INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
2nd session
Agenda item 8

92FUND/EXC.2/10
3 February 1999
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RECORD OF DECISIONS OF THE SECOND SESSION OF THE EXECUTIVE COMMITTEE

(held from 1 to 3 February 1999)

Chairman: Professor L S Chai (Republic of Korea)

Vice-Chairman: Mr J Wren (United Kingdom)

Opening of the session

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 92FUND/EXC.2/1.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

Cyprus	Japan	Philippines
Denmark	Liberia	Republic of Korea
Finland	Mexico	Spain
Greece	Netherlands	Tunisia
Ireland	Norway	United Kingdom

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:

France	Marshall Islands	Sweden
Germany	Singapore	Uruguay
Grenada		

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:

Algeria	China (Hong Kong Special Administrative Region)	New Zealand
Belgium		Venezuela
Canada	Latvia	

Other States:

Argentina	Fiji	Panama
Brazil	Italy	Poland
Chile	Morocco	Portugal
Colombia	Nigeria	Russian Federation
Estonia	Papua New Guinea	Tonga

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

Intergovernmental organisations:
International Oil Pollution Compensation Fund 1971 (1971 Fund)
International Maritime Organization (IMO)

International non-governmental organisations:
Comité Maritime International (CMI)
Cristal Limited
International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)
International Group of P & I Clubs
International Tanker Owners Pollution Federation Limited (ITOPF)
International Union for the Conservation of Nature and Natural Resources (IUCN)
Oil Companies International Marine Forum (OCIMF)

3 Incidents involving the 1992 Fund

3.1 Incident in Germany

The Executive Committee took note of documents 92FUND/EXC.2/2 and 92FUND/EXC.2/2/Add.1 which set out the developments which had taken place in respect of this incident since the Committee's 1st session.

3.2 *Nakhodka*

3.2.1 The Executive Committee took note of the developments in respect of the *Nakhodka* incident, as contained in document 92FUND/EXC.2/3 and as set out in 1971 Fund document 71FUND/EXC.60/9.

Claims for compensation

3.2.2 It was noted that the Director had rejected a claim relating to the cost of participation in the clean-up operations by three Russian vessels after 28 January 1997 on the ground that the claim related to operations which were not reasonable from an objective point of view (1971 Fund document 71FUND/EXC.60/9, paragraph 3.2.5).

3.2.3 The Russian observer delegation stated that it reserved its position in respect of the claim for compensation referred to in paragraph 3.2.2 above.

3.2.4 The Japanese delegation expressed its gratitude to the Secretariat for its efforts to settle claims but pointed out that there was less than one year before the time bar period expired. The delegation expressed the hope that the remaining claims would be settled without delay.

Level of payments

3.2.5 In the light of the continuing uncertainty as to the level of the total amount of the claims arising from the *Nakhodka* incident, and noting the decision of the 1971 Fund Executive Committee at its 60th session on that issue, the 1992 Fund Executive Committee decided to maintain the level of the 1992 Fund's payments at 60% of the amount of the damage actually suffered by the respective claimants.

3.2.6 The Director was instructed to make further efforts to obtain clarification as to the total amount of the claims.

Applicability of the Conventions

3.2.7 The Executive Committee noted that the shipowner and his insurer (the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd (UK Club)) had raised the issue of the applicability of the 1992 Civil Liability Convention to the *Nakhodka* incident.

3.2.8 It was recalled that this issue had been considered by the Assembly at its 2nd extraordinary session when the Assembly had noted that the 1992 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention had entered into force in respect of Japan on 30 May 1996 and that the 1992 Civil Liability Convention and the 1992 Fund Convention were therefore in principle applicable to this incident. It was also recalled that the *Nakhodka* was registered in the Russian Federation, which had not ratified the 1992 Protocols but which was Party to the 1969 Civil Liability Convention and the 1971 Fund Convention. It was further recalled that the Assembly had endorsed the Director's view that the shipowner's right of limitation should be governed by the 1969 Civil Liability Convention, to which both Japan and the Russian Federation were Parties (document 92FUND/A/ES.2/6, paragraph 3.1.4).

