) submitted by the Japanese Maritime Disaster Prevention Centre (JMDPC) in respect of the construction and removal of a causeway to facilitate the removal of oil from the bow section of the *Nakhodka* for a total of ¥2 043 million (£11 million). It was noted that JMDPC had not yet given its formal acceptance of the settlement approved by the governing bodies.

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 (£125 million).

3.1.6 It was recalled that, 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. It was also recalled that at the April/May 2002 session, the Director had been authorised 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 (documents 92FUND/EXC.17/2, paragraph 3.1.2 and 71FUND/AC.7/A/ES.9/14, paragraph 8.14.12).

3.1.7 The Committee noted that, after taking the unsettled claims by the Japanese government agencies and JMDPC into account, the total exposure of the IOPC Funds could be estimated at ¥27 021 696 000 (£146 million). It was also noted that the Director had therefore decided that he was unable to increase the level of payments over 80% at this stage.

Legal actions

3.1.8 The Committee recalled that, pursuant to the governing bodies' decisions, in November 1999 the IOPC Funds had 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.

3.1.9 The Executive Committee noted that at a hearing on 13 May 2002, in response to the decisions made by the Funds' governing bodies at their April/May 2002 session mentioned in paragraph 3.1.10 below, the Tokyo District Court had proposed that all parties should hold an informal meeting on 24 May 2002 in order to enable the Court to propose a settlement. The Committee further noted that several informal meetings had been held before the Court to consider a proposal for settlement put forward by the shipowner and the UK Club, which had been agreed with the IOPC Funds, setting out the admissible amount of each government agency's claim and those of JMDPC (cf paragraphs 3.1.3 and 3.1.4 above). It was also noted that the Court had invited the Japanese Government and JMDPC to give positive consideration to the proposal. The Committee also noted that an informal meeting had been held on 1 July 2002, that the lawyer representing the Japanese authorities had informed the Court that it had not yet been possible to obtain the approval of the Ministries involved of the proposed settlement and that a further informal meeting before the Court was to be held on 30 July 2002.

Global solution

3.1.10 It was recalled that, at their April/May 2002 sessions, the governing bodies had approved the following global settlement proposed 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.

3.1.11 The Committee recalled 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.

3.1.12 The Committee further recalled that the governing bodies had authorised the Director to conclude a settlement agreement provided it contained the elements set out in paragraph 3.1.10 above and had also authorised the Director to agree with the other parties the details of such an agreement (documents 92FUND/EXC.16/6, paragraph 3.1.36 and 71FUND/AC.7/A/ES.9/14, paragraph 8.4.36).

3.1.13 The Committee recalled that the governing bodies had decided that the IOPC Funds should withdraw their actions against the Russian Register of Shipping.

3.1.14 The Committee noted that the details of the global settlement were being discussed between the IOPC Funds and the UK Club, pending the acceptance by the Japanese government agencies and JMDPC of the offered settlements.

Conversion of the maximum amount payable by the 1971 Fund from SDR to Yen

3.1.15 The Committee noted that the maximum amount payable by the 1971 Fund in compensation in respect of the *Nakhodka* incident under the 1971 Fund Convention was 60 million SDR minus the limitation amount applicable to the shipowner, ie 1588 000 SDR, which gave 58 412 000 SDR. It also noted that under the 1971 Fund Convention, the conversion of the SDR into national currency should be made on the basis of the rate of exchange applicable on the date when the shipowner established his limitation fund (Article 1.4 of the 1971 Fund Convention as amended by the 1976 Protocol thereto read in conjunction with Article V.9 of the 1969 Civil Liability Convention as amended by the 1976 Protocol thereto). The Committee recalled that as a result of the global settlement approved by the governing bodies at their April/May 2002 sessions, the shipowner's limitation fund would not be constituted in the *Nakhodka* case and that the

1971 Fund Administrative Council would therefore have to decide on the date to be used for the conversion of the amount payable by the 1971 Fund into Japanese Yen.

3.1.16 It was noted that at its 8th session, the 1971 Fund Administrative Council had decided (cf document 71FUND/AC.8/6, paragraph 3.3.20) that the conversion of the amount payable by the 1971 Fund in respect of the *Nakhodka* incident should be made using the rate of exchange between the SDR and Japanese Yen on 19 February 1997, the date on which the 1971 Fund Executive Committee adopted the Record of Decisions of the session at which the Committee took the decision to authorise the Director to make final settlements of claims (document 71FUND/EXC.59/11, paragraph 3.7.7.)

Distribution between the 1971 and 1992 Funds of any amount recovered on the basis of the global settlement

3.1.17 The Committee considered the Director's proposal that the financial benefits of the global settlement should be shared between the 1971 Fund and the 1992 Fund in proportion to their respective maximum liabilities under the 1971 Fund Convention and the 1992 Fund Convention, namely 58 412 000 SDR and 75 million SDR respectively, ie the 1971 Fund would be liable for 43.783% and the 1992 Fund for 56.217%.

3.1.18 A number of delegations agreed with the Director's proposal, but expressed concern that the adoption of the proposal might set a precedent which could result in an inequitable distribution of recovered amounts in future cases. Some delegations expressed the view that the financial benefits should be shared on the basis of the actual payments made by the respective Funds rather than their maximum liabilities, although it was recognised that in the *Nakhodka* case both the 1971 Fund and the 1992 Fund would have paid up to their respective limits had it not been for the global settlement.

3.1.19 One delegation referred to the fact that the *Nakhodka* incident had occurred during the transitional period, ie between the date of the entry into force of the 1992 Fund Convention and the date on which the denunciations provided for in Article 31 of the 1992 Protocol to amend the 1971 Fund Convention took effect. That delegation drew attention to the provisions in Article 36 bis (b) and (c) of the 1992 Fund Convention whereby the 1992 Fund was only required to pay compensation to the extent that claims exceeded the maximum amounts available under the 1969 Civil Liability Convention, the 1971 Fund Convention and, if applicable, the 1992 Civil Liability Convention. In that delegation's view, as long as the relevant provisions existed in the 1992 Fund Convention, they should apply when determining the distribution between the two Funds and a natural interpretation of the provisions would lead to the conclusion that any amount recovered relating to an incident occurring during the transitional period should be reimbursed to the 1992 Fund first.

3.1.20 Another delegation made the point that Article 36 bis referred only to compensation payments as opposed to the distribution between the two Funds of any amount recovered as a result a successful recourse action. In that delegation's view, a more equitable distribution of amounts recovered would be on the basis of the respective payments made by each Fund.

3.1.21 A number of delegations expressed the view that it was premature for the Executive Committee to make a decision on this important issue and proposed that the matter should be deferred pending a detailed analysis by the Director of the various options for distributing any recovered amounts.

3.1.22 One delegation expressed the view that any analysis undertaken by the Director should include a consideration of how any such distribution would be made in cases involving the 1992 Fund and the Supplementary Fund which would be set up under the proposed Protocol introducing a third tier of compensation.

3.1.23 The Committee decided to postpone its decision regarding the distribution of the amounts recovered as a result of the global settlement and instructed the Director to carry out a further study of the options available and their implications for the two Funds.

3.2 *Erika*

Claim by Brittany Ferries

3.2.1 The Executive Committee considered the admissibility of a claim for compensation submitted by BAI Brittany Ferries SA (Brittany Ferries), a French company providing ferry services between England and France (Brittany and Normandy), between England and Spain (Santander) and between Ireland and France (Brittany). The Committee noted that the claim, which totalled FFr69 335 000 (€10.6 million or £6.8 million), was for economic loss and the costs of a marketing campaign to mitigate losses.

3.2.2 The Executive Committee noted that Brittany Ferries had pointed out that the pollution on the coast of Brittany, Pays de la Loire and to a lesser extent Poitou-Charente arising out of the *Erika* incident, and the considerable time required to clean up the affected beaches had caused many British holiday makers to choose holiday destinations not served by the company which had led to a reduction in passenger numbers, ferry ticket revenue and on board sales. The Committee noted that the company had also claimed for losses in anticipated profits from price rises and anticipated gains in currency conversion from pounds sterling to euros, for a reduction in the number of package holidays sold by its tour operating arm and for extra marketing costs immediately after the *Erika* incident in an attempt to redress the fall in reservations.

3.2.3 The Committee noted that Brittany Ferries had stated that it was the main transporter of tourists to the Brittany, Pays de la Loire and Poitou-Charente regions and had argued that most passengers on its ferries travelled by car and continued to destinations within the area affected by the *Erika* oil spill. It was noted that the company had contended that traditionally holiday companies published their brochures in November/December, that the *Erika* incident occurred at a time immediately prior to the normal booking period, which starts in January, and that as a result many British holiday makers had decided not to visit Brittany in 2000. The Committee further noted that Brittany Ferries had argued that the reduction in reservations was unrecoverable, since by the time the situation had improved in Brittany potential visitors had selected other destinations for their main summer holidays.

3.2.4 The Committee noted that Brittany Ferries had stated that the company's marketing strategy was largely oriented towards the promotion of Brittany and western France as an attractive destination for British holiday makers, that much of its promotional activity was made in partnership with the Brittany and the Pays de la Loire regional tourist boards, and that it had preferential commercial arrangements with Gîtes de France (a major agency for letting self-catering accommodation in France) for the promotion in the United Kingdom of self-catering holiday cottages in France.

3.2.5 The Executive Committee noted that Brittany Ferries had maintained that its business was dependent on the condition of the beaches in the area affected by the *Erika* oil spill, that the company's integration with the economic activity of the area was demonstrated by the marketing partnership with the Brittany and Pays de la Loire tourist boards and that in practical terms the company had had little opportunity to diversify its business activities for the 2000 season.

3.2.6 The Committee noted that serious pollution resulting from the *Erika* incident remained on a substantial part of the French Atlantic coast during the main reservation period for British holiday makers (January to April 2000). The Committee also noted that the contaminated state of the beaches had been reported widely in the media in the United Kingdom and other European countries as well as in France. It was noted that the Director took the view that it was likely that this had caused many British holiday makers to reconsider any plans about going on holiday to Brittany or other parts of the French Atlantic coast in 2000.

3.2.7 The Committee took note of the 1992 Fund's analysis of the information provided on the numbers of passengers transported between England and France, Ireland and France and England and Spain in the period 1997-2001 and the number of passengers transported by Brittany Ferries' competitors on routes between England and Brittany and England and Normandy.

3.2.8 It was noted that with the exception of the Cork-Roscoff route, all western channel routes to France operated by Brittany Feries (ie those to Saint Malo and Roscoff) had suffered a reduction of between 7.02% and 8.6% in the number of passengers carried in the summer of 2000 compared with the summer of 1999. It was also noted that the Cork – Roscoff route, which was the only ferry service between south-west Ireland and France, had showed an increase of 7.14% in the number of passengers in the summer of 2000 compared with 1999, but that this service represented only 2.75% of Brittany Ferries total passenger traffic and was therefore a marginal activity.

3.2.9 It was noted that the route between England and Santander operated by Brittany Ferries had suffered a reduction of 6.38% in the number of passengers carried in the summer of 2000 compared with the summer of 1999. The Committee took note of the Director's view that this reduction could not be considered to have been caused by the *Erika* incident, but must have been due to other factors. It was also noted that Brittany Ferries had not claimed for losses on this route.

3.2.10 It was noted that Brittany Ferries had only one direct competitor on the west channel crossing (Condor), which operated a fast ferry between Weymouth and Saint Malo via Guernsey in the Channel Islands, and that this service was first introduced by Condor in 1998 and might have contributed to the fall in passenger numbers on Brittany Ferries' Portsmouth – Saint Malo routes in the years 1998 to 2000.

3.2.11 It was noted that all mid-channel routes operated by Brittany Ferries (ie those to Cherbourg and Caen) had suffered reductions of between 7.23% and 10.41% in passenger numbers in the summer of 2000 compared with the summer of 1999, as had Brittany Ferries' competitors on these routes.

3.2.12 It was noted that the Director took the view that there were probably a number of factors other than the *Erika* incident that might have contributed to the reduction in the number of passengers in 2000 on the routes operated by Brittany Ferries between the United Kingdom and France, such as increased competition from low price airlines, competition from other holiday destinations and increased use of the internet as a sales channel making price comparison easier and wider choice of holiday destinations available. It was also noted that the Director considered that it was likely that the *Erika* incident was a significant cause of the decrease in the numbers of passengers using Brittany Ferries' routes to France in the summer of 2000.

3.2.13 The Committee recalled that, in the context of the *Braer* incident, the 1971 Fund Executive Committee had considered in 1995 a claim submitted by P & O Scottish Ferries Ltd (P&O Ferries) for alleged loss of income from its ferry service from Aberdeen to Shetland as a result of a reduction in the number of tourists visiting the Shetland Islands and a reduction in the volume of freight. The Committee also recalled that the claimant, who had its main office in Aberdeen, operated the only passenger ferry line between Shetland and the United Kingdom mainland. It was recalled that the 1971 Fund Executive Committee had taken the view that the criterion of reasonable proximity was not fulfilled, that the claimant's business did not form an integral part of the economic activity of Shetland, and that the claim had therefore been rejected (document FUND/EXC.44/17, paragraph 3.4.25). The Committee recalled that the claim by P&O Ferries had also been rejected by the Scottish Court of first instance on the grounds that the losses sustained by the claimant were not a direct consequence of the oil pollution but rather an indirect consequence of the negative publicity that had marked the image of the Shetland Islands as a source for fish products and as a holiday destination, this negative publicity being brought about by contamination of property belonging to a third party.

3.2.14 The Committee noted that the destinations in France of Brittany Ferries' routes (Saint Malo, Roscoff, Caen and Cherbourg) were all situated north of the area affected by the spill, but that they were the only ports serving the affected area from the United Kingdom from which there was quick and easy access by road to that area. The Committee took note of the Director's view that it was doubtful nevertheless whether the claim would fulfil the criterion of geographic proximity on a strict interpretation.

3.2.15 The Committee noted that the great majority of passengers using the western channel crossings to Saint Malo and Roscoff and around 50% of those using the mid channel crossings proceeded to destinations which were in or close to the area affected by the *Erika* oil spill. It was noted that Brittany Ferries had emphasised that both the ferry company and its tour operating arm had contractual relationships with a number of tour operators in the area affected by the spill, who had also made admissible claims for compensation. It was also noted that the Director took the view that the claimant depended on the affected area.

3.2.16 The Committee took note of the Director's view that although the company's headquarters and the destination ports were located at some distance outside the affected area, the company's business formed to some extent an integral part of the economic activity of the area affected by the oil spill, since a substantial proportion of the tourists using the company's ferries visited the area and made an important contribution to the local economy.

3.2.17 It was recalled that at its 16th session, held in April/May 2002, the Executive Committee had considered the admissibility of claims which had been submitted by businesses within the tourism industry (campsites, hotels, restaurants, historical buildings, museums and other tourist attractions) which had alleged losses as a result of the *Erika* incident but which were located at some distance inland. It was also recalled that the Executive Committee had 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 (document 92FUND/EXC.16/6, paragraph 3.2.53).

3.2.18 It was noted that the Director considered that the approach taken by the Executive Committee at its April/May 2002 session in respect of claims from businesses located at some distance from the coast would be appropriate also as regards the claim by Brittany Ferries and that the daim for losses resulting from a reduction in the number of passengers in 2000, although probably not fulfilling the criterion of geographic proximity on a strict interpretation, did fulfil the criterion of dependency on the affected resource and to some extent the criterion of forming an integral part of the economic activity of the area affected by the spill. It was also noted that the Director was of the view that the claimant had had only limited possibilities to displace its customers to other destinations and that he therefore considered that there was a sufficient link of causation between the contamination of the French Atlantic coast resulting from the *Erika* incident and the reduction in the number of passengers transported by the company in 2000. It was noted that for these reasons the Director considered the part of the claim relating to losses resulting from a reduction in passenger numbers admissible in principle. One delegation expressed the view that the P & O Ferries case in the context of the *Braer* incident was not a good example as the issues involved in the Brittany Ferries case were different.

3.2.19 A number of delegations expressed the view that the claim was admissible in principle both as regards economic losses and as regards additional marketing costs. Those delegations considered that it was not necessary to attach the same weight to all of the Fund's admissibility criteria, and that whilst the claim did not meet the geographical proximity criterion, the criteria relating to economic dependency, opportunities for alternative sources of supply and integration into the economic activity of the area appeared to be fulfilled. Those delegations also stated that the key was the existence of a direct link of causation between the damage and the contamination.

3.2.20 Some delegations pointed out that the claim by Brittany Ferries was a complex one and that the Director's analysis had shown that there were factors other than the pollution cased by the *Erika* that may have contributed to the decline in passenger numbers in 2000. Those delegations considered that the claim would need to be closely scrutinized to ensure that any downturn in passenger numbers was attributable to the *Erika* incident and was not simply part of a medium or long-term trend or was within the normal range of annual fluctuations. One delegation stated that for claims of this nature to be admissible there must be in principle a direct link of causation between the damage and the contamination.

3.2.21 As regards the item relating to additional marketing costs, some delegations noted that the 1992 Fund had not been consulted at the time the marketing campaigns were carried out, but that the item had to be assessed against the criteria for admissibility of this type of claim set out in paragraphs 3.3.23 and 3.3.24 of document 92FUND/EXC.17/3 and that it would be important to ensure that any marketing efforts were over and above those normally undertaken by the company.

3.2.22 The Executive Committee decided that, since there was a link of causation as regards various items of the claim between the alleged loss and the contamination, the claim by Brittany Ferries was admissible in principle. The Committee authorised the Director to assess the admissible quantum of the claim, taking into account in particular whether the reduction in passenger numbers fell within the normal fluctuations. The Director was instructed to take into consideration all factors, including those raised during the discussion, that could have contributed to the losses.

Claims situation

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

> As at 26 June 2002, 6206 claims for compensation had been submitted to the Claims Handling Office in Lorient established by the 1992 Fund and the shipowner's P&I insurer, the Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual) for a total of FFr1 038 million or €158 million (£102 million). 5 599 claims totalling FFr819 million or €125 million (£81 million) had been assessed at a total of FFr427 million or €65 million (£41 million). Assessments had thus been carried out of 90% of the total number of claims received.
>
> Settlement agreements had been reached in respect of 4 211 claims. The claimed amounts totalled FFr482 million or €73 million (£47 million), whereas the settlement amounts totalled FFr342 million or €52 million (£34 million).
>
> Seven hundred and sixteen claims totalling FFr108 million or €16 million (£11 million) had been rejected. One hundred and thirty claimants whose claims totalled FFr37 million or €5.6 million (£3.6 million) had contested the rejection and their claims were being reassessed in the light of additional documentation provided by the claimants.
>
> Payments for compensation had been made in respect of 4389 claims (including interim payments) for a total of FFr285 million or €43 million (£28 million). Payments had thus been made in respect of 71% of all claims. A further 627 claims, totalling FFr219 million or €33 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 six of the eight categories

over 95% of all claims had been assessed. Payments had been made in respect of over 70% of claims in all categories. Although in the tourism sector a major part of the claims had been presented relatively late, 95% of the claims in this sector had been assessed.

Claims totalling FFr124 million or €19 million (£11 million) had been lodged against the shipowner's limitation fund constituted by the shipowner's insurer, Steamship Mutual. Some 25 of these claims, totalling FFr46 million or €7 million (£4.5 million), had not been presented to the Claims Handling Office. The remaining claims lodged against the limitation fund, totalling FFr78 million or €12 million (£8 million), had also been submitted to the Claims Handling Office, but for a lesser amount (FFr44 million or €6.7 million (£4.3 million)).

Some 50 claimants, almost all of which were public bodies, had presented claims for alleged loss or damage in various courts in the context of the court surveys. These claims, which totalled FFr120 million or €18 million (£12 million), including one for FFr59 million or €9 million (£5.8 million) for damage to the environment, had neither been presented to the Claims Handling Office nor in the limitation proceedings.

3.2.24 The Executive Committee noted with satisfaction the significant progress that had been made in the assessment and payment of claims.

Time bar

3.2.25 The Committee noted that the Director intended to inform individually during September 2002 all those who had submitted claims and with whom settlements had not been reached by that time about the provisions in the 1992 Civil Liability Convention and the 1992 Fund Convention on time bar. The Committee also noted the Director's view that in respect of the *Erika* incident there might be uncertainty as to the date on which the three year time bar period started to run for the individual claimant (ie the day when the respective claimant's loss occurred). It was further noted that in view of this uncertainty the Director would suggest that the claimants should assume that the time bar period commenced on the day of the incident (ie 12 December 1999) in order to avoid any risk of the claims becoming time-barred.

3.2.26 Some delegations expressed the view that efforts to publicise the time bar should be made immediately. The Director stated that in his view it would not be productive to take steps in this regard during the holiday months of July and August.

Level of payments

3.2.27 The Executive Committee recalled that it had decided that the conversion of 135 million SDR into French Francs should be made on the basis of the value of that currency *vis-à-vis* the SDR on 15 February 2000 (document 92FUNDEXC.6/5, paragraph 3.2.9) and that it had endorsed the Director's calculation of the conversion on the basis of the rates applicable on that day, giving 135 million SDR = FFr1 211 966 881.

3.2.28 It was recalled that the Executive Committee had decided, at its 16th session held in April/May 2002, that in 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% of the loss or damage actually suffered by the respective claimants as assessed by the 1992 Fund's experts (document 92FUND/EXC.16/6, paragraph 3.2.25).

3.2.29 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.

3.2.30 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.

3.2.31 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. The Committee also 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.

3.2.32 It was also noted that the official statistical data on the 2001 tourism season had not yet been published but that the information obtained by the 1992 Fund's experts indicated that there was a recovery in 2001 compared to 2000 but that the number of visitors during the 2001 tourism season was lower than the 1999 figures. It was also noted that the Director believed nevertheless that it was unlikely that there would be a significant number of further claims from the tourism sector for 2001. 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.

3.2.33 The Committee took note of the Director's estimate as to the total amount of the admissible claims on the basis of the claims submitted to the Claims Handling Office and in the light of the 1992 Fund's experience of settlement levels. It was noted that the Director estimated that the total amount of the admissible claims in the tourism sector would be in the region of FFr550 – 600 million or €84 - 91 million (£54 – 59 million) and that an additional allowance for marketing campaigns of FFr50 million or €8 million (£5 million) would be prudent. The Committee also noted that the total amount of the admissible claims in sectors other than tourism was estimated at FFr250 - 300 million or €38 – 46 million (£25 - 30 million). It was further noted that based on these estimates, the total of the admissible claims would be in the region of FFr950 million or €145 million (£94 million). The Committee recalled that the total amount available for compensation was FFr1 211 966 811 or €184 753 149 (£114 million). On this basis there would in the Director's view be a sufficient safety margin to enable the 1992 Fund to increase the level of payments to 100%.

3.2.34 The Executive Committee also took note of the Director's view that there were other factors that gave rise to uncertainties, namely claims which had not been presented to the Claims Handling Office but had been lodged against the shipowner's limitation fund for some FFr46 million or €7 million (£4.5 million), and claims presented in various courts in the context of court surveys where the claims totalled FFr120 million or €18 million (£17 million). It was also noted that in the Director's view the outcome of the court surveys might result in further claims and that it was not possible to make an estimate of the magnitude of such claims. It was further noted that there was still considerable time before the expiry of the time bar period. It was noted that in view of these uncertainties the Director proposed that the level of payments should be maintained at 80%.

3.2.35 The French observer delegation agreed that the 1992 Fund would have to strike a balance between the importance of the Fund paying compensation promptly and the need to avoid an overpayment situation. That delegation emphasised that there would be certainty as to the total amount of the admissible claims only after the expiry of the time bar period of six years from the date of the incident and the termination of all legal proceedings, but that it would not be appropriate to pile precaution upon precaution.

3.2.36 The French delegation pointed out that the claims from the tourism sector settled so far had a satisfaction rate of 60% and that on this basis the total amount of the admissible tourism claims could be estimated at FFr450 million. It was also pointed out that in recent months only a few tourism claims had been presented, and that the 2001 tourism season would have only marginal effects on the total amount of the admissible claims. That delegation pointed out that, whereas the Director had considered it appropriate to make an allowance of FFr50 million for marketing campaigns, the claims for such campaigns presented so far totalled only FFr25 million and that normally such claims were assessed at relatively low amounts. That delegation mentioned that claims from sectors other than tourism presented so far totalled FFr300 million and that the satisfaction factor in this sector was 70%, which would result in a total admissible amount of FFr210 million leaving a margin of FFr90 million in comparison with the Director's estimate. The French delegation stated that on these assumptions the total amount of the admissible claims could be estimated at FFr700 million, leaving a safety margin of FFr500 million.

3.2.37 The French delegation accepted that there was an additional exposure in respect of the claims submitted in the limitation proceedings but stated that it could be assumed that these claims would not be accepted at 100%. As regards the claims presented in the context of the court surveys, totalling FFr120 million, the French delegation mentioned that these claims were very vague and to a large extent not accompanied by proper supporting documentation and that therefore it was probable that the total amount admitted would be considerably lower.

3.2.38 The French delegation stated that if the claims not presented to the Claims Handling Office were estimated at FFr200 million, the total amount of the admissible claims would be FFr900 million, resulting in a safety margin of FFr300 million. In the view of that delegation it would therefore be reasonable to increase the level of payments to 100%. It was emphasised that a decision to increase the level of payments would be an important indication of the 1992 Fund's ambition to compensate victims in full.

3.2.39 A number of delegations expressed sympathy with the views expressed by the French delegation and noted that as the claims situation was becoming clearer it should soon be possible to increase the level of payments to 100%. Nevertheless, those delegations pointed out that however persuasive the French delegation's arguments were, the final analysis of the situation had to be entrusted to the Director.

3.2.40 The Director agreed that there was a great deal of logic in the analysis made by the French delegation, but pointed out that there was still some time to run before the expiry of the three year time bar period and that there was always the possibility that a significant number of claims would be presented immediately prior to the three year anniversary of the incident. He agreed that it was important not to be overcautious when assessing the total exposure of the 1992 Fund, but stated that it would be imprudent not to take into account the numerous court surveys that were being carried out to determine the extent of the damage incurred by some claimants and the possible approach of the French courts towards claims for pure economic loss. The Director also drew attention to the fact that many of the outstanding claims, including the claim by Brittany Ferries, were highly complex and involved considerable amounts, and that it was for these reasons that he had proposed to maintain the level of payments at 80% for the time being.

3.2.41 A number of delegations stated that it was important that both claimants and potential claimants were given early notification of the expiry of the three year time bar period and that the 1992 Fund should co-operate to this effect with central and local government as well as local bodies.

3.2.42 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 18th session.

3.3 *Zeinab*

3.3.1 The Executive Committee took note of the developments in respect of the *Zeinab* incident, as contained in document 92FUND/EXC.17/4.

Claims for compensation

3.3.2 The Executive Committee noted that the Dubai Ports Authority had submitted claims totalling US$480 000 (£343 000) in respect of costs of preventive measures and clean-up and that this claim had been settled at US$454 000 (£312 000). It was noted that the Federal Environment Agency had submitted claims for US$850 000 (£583 000) in respect of the operations to remove the remaining oil from the sunken wreck and the costs it had incurred in responding to the oil pollution. It was also noted that the IOPC Funds had assessed the claims at a total of US$795 000 (£545 000). It was further noted that claims in the region of US$1.2 million (£850 000) were anticipated from the Dubai Municipality in respect of shoreline clean-up operations and that further claims were expected from local oil companies that had participated in the clean-up operations.

3.3.3 The Committee noted that as at 1 June 2002, the Funds had paid a total of £346 000 in compensation and legal and other experts' fees. It was also noted that on the basis of the 50:50 sharing of liabilities between the 1971 and 1992 Funds, decided by the 1992 and 1971 Fund's governing bodies, each Fund had therefore made payments of some £173 000.

Determination of the 1971 Fund's deductible under the terms of the insurance cover

3.3.4 The Committee recalled that as authorised by the 1971 Fund Administrative Council at its October 2000 session, the 1971 Fund had purchased insurance covering any liabilities of the 1971 Fund for compensation and indemnification up to 60 million SDR (£55 million) per incident minus the amount actually paid by the shipowner or his insurer under the 1969 Civil Liability Convention as well as legal and other experts' fees in respect of all incidents occurring between 25 October 2000 and 24 May 2002, the date when the 1971 Fund Convention ceased to be in force. The Committee also recalled that under the insurance policy the 1971 Fund had to cover a deductible of 250 000 SDR for each incident.

3.3.5 The Committee noted that the 1971 Fund Administrative Council had, at its 8th session, decided that the SDR : pound sterling exchange rate on 12 April 2001 was 1 SDR = £0.88130 and that therefore the deductible under the insurance policy would be £220 325 in respect of the *Zeinab* incident (document 71FUND/AC.8/6, paragraph 3.5.6).

3.4 Incident in Sweden

The incident

3.4.1 The Executive Committee took note of the information contained in document 92FUND/EXC.17/5.

3.4.2 It was noted that between 23 September and 9 October 2000 persistent oil had landed on the shores of two islands to the north of Gotland in the Baltic Sea and on several islands in the Stockholm archipelago. The Committee noted that the Swedish Coastguard, the Swedish Rescue Service Agency and local authorities had undertaken clean-up operations.

3.4.3 The Committee noted that investigations by the Swedish authorities had indicated that the oil could have been discharged on 3 September 2000 within the Swedish Exclusive Economic Zone to the east of Gotland, possibly from the Maltese tanker *Alambra* which had passed the area at the assumed time of the oil spill on a ballast voyage to Tallinn (Estonia). It was further noted that according to the Coastguard, analyses of oil samples from the polluted islands matched those of

samples taken from the *Alambra*. It was also noted that the shipowner and the insurer had maintained that the oil had not originated from the *Alambra*.

Limitation of liability

3.4.4 The Committee noted that Sweden was Party to the 1992 Civil Liability Convention and the 1992 Fund Convention and that the limitation amount applicable to the *Alambra* under the 1992 Civil Liability Convention was 32 684 760 SDR (£28 million).

Claims for compensation

3.4.5 The Committee noted that the Swedish Coastguard had incurred costs in respect of clean-up operations totalling SEK 1.1 million (£72 000), that the Rescue Service Agency, together with local authorities, had incurred clean-up costs totalling SEK 4.1 million (£270 000) and that therefore the aggregate amount of the claims was well below the limitation amount applicable to the *Alambra*.

3.4.6 The Committee noted that the Swedish authorities had informed the Director that they intended to submit their claims for compensation to the shipowner but that they had further indicated that in the event that they were to be unsuccessful in receiving compensation from the shipowner, they would consider claiming against the 1992 Fund. It was noted, however, that in order to be able to obtain compensation from the 1992 Fund, the authorities would have to prove that the damage resulted from an incident involving a ship as defined in the 1992 Civil Liability Convention.

3.4.7 It was noted that the Swedish Coastguard had imposed a fine of SEK 439 000 (£29 000) on the owner of the *Alambra* under the 1980 Act on Measures Against Pollution from Ships, but that the shipowner had appealed against the decision to the Stockholm City Court.

3.4.8 The Swedish delegation stated that the shipowner's appeal was still pending, and that whilst the appeal proceedings did not relate to the civil liability of the shipowner, they had a bearing on the question of the origin of the oil, and that the Swedish authorities were therefore awaiting the outcome of the proceedings before submitting their claims for compensation against the owner.

3.4.9 One delegation drew attention to the similarity between the incident in Sweden and an incident in Germany in 1996. That delegation pointed out that in both cases the claimant was a public body that could afford to wait for the outcome of legal proceedings. However, that delegation believed that the 1992 Fund was likely to become involved in other such incidents in the future and that the Fund might have to reconsider its policy of requiring a claimant to pursue all legal remedies against the shipowner in such cases if the claimant was a private individual suffering economic hardship. That delegation considered that in such cases it might be necessary for the Fund to take necessary measures with the P & I Club concerned to ensure making early payments of compensation.

3.5 *Slops*

3.5.1 The Executive Committee took note of the information contained in document 92FUND/EXC.17/6 concerning the *Slops* incident.

Applicability of the 1992 Civil Liability Convention and the 1992 Fund Convention

3.5.2 The Executive Committee recalled that, at its 8th session held in June 2000, it had decided that the *Slops* should not be considered as a 'ship' for the purpose of the 1992 Civil Liability Convention and the 1992 Fund Convention and that therefore these Conventions did not apply to this incident (document 92FUND/EXC.8/8, paragraph 4.3.8).

3.5.3 The Committee further recalled that a claimant who had been unable to obtain compensation from the owner of the *Slops* had maintained that the vessel fell within the definition of 'ship' and had

requested that his claim be submitted to binding arbitration in accordance with Internal Regulation 7.3 of the 1992 Fund. The Committee recalled that, at its 11th session held in January 2001, it had endorsed the Director's view that it would not be appropriate to submit to arbitration the question of whether the governing bodies' interpretation of the definitions of 'ship' was correct (document 92FUND/EXC.11/6, paragraph 4.3.13).

Legal actions

3.5.4 The Committee noted that in October 2001 two Greek companies had taken legal action in the Court of first instance in Piraeus (Greece) against the registered owner of the *Slops* claiming compensation for costs of clean-up operations and preventive measures for US$1 677 432 (£1 143 500) and US$858 987 (£585 500) (plus interest), respectively, and that the claimants had served the writ on the 1992 Fund in January 2002.

3.5.5 The Committee noted that the companies had alleged that they had been instructed by the owner of the *Slops* to carry out clean-up operations and to take preventive measures in response to the oil spill, that they had informed the Greek Ministry of Merchant Marine on a daily basis of the operations which were carried out during a period of 37 days and that the operations had been monitored by an expert engaged by the 1992 Fund. The Committee further noted that the companies had stated that they had requested the owner of the *Slops* to pay the above-mentioned costs but that he had failed to do so. It was noted that the companies had not in their court action referred to the 1992 Civil Liability Convention and that it appeared that the action was based on the owner of the *Slops* not having fulfilled his contractual obligations to pay the costs of the operations.

3.5.6 It was recalled that notification of the 1992 Fund of legal actions against the registered owner was governed by Article 7.6 of the 1992 Fund Convention and that such notification could be made only if that action was based on the 1992 Civil Liability Convention. The Committee noted that, since the action had not been based on that Convention and that, in addition, the provisions of the Greek Civil Procedural Code on notification of actions had not been complied with, the Director had decided that the 1992 Fund should not intervene in the proceedings.

3.5.7 The Committee noted that in February 2002 the same companies had taken legal action against the 1992 Fund in the Court of first instance in Piraeus claiming compensation for the cost of clean-up operations and preventive measures for the same amounts as in their action against the owner, ie for US$1 677 432 (£1 143 500) and US$858 987 (£585 500) (plus interest), respectively and that the 1992 Fund had only been informed of these actions in June 2002.

3.5.8 It was noted that in their pleading the companies had stated that the *Slops* had been constructed exclusively to carry oil by sea (ie was constructed as a tanker), that it had a nationality certificate as a vessel and that it was still registered as a tanker with the Piraeus Ships Registry. It was also noted that they had maintained that even when the *Slops* operated as a oil separation unit (a slops handling unit), it floated at sea and that its only purpose was to carry oil in its hull.

3.5.9 The Committee noted that the companies had stated that the registered owner had no assets apart from the *Slops*, which had been destroyed by fire, had no scrap value and did not have any insurance as required under the 1992 Civil Liability Convention. It was also noted that the companies had argued that they had taken all reasonable measures against the owner of the *Slops*, namely taken legal action against the owner, investigated the owner's financial situation, requested the court to arrest assets belonging to the owner and requested for declaration of bankruptcy. It was further noted that they had maintained that, since the owner was manifestly incapable of satisfying their claims, they were entitled to compensation for their costs as specified in paragraph 3.5.7 above.

3.5.10 The Executive Committee endorsed the Director's view that the companies had not provided any information in their pleading which would modify the Executive Committee's position referred to

in paragraph 3.5.2 that the *Slops* should not be considered as a 'ship' for the purpose of the 1992 Fund Convention and instructed the Director to oppose the action accordingly.

3.6 *Neptank VII*

3.6.1 The Executive Committee took note of the information contained in document 92FUND/EXC.17/7. It was noted that on 12 June 2002 the bunker tanker *Neptank VII* (1 937 GT), registered in Singapore, carrying a cargo of some 3 100 tonnes of heavy fuel oil and 200 tonnes of marine diesel oil, had been in collision with the Thai-registered general cargo ship *Hermion* (9 580 GT) near Sentosa Island in the Singapore Strait, within the port of Singapore. The Committee further noted that the collision had resulted in the escape of about 300 tonnes of heavy fuel oil from the *Neptank VII*.

3.6.2 The Committee noted that the shipowner and the Maritime Port Authority of Singapore had mobilised anti-pollution craft to control the spill. It was noted that no oil had been reported to have gone ashore in Singapore, but that some oil had stranded in Malaysia.

3.6.3 It was noted that Singapore was a Party to the 1992 Civil Liability Convention and the 1992 Fund Convention and that the limitation amount applicable to the *Neptank VII* under the 1992 Civil Liability Convention was 3 million SDR (£2.6 million). It was also noted that Malaysia was a Party to the 1969 Civil Liability Convention and had been a Party to the 1971 Fund Convention, but that the latter Convention was no longer in force at the time of the incident.

3.6.4 The Committee noted that it had not yet been possible to make an evaluation of the total amount of the claims for compensation but that it was anticipated that clean-up costs would not exceed the limitation amount applicable to the ship under the 1992 Civil Liability Convention.

3.6.5 The Director stated that in view of the fact that the total amount of claims arising from the incident was unlikely to exceed the limitation amount applicable to the *Neptank VII* under the 1992 Civil Liability Convention there was no need for the Executive Committee to authorise the Director to make final settlement of claims beyond his general authority under the Internal Regulations.

4 Any other business

4.1 Status of the 1992 Fund Convention

The Executive Committee noted the information in document 92FUND/EXC.17/8 concerning the situation in respect of ratifications of the 1992 Fund Convention. It was noted that there were at present 66 Member States of the 1992 Fund, that 14 States had deposited instruments of accession to the Conventions and that the 1992 Fund would have 80 Member States by June 2003.

4.2 International Convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea (HNS Convention)

4.2.1 The Executive Committee took note of the information in document 92FUND/EXC.17/9 relating to the proposed system for identifying and reporting contributing cargo under the HNS Convention. The Committee recalled that, at the Assembly's 6th extraordinary session held in April/May 2002, a non-functioning prototype of a system to identify and report contributing cargo had been demonstrated.

4.2.2 The Committee noted that a functioning prototype had since been developed, taking into account the comments received on the non-functioning prototype.

4.3 Time for commencing the 1992 Fund meetings

The Executive Committee endorsed the Director's proposal that future meetings of the 1992 Assembly, 1992 Fund Executive Committee and Working Groups should commence at 9.30 am on the first day of the respective meetings.

4.4 Late submission of documents

4.4.1 One delegation referred to the late submission of the document relating to the *Nakhodka* incident, which had given that delegation insufficient time to consider the issues that were raised in that document.

4.4.2 The Director stated that as only two months had elapsed since the Committee's last session, it was inevitable that in order to reflect developments the documents would be issued shortly before the present session. He acknowledged that this caused difficulties for delegations in their preparations for the meeting, but suggested that the policy of posting documents on the web site on the day of printing went some way to alleviating the difficulties.

4.5 Audit Body

4.5.1 The Chairman of the 1992 Fund Assembly reminded the Executive Committee that the Assembly of the 1992 Fund and the Administrative Council of the 1971 Fund had decided at their October 2001 sessions to establish a joint Audit Body, which would be composed of seven members elected by the 1992 Fund Assembly: one named Chairman and five named individuals nominated by Member States and one individual with specialist expertise nominated by the Chairman of the 1992 Fund Assembly.

4.5.2 He further reminded the Committee that elections to the Audit Body would take place at the governing bodies sessions in October 2002 and that nominations of candidates, accompanied by their curriculum vitae, should be submitted to the Director by 2 September 2002 at the latest.

4.5.3 In order to ensure the independence of the members of the Audit Body the Chairman of the Assembly suggested that Member States might wish to consider nominating candidates from outside their own countries and that candidates could be nominated by groups of States.

4.5.4 The Director stated that he would be issuing a circular to Member States drawing their attention to the fact that nominations of candidates for the Audit Body should be submitted by 2 September 2002.

5 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.17/WP.1, was adopted, subject to certain amendments.