INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
4th session
Agenda item 7

92FUND/EXC.4/11
22 October 1999
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RECORD OF DECISIONS OF THE FOURTH SESSION OF THE EXECUTIVE COMMITTEE

(held from 20 to 22 October 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.4/1.

2 Election of Chairman and Vice-Chairman

The Executive Committee decided that it was not necessary at the present session to elect a Chairman and Vice-Chairman, as the composition of the present Committee was the same as that when the Chairman and Vice-Chairman had been elected at the Committee's 1st session.

3 Examination of credentials

3.1 The following members of the Executive Committee were present:

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

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.

3.2 The following Member States were represented as observers:

Algeria	Grenada	Sweden
Australia	Latvia	United Arab Emirates
Belgium	Marshall Islands	Uruguay
Canada	Monaco	Venezuela
France	New Zealand	
Germany	Singapore	

3.3 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:

China (Hong Kong Special Administrative Region)	Italy	Sri Lanka
	Panama	Vanuatu

Other States:

Argentina	Estonia	Peru
Brazil	Fiji	Poland
Cameroon	Georgia	Russian Federation
Chile	Ghana	Saudi Arabia
Colombia	India	Turkey
Congo	Malaysia	United States
Côte d'Ivoire	Malta	
Ecuador	Nigeria	

3.4 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)
United Nations

International non-governmental organisations:
Comité Maritime International (CMI)
European Chemical Industry Council (CEFIC)
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)

4 Incidents involving the 1992 Fund

4.1 Overview

The Executive Committee took note of document 92FUND/EXC.4/2 which contained a summary of the situation in respect of all ten incidents dealt with by the 1992 Fund since the Committee's 1st session.

4.2 Incident in Germany

4.2.1 It was recalled that on 20 June 1996 crude oil was found to have polluted a number of German islands close to the border with Denmark in the North Sea and that the German authorities had undertaken clean-up operations at sea and on shore. It was also recalled that investigations by the German authorities had revealed that the Russian tanker *Kuzbass* had discharged Libyan crude in the port of Wilhelmshaven on 11 June 1996. It was noted that according to the German authorities analysis of oil samples taken from the ship matched the results of the analysis of samples taken from the polluted coastline.

4.2.2 It was noted that in July 1998 the German authorities had brought legal action in the Court of first instance in Flensburg against the owner of the *Kuzbass* and his P & I insurer, claiming compensation for the cost of the operations for an amount of DM2 610 226 (£890 000). It was further noted that the 1992 Fund had been notified of the legal actions and had intervened in the proceedings on 24 August 1999 in order to protect its interests.

4.2.3 The Executive Committee took note of developments in respect of this incident contained in document 92FUND/EXC.4/3 and in particular of the pleadings submitted to the Court by the owner and his P & I insurer in which they stated that analyses carried out on their behalf showed that although the oil carried by the *Kuzbass* and the oil found ashore had both originated from Libya, the oil carried by the *Kuzbass* was Brega crude and the polluting oil was not. The Committee also noted that the shipowner and the insurer had stated that since the *Kuzbass* was proceeding to the Mediterranean to load a cargo of crude oil, there had been no requirement to clean the tanks, and that in any event the route followed by the *Kuzbass* was far from the areas where the oil which caused the pollution was alleged to have been discharged into the sea.

4.2.4 The Executive Committee instructed the Director to follow closely the legal proceedings and to take such steps as might be required to protect the 1992 Fund's interests.

4.3 *Nakhodka* incident

Claims for compensation

4.3.1 The Executive Committee took note of the developments in respect of the *Nakhodka* incident, as contained in documents 92FUND/EXC.4/4 and 71FUND/EXC.62/8. It was noted that as at 30 September 1999 claims totalling ¥34 758 million (£204 million) had been received and that payments totalling ¥7 635 million (£38.8 million) had been made by the 1971 Fund and the shipowner/United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd (UK Club).

4.3.2 The Executive Committee noted that it was expected that the assessment of most of the claims in the tourism sector would be completed by the end of 1999.