3.2.9 It was noted that until October 1998 payments had been made by the 1971 Fund against a receipt stating that the claim was made under the 1969 Civil Liability Convention, the 1971 Fund Convention and the 1992 Protocol to the 1971 Fund Convention and that the text of the receipt had been approved by the shipowner and the UK Club. It was also noted that in October 1998 the shipowner and the UK Club had requested that the receipt documents should be amended to the effect that it would be stated that the claims were made under the 1969 and 1971 Conventions and the 1992 Protocols to both these Conventions, since in their view it was not clear that the 1992 Civil Liability Convention did not apply. The Committee noted that the shipowner and UK Club had maintained that it was not for the IOPC Funds to decide the issue but for the Japanese courts.

3.2.10 The Japanese delegation confirmed that for the transitional period when both the 1969/1971 Conventions and the 1992 Conventions applied, the issues relating to limitation of liability were dealt with differently in the Japanese legislation implementing the Conventions and were dependent on whether the ship flew the flag of a State which had ratified the 1969 Civil Liability Convention but not the 1992 Civil Liability Convention or the flag of another State. The delegation stated that for this reason a Japanese court could not grant a request by the shipowner to apply the 1992 Civil Liability Convention to these issues in the *Nakhodka* case.

3.2.11 The Executive Committee restated the position taken by the Assembly at its 2nd extraordinary session that the shipowner's right of limitation was governed by the 1969 Civil Liability Convention as implemented into Japanese law.

Recourse action

3.2.12 The Executive Committee renewed its instruction that the Director should continue to investigate the cause of the incident with a view to the IOPC Funds taking recourse action, if appropriate.

3.3 *Osung N°3*

3.3.1 The Executive Committee took note of the information on the *Osung N°3* incident contained in document 92FUND/EXC.2/4 and 1971 Fund document 71FUND/EXC.60/7. The Committee noted that the operation to recover the oil from the wreck had been completed successfully. It was further noted that, following the 1971 Fund's decision to increase the level of its payments to 100%, the 1971 Fund had reimbursed the 1992 Fund in respect of the amounts the latter had paid to cover the balance of the Japanese claims, and that the 1992 Fund would therefore ultimately not be liable in respect of this incident.

3.3.2 The Director stated that the contributors to the 1992 Fund's Interim Major Claims Fund for the *Osung N°3* incident would be reimbursed in connection with the levy of 1999 contributions to the 1992 Fund.

3.4 *Milad 1* incident

3.4.1 The Executive Committee considered document 92FUND/EXC.2/5 regarding the *Milad 1* incident. The Committee noted that the coastal tanker *Milad 1* had developed a crack in its hull off the coast of Bahrain, that a salvage tug with a repair team on board had been mobilised by the Marine Emergency Mutual Aid Centre (MEMAC) to stand by to undertake temporary emergency repairs, but that the tanker had eventually been towed to a more central location in the Persian Gulf where it was lightered without any spill of oil and without the need for emergency repairs. It was noted that MEMAC had presented a claim of £33 000 for the cost of the salvage tug and the ship repair team.

3.4.2 The Committee considered whether the events in this case fell within the definition of 'incident' in Article I.8 of the 1992 Civil Liability Convention (document 92FUND/EXC.2/5, section 3), and in particular whether the occurrence constituted a grave and imminent threat of causing pollution damage in the territory and territorial sea of a State Party to the 1992 Fund Convention. The Committee noted the Director's view that, in the light of the critical condition of the vessel and the prevailing wind conditions, these requirements were fulfilled. The Committee endorsed the Director's position on this point. The Committee also considered that, in the circumstances, sending a repair team to the site was a reasonable preventive measure, although the repairs were not subsequently undertaken.

3.4.3 The Committee also considered the question of whether MEMAC had taken all reasonable steps to pursue the legal remedies available to it and whether the claim by MEMAC was therefore admissible in principle under Article 4.1(b) of the 1992 Fund Convention.

3.4.4 A number of delegations expressed reservations as to whether sufficient steps had been taken by MEMAC, notwithstanding that the *Milad 1* was not required to have insurance to cover liability for pollution damage under the 1992 Civil Liability Convention because she was carrying less than 2 000 tonnes of oil as cargo. Several delegations considered that, in deciding whether the claimants had taken all reasonable steps, all facts of the case should be taken into account and not only the amount of the claim.

3.4.5 Some delegations expressed the view that the Executive Committee should approve the claim in principle so that the claimant could be compensated without further delay. These delegations considered that the 1992 Fund should examine whether to pursue a recourse action against the shipowner, as the Fund would be in a better position to obtain the necessary information.

3.4.6 As the Executive Committee was not convinced that MEMAC had taken all reasonable steps to pursue the legal remedies available to it, the Director was instructed to discuss with MEMAC what courses of action might be available to it and to report any developments to the Committee at its 3rd session so as to enable the Committee to take a decision on this point. The Director was also instructed to examine whether the 1992 Fund should pursue a recourse action against the shipowner if further steps by MEMAC proved unsuccessful. It was noted that in taking that decision it would be necessary to consider whether the costs which would be incurred in any recourse action were justified in view of the low amount which could be recovered.

4 Apportionment of compensation payments between P & I Club and the 1992 Fund

4.1 The Executive Committee considered a revised procedure for the apportionment of payments between P & I Clubs and the 1992 Fund which had been proposed by a P & I Club, and the Director's analysis of the issues involved (document 92FUND/EXC.2/6). The Committee also took note of a submission by the International Group of P & I Clubs on the same subject (document 92FUND/EXC.2/6/1).

4.2 The Committee recalled that the 1971 Fund's policy had been to start paying compensation only after the shipowner's insurer had paid up to the limitation amount applicable to the ship in question. The Committee noted that the 1971 Fund and the P & I Club made an estimate of the limitation amount as soon as possible after the incident, and that an adjustment between the Fund and the Club was made once the exact limitation amount had been determined, often in connection with the payment of indemnification of the shipowner under Article 5.1 of the 1971 Fund Convention.

4.3 The Committee recognised that in respect of incidents where the total amount of claims was expected to exceed 60 million SDR, or where there was a risk that this might occur, the 1971 Fund had in the past decided to limit its payments to a specific percentage of the established amount of each claim.

4.4 The observer delegation of the International Group of P & I Clubs stated that in its view the successful operation of the international system of compensation required a balance to be struck between an approach which was technically correct and one which contributed in a practical manner to the prompt payment of claims. In particular the delegation noted that, just as it was important for the Funds to keep within the appropriate compensation limits, it was also important for the insurers to be cautious about any procedures that might involve an undue risk of their having to pay in excess of the limit laid down in the Civil Liability Convention.

4.5 The Committee noted that a P & I Club had proposed that, when there was a risk that the total amount of the established claims would exceed the maximum amount of compensation available under the Conventions and the payments would therefore be pro-rated, the 1992 Fund should from the outset participate in the payment to each claimant in proportion to the estimated respective ultimate liabilities of the Club and the Fund. The Committee noted that, in the view of the International Group of P & I Clubs, by applying this method of payment, both the Funds and the P & I Club concerned would be able to ensure that payments remained within their respective limits.

4.6 Many delegations acknowledged the great importance of the co-operation between the P & I Clubs and the IOPC Funds and stressed that it was essential for the future of the IOPC Funds that this co-operation continued. Further, a number of delegations noted that the advance payments made by the P & I Clubs were made on a voluntary basis and that each Club was free to decide whether to make such payments in a particular case.

4.7 Some delegations recognised that the existing procedure had worked well in most cases but stated that they could understand the concerns of the International Group of P & I Clubs. These delegations considered that discussions should be held between the Director and representatives of the International Group of P & I Clubs to discuss this matter in more detail, in an effort to find practical ways of promoting prompt payments to victims and at the same time of avoiding the risk of overpayments.

4.8 Some delegations were of the view that there were no difficulties with the existing arrangements for the payment of claims and that the risk of overpayment was a theoretical one which could be minimised if both the P & I Club and the Fund were to handle carefully the settlement of claims.

4.9 It was noted that the International Group of P & I Clubs had referred to the fact that it was not certain that the Courts would accept subrogation agreements in all cases and that the Clubs would in such cases face an overpayment situation. A number of delegations did not consider this fear justified.

4.10 Some delegations stated that they could envisage situations where the difficulties mentioned by the International Group of P & I Clubs might arise. Those delegations were of the view that in such circumstances a case by case approach should be adopted.

4.11 One delegation stated that if the proposed new procedure was for the easing of cash flow, this should not have a bearing on whether the existing procedures should be changed. That delegation reminded the Executive Committee that advance payments were made by the P & I Clubs in the interests not only of the victims but also of the shipowner.

4.12 Other delegations were of the view that, if the procedure recommended by the P & I Club was followed and both the Club and Fund contributed to each payment of compensation, the procedures would become more complicated, since each claimant would receive payments from two sources. It was also mentioned that the procedure proposed by the International Group of P & I Clubs would in many cases result in a delay in payments.

4.13 A number of delegations referred to the fact that, in accordance with Article 4.1(c) of the 1992 Fund Convention, the 1992 Fund should compensate victims only when the shipowner's payments had exceeded the limitation amount applicable to the ship under the Civil Liability Convention. Those delegations were of the view that the 1992 Fund should not deviate from the 1992 Fund Convention and that the procedure which had been developed should be maintained. Some delegations were of the opinion that a change in policy would require a Protocol to the Conventions and that this was not an option for consideration for the time being. Many delegations were not convinced that any changes to the existing arrangements were necessary.

4.14 Several delegations considered that it was premature to consider new procedures, since the system of the 1992 Conventions had not been in existence for very long.

4.15 In conclusion the Executive Committee decided that the existing practice and procedures did not require any change.

5 Compensation of unlicensed fishermen

5.1 The Committee noted that the Executive Committee of the 1971 Fund had at its 60th session considered the issue of whether or not unlicensed fishermen should be compensated for economic losses arising out of incidents covered by the 1971 Fund Convention on the basis of 1971 Fund document 71FUND/EXC.60/13 (which was also a 1992 Fund document, 92FUND/EXC.2/7).

5.2 The Executive Committee noted that the 1971 Fund's discussions were summarised in the Record of Decisions as follows:

> 5.1 It was recalled that the issue of whether or not unlicensed fishermen should be compensated for economic losses arising out of incidents covered by the 1971 Fund Convention had been considered by the 1971 Fund in connection with several previous incidents. It was also recalled that in recognition of the importance of this subject, the Executive Committee at its 54th session had instructed the Director to study the question further so that it could re-examine the 1971 Fund's policy in respect of such claims. The Committee noted that the Director had engaged a firm of international fishery consultants to carry out a study of the fisheries legislation of a representative

sample of countries, and took note of the conclusions and recommendations of the consultants (document 71FUND/EXC.60/13, section 2).

5.2 The Executive Committee considered it necessary to maintain the 1971 Fund's policy of not paying compensation for alleged loss of catches which exceeded quotas laid down by the competent authorities. However, some flexibility might be required to allow for different methods of implementing quotas.

5.3 In noting the 1971 Fund's current policy of not paying compensation in respect of claims from commercial fishermen who carried out their activities in breach of applicable licensing requirements, some delegations felt that it was necessary to take a flexible approach and to consider claims on a case by case basis taking into account national legal systems. It was suggested that guidelines might be required on the scope for flexibility. One delegation made the point, however, that it would be very difficult to quantify the damage suffered by unlicensed fishermen.

5.4 The Committee decided to maintain the general policy of not accepting claims from commercial fishermen who carried out their activities in breach of licensing requirements laid down in or based on national legislation. However, the Committee considered that a certain flexibility should be exercised in respect of such claims and that the scope for such flexibility would have to be considered further.

5.5 With regard to so-called 'subsistence' fishing, ie fishing carried out by individual fishermen mainly for the purpose of providing food for their families, the Committee concluded that a review of the IOPC Funds' policy would be appropriate. One delegation proposed that the policy review should also take into account recognised customary fishing rights.

5.6 The Committee therefore instructed the Director to study further the admissibility of claims relating to subsistence fishing, in consultation with the Funds' experts and the Food and Agriculture Organization (FAO), and to consider whether guidelines on the admissibility of such claims should be developed.

5.7 Since the Committee had only been able to make a preliminary examination of the various issues, the Committee considered that further discussions would be required at future sessions, and that such further discussions should be co-ordinated with the discussions within the 1992 Fund.

5.3 The Chairman drew attention to the fact that the Assemblies of the 1971 Fund and 1992 Fund had taken the position that the two Organisations should endeavour to apply the same criteria for the admissibility of claims for compensation.

5.4 It was noted that this issue would have to be considered within the 1992 Fund at a later stage and that such further discussions should be co-ordinated with the discussions within the 1971 Fund.

6 Implementation of organisational changes within the Secretariat

The Executive Committee noted the developments in respect of the organisational changes and new working methods of the Secretariat, as set out in document 92FUND/EXC.2/8.

7 Any other business

7.1 Status of the 1992 Fund Convention

7.1.1 The Executive Committee noted the information in document 92FUND/EXC.2/9 regarding the status of the 1992 Fund Convention.

7.1.2 It was noted that it had been stated in the instrument of accession deposited by the People's Republic of China that the 1992 Fund Convention would be applicable only to the Hong Kong Special Administrative Region at present, whereas there was no such statement in the instrument of accession deposited by China to the 1992 Civil Liability Convention.

7.1.3 It was noted that the appropriate forum for any discussion of this instrument of accession within the 1992 Fund would be the Assembly and not the Executive Committee.

7.1.4 Some delegations nevertheless expressed their serious concern about accession limited to the Hong Kong Special Administrative Region. The question was raised whether such an accession was permitted under the 1969 Vienna Convention on the Law of Treaties. The Director was requested by one delegation to study the legal and practical implications of the situation and report to the Assembly at its next session.

7.1.5 One delegation requested that the Director should invite the depositary, the Secretary-General of the International Maritime Organization, to explain the basis on which the instrument of accession to the 1992 Fund Protocol deposited by China had been accepted. That delegation also requested that the Director should submit to the next session of the Executive Committee or Assembly a study of the consequences for the 1992 Fund if objections to the instrument were forwarded to the Secretary-General by Member States.

7.1.6 The Director stated that he did not consider it appropriate for him to raise such questions with the Executive Head of another intergovernmental organisation, and that the issue was a legal and political matter which should be addressed by States and not by the Director of the 1992 Fund.

7.1.7 The Chinese observer delegation informed the Committee that China had taken this course of action after its legal experts had carefully considered whether it would be permissible under the 1992 Fund Protocol and the Vienna Convention, and this question had been answered in the affirmative. The delegation explained that it considered that, having been part of the 1971 Fund, the Hong Kong Special Administrative Region would be replacing that by becoming a part of the 1992 Fund. It was added that the Chinese Government considered that mainland China did not require the additional protection offered by the 1992 Fund Protocol and that the cover afforded by the 1992 Protocol to the Civil Liability Convention was sufficient for the foreseeable future. The delegation stated that a fuller explanation of China's action would be submitted to the Assembly at its next session.

7.2 Holding Executive Committee meetings

The Committee noted and endorsed the Director's proposal that future Executive Committee meetings might be cancelled, even after invitations were issued, if it were later found that no significant decisions needed to be made.

7.3 1998 contributions

The Executive Committee noted that the 1998 contributions had been due on 1 February 1999 and that approximately 85% of the amount levied had been paid by 2 February 1999.

8 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.2/WP.1, was adopted, subject to certain minor amendments.