4.3.3 The Japanese delegation expressed its gratitude for the work undertaken by the Secretariat towards the settlement of claims, but stated that with only 2½ months left before the three-year time bar that delegation hoped that there would be a smooth and rapid progress towards the assessment and payment of the remaining claims.

4.3.4 The Director recognised that the assessment of claims had not progressed as fast as had been hoped but drew attention to the enormous volume of documentation which had to be examined by the Claims

Handling Office. He pointed out that a balance had to be struck between the number of surveyors engaged and the need for a consistent approach to the assessment of claims. In response to a question from one delegation regarding the need to ensure that claimants' attention was drawn to the issue of time bar, the Director informed the Committee that such steps were being undertaken.

Level of payments

4.3.5 In the light of the continuing uncertainty as to the level of the total amount of claims arising from the *Nakhodka* incident, the Executive Committee decided to maintain the level of the 1992 Fund's payments at 60% of the amount of the losses actually suffered by the respective claimants.

4.3.6 It was noted that the total payments of claims would in the near future reach the maximum amount payable by the 1971 Fund and that the 1992 Fund would then commence making payments.

Recourse action

4.3.7 The Executive Committee held a session in private, pursuant to Rule 12 of the Rules of Procedure to consider the investigation into the cause of the incident and possible recourse action (cf documents 92FUND/EXC.4/4/1 and 71FUND/EXC.62/8/1). During the closed session covered by paragraphs 4.3.7 to 4.3.19 only the delegations of Member States of the 1971 Fund and the 1992 Fund were present.

4.3.8 The Committee noted the conclusion of the IOPC Funds' experts that the *Nakhodka* was in a seriously dilapidated condition. It was noted that there was, in the experts' view, evidence of serious wastage of hull strength members and inadequate repairs, that it was clear that the hull strength was seriously reduced, but that while the actual loading of the ship was not in accordance with the loading manual which increased the stress in the ship, this would not in their view have affected a well-maintained ship. It was noted that the experts considered that there was no evidence of collision or near-collision with a low buoyancy object nor of any other contact or any explosion. It was further noted by the Committee that the fact that the ship had failed in these circumstances supported the experts' view that the ship was unseaworthy, that the *Nakhodka* did experience bad weather but such bad weather was not in their view exceptional in the Sea of Japan in January, but that the experts were of the opinion that the shipowner was or should have been aware of the actual condition of the hull structure.

4.3.9 The Committee shared the Director's opinion that the *Nakhodka* was unseaworthy at the time of the incident and that the defects which caused the ship to be unseaworthy were causative to the incident. The Committee also agreed with the Director that the shipowner was or at least should have been aware of the defects that caused the ship to be unseaworthy, that the incident was therefore caused by the fault or privity of the shipowner and that consequently, pursuant to Article V.2 of the 1969 Civil Liability Convention, the shipowner was not entitled to limit his liability.

4.3.10 The Committee confirmed that it was the 1969 Civil Liability Convention and not the 1992 Civil Liability Convention that applied in this case.

4.3.11 The Committee decided that if the shipowner, Prisco Traffic Limited, initiated limitation proceedings the 1992 Fund should oppose his right to limit his liability.

4.3.12 The Executive Committee noted that it would take considerable time to serve legal proceedings on the shipowner in Russia. The Committee recognised that for a number of reasons a recovery action against the company might not result in any money being recovered. It was noted that the investigations carried out by the IOPC Funds indicated that it was unlikely that this company had any significant assets against which a judgement could be enforced. It was also noted that the company had disposed of its fleet and no longer appeared in the list of shipowners published by Lloyds' Register and that it was possible that steps were being taken to dissolve the company. The Executive Committee decided that the 1992 Fund should nevertheless take recovery action against the shipowner, Prisco Traffic Limited.

4.3.13 The Committee decided that recourse action should be taken against Primorsk Shipping Corporation ('Primorsk'), the parent company of Prisco Traffic Limited. The Committee noted that both companies

shared the same office until 1996 and that Prisco Traffic appeared as a subsidiary of Primorsk in Lloyds Confidential Index until late in 1996 and as a separate entry after the incident in 1997. The Committee also noted that both companies had the same hull insurer and the same P & I Club and that Primorsk appeared to have a considerable involvement with Prisco Traffic in matters of shipping. It further noted that the proximity of the two companies and the links between them suggested that the parent company exercised a considerable degree of control over Prisco Traffic and the fleet. The Committee shared the Director's view that such control brought with it responsibility for the seaworthiness and safe operation of the fleet.

4.3.14 The Executive Committee considered the further question of whether recovery action should be brought against the UK Club. Although the Committee noted that under the 1969 Civil Liability Convention the shipowner was obliged to maintain insurance covering the limitation amount applicable to the ship under the Convention, in the case of the *Nakhodka* 1 588 000 SDR (approximately ¥229 million or £1.3 million), it was believed that the *Nakhodka* was covered for its legal liabilities for pollution damage up to an amount of US$500 million, as was normally the case for oil tankers.

4.3.15 The Committee also noted that the UK Club's Rules contain a "pay to be paid" clause (ie that the Club is under an obligation to indemnify the shipowner only for compensation actually paid by him to third parties), and that this clause had been upheld by the United Kingdom courts. The Committee noted, however, that the legal advice given to the Director indicated that the "pay to be paid" clause might not be upheld in Japan. In the light of this advice, the Executive Committee decided that the 1992 Fund should take recovery action against the UK Club.

4.3.16 The Executive Committee noted that the *Nakhodka* was subject to classification under the rules of the Russian Maritime Register of Shipping. The Committee recognised that litigation against classification societies was difficult, due to the special role they play in international shipping. The Committee concluded, however, that the Russian Register had failed to ensure that the *Nakhodka* met its requirements and that this failure was causative to the incident, and therefore decided that the 1992 Fund should initiate recovery action against the Russian Register.

4.3.17 It was noted that significant repairs were carried out on the *Nakhodka* in 1993 at a shipyard in Singapore and that the IOPC Funds' technical experts were investigating the extent of these repairs. The Committee decided that the question of whether or not the 1992 Fund should take legal action against the shipyard should be left to the discretion of the Director, in the light of what was in the best interest of the Organisation.

4.3.18 A number of delegations expressed concerns over the legal position of those claimants whose claims had not been settled and those claimants whose claims had been settled but had only received partial payments from the Funds. The Director indicated that these claims would have to be protected under Japanese law and that steps were being taken to ensure that those claimants' rights were protected.

4.3.19 The Japanese delegation informed the Committee that the Japanese experts who had conducted the investigation into the cause of the incident were prepared to assist with the preparation of further technical arguments.

4.4 *Osung N°3* incident

The Executive Committee took note of the developments in respect of the *Osung N°3* incident as set out in documents 92FUND/EXC.4/5 and 71FUND/EXC.62/6. The Committee noted in particular that the 1992 Fund would ultimately not be liable in respect of this incident since all established claims would be paid in full by the 1971 Fund.

4.5 Incident in the United Kingdom

The Executive Committee took note of the information contained in document 92FUND/EXC.4/6 concerning an oil spill in the United Kingdom from an unidentified source. It was noted that a local authority

had submitted a claim for compensation to the 1992 Fund for the cost of the clean-up operations, provisionally indicated at approximately £10 000. The Committee noted that the local authority had informed the 1992 Fund that this claim would not be pursued.

4.6 *Santa Anna* incident

4.6.1 The Executive Committee took note of the information concerning the *Santa Anna* case, as set out in document 92FUND/EXC.4/7.

4.6.2 The Executive Committee recalled that the unladen tanker *Santa Anna* had grounded on rocks in the United Kingdom and had been refloated without any bunkers having been spilled. It was noted that the United Kingdom Government had submitted a claim for the cost of mobilising oil-combatting equipment and surveillance aircraft to respond to the possible escape of persistent bunker oil.

4.6.3 The Committee recalled that at its 1st session it had taken the view that the grounding and subsequent refloating of the *Santa Anna* constituted an 'incident' as defined in the 1992 Conventions, and that the 1992 Civil Liability Convention could be applied to the *Santa Anna* even though it was registered in a State Party to the 1969 Civil Liability Convention but not to the 1992 Civil Liability Convention (document 92FUND/EXC.1/9, paragraphs 4.6.5 and 4.6.16).

4.6.4 It was further recalled that the question had arisen whether the *Santa Anna* fell within the definition of 'ship' laid down in Article I.1 of the 1992 Civil Liability Convention. The Committee noted that an intersessional Working Group established by the 1992 Assembly had studied *inter alia* the interpretation of the definition of 'ship'. The Committee also noted that the report of the Working Group, which met on 26 and 27 April 1999, would be considered by the 1992 Assembly at its 4th session.

4.6.5 The Committee noted that the United Kingdom Government was still pursuing its claim against the shipowner on the basis of strict liability and that the amount claimed fell well below the limitation amount applicable to the vessel. The Committee considered therefore that there was no need to decide whether the *Santa Anna* fell within the definition of 'ship'. It was noted, however, that the issue would be reviewed at the request of the United Kingdom delegation if the United Kingdom Government was unable to recover its costs from the shipowner.

4.7 *Milad 1* incident

4.7.1 The Executive Committee recalled that the coastal tanker *Milad 1* had been intercepted by the United States Coast Guard (USCG) contingent of the Multinational Maritime Interception Forces (MIF) in international waters some 25 nautical miles north east of Bahrain. The Committee also recalled that the tanker had been carrying 1 500 tonnes of mixed diesel/crude oil and was found to have a crack in the hull approximately 6 metres long, allowing sea water into the ballast tanks, posing a grave and imminent threat of pollution to the coast of Bahrain, in response to which the Marine Emergency Mutual Aid Centre (MEMAC) in Bahrain had engaged a contractor to undertake temporary emergency repairs to the *Milad 1*, at a cost of BD21 168 (£35 000).

4.7.2 It was recalled that at its 3rd session the Executive Committee had considered the various steps that MEMAC could in principle take to trace the owner, with a view to recovering the costs incurred (document 92FUND/EXC.3/3/Rev.1, paragraphs 3 and 4). It was also recalled that the Committee had decided that, taking all factors into account, MEMAC had taken all reasonable steps to pursue the legal remedies available to it and that MEMAC's claim was therefore admissible (document 92FUND/EXC.3/7, paragraph 3.2.8). The Committee noted that, following that decision, the Director had approved MEMAC's claim at BD21 168 (£35 000), and that this amount had been paid to MEMAC on 8 June 1999.

4.7.3 The Committee recalled that at its 3rd session the Director had been instructed to investigate the possibilities for the 1992 Fund of taking recourse action against the shipowner and had been invited to

contact those delegations which had suggested alternative steps that could be taken to trace the shipowner. The Committee noted that the Director had received helpful advice from a number of delegations.

4.7.4 The Committee noted that an investigator engaged by the 1992 Fund had established that the *Milad 1* had been laid up in Sharjah (United Arab Emirates) for about one month after the incident, and had then sailed in a damaged condition to Basra (Iraq), the home port of the ship and crew. It was noted that the vessel had been laid up in Iraq due to the owner's lack of funds to undertake the necessary repairs to make it seaworthy, and that the vessel's scrap value was about US$65 000 (£41 000). It also noted that it had not been possible to contact the shipowner, but that in view of the time that has elapsed since the incident, it was possible that the shipowner has already scrapped the vessel.

4.7.5 One delegation informed the Committee that its own investigations had shown that the *Milad 1* had been scrapped. That delegation also pointed out that since the flag State was unable to trace the owner, there was no point in pursuing the case.

4.7.6 The Executive Committee considered the results of the investigations carried out so far. The Committee agreed with the Director that it would be very costly and difficult to pursue the investigation further, as would any recovery action. The Committee concluded that the likelihood of recovering the amount paid by the 1992 Fund in compensation to MEMAC was extremely small and therefore decided that further efforts to this end were not justified.

4.8 *Sea Brothers 1, DB 22* and *Mary Anne*

Sea Brothers 1

4.8.1 The Executive Committee noted that the *Sea Brothers 1* had sunk in Manila harbour, spilling approximately 280 tonnes of bunker fuel, and that claims by the Coast Guard and various contractors in respect of clean-up costs had been settled for US$1.2 million (£750 000). It was also noted that the insurer did not anticipate any further claims for pollution damage arising from the incident and that therefore it was unlikely that the 1992 Fund would be called upon to pay any compensation as a result of this incident.

DB 22

4.8.2 The Committee noted that the Philippines-registered dumb barge (1 343 GRT) had spilled about 16 tonnes of heavy fuel oil whilst loading cargo at a jetty of the National Power Corporation's Sucat terminal (Philippines). It was also noted that clean-up costs had been estimated to be in the region of US$28 000 (£17 500) and that no further claims for pollution damage were anticipated. The Committee further noted that it was highly unlikely that the 1992 Fund would be called upon to pay any compensation as a result of this incident.

Mary Anne

4.8.3 The Executive Committee noted that the Philippines-registered sea-going, self-propelled barge *Mary Anne* (465 GRT) had become swamped during strong winds and heavy seas and had sunk in approximately 60 metres of water off the port of Mariveles at the entrance to Manila Bay (Philippines). It was noted that the barge was reportedly carrying a cargo of 711 tonnes of intermediate fuel oil as well as some 2.5 tonnes of gas oil bunkers. It was also noted that the wreck had leaked oil continuously over several days, and that although much of the surfacing oil dispersed naturally, some oil apparently from the *Mary Anne* had stranded on shorelines.

4.8.4 The Committee noted that the *Mary Anne* was entered with the Terra Nova Insurance Company Limited (Terra Nova) which was not a Protection and Indemnity Association but a conventional insurance company which covered P & I risks at fixed premiums.

4.8.5 It was noted that the 1992 Fund's co-operation with P & I Clubs in respect of the handling of incidents was governed by a Memorandum of Understanding signed in 1985 by the 1971 Fund and the

International Group of P & I Clubs, which was extended in 1996 to apply also to the 1992 Fund. Since Terra Nova was not a member of the International Group, the Memorandum did not apply in this case. The Committee noted that the Director had proposed that Terra Nova and the 1992 Fund should co-operate in accordance with the Memorandum, which had been the case in the past in respect of incidents involving P & I Clubs outside the International Group, but that the proposal was not accepted by Terra Nova. The Executive Committee noted, however, that it had been agreed that the 1992 Fund should receive copies of reports of the expert from the International Tanker Owners Pollution Federation Ltd (ITOPF) who attended the incident on behalf of Terra Nova to oversee operations and render advice in respect of clean-up operations.

4.8.6 The Executive Committee noted that Terra Nova had informed the 1992 Fund that the overall cost of the aborted oil removal operation was about £1 million and that this cost had been paid by Terra Nova. The Committee also noted that Terra Nova had paid claims in respect of clean-up costs of £680 000 and that further claims of around £750 000 had been lodged with the shipowner. It was further noted that it had been indicated that some 4 000 fishermen operated out of the Mariveles district and that it was not known whether the incident would give rise to claims for losses in the fishery sector.

4.8.7 The Executive Committee noted that the limitation amount applicable to the *Mary Anne* was 3 million SDR (£2.5 million). It was noted that it was unlikely that the total amount of the established claims would exceed the maximum amount of compensation available under the 1992 Civil Liability Convention. It was noted, however, that Terra Nova had informed the 1992 Fund that it was investigating a number of apparent anomalies surrounding the incident which, if substantiated, could, in Terra Nova's view, put the shipowner in breach of the insurance policy in respect of the vessel. The Committee noted that, although it was understood that the investigations were not yet completed, Terra Nova had informed the 1992 Fund of its intention to direct further claims arising from the incident to the shipowner, and that it might request the shipowner and/or the 1992 Fund to reimburse Terra Nova the amounts it had paid to claimants. The Committee also noted that it was not known whether the shipowner was financially capable of meeting its obligations under the 1992 Civil Liability Convention.

4.9 *Laura d'Amato*

4.9.1 The Executive Committee noted that on 3 August 1999 the Italian tanker *Laura d'Amato* (54 962 GRT) was discharging its cargo of Murban crude oil at an oil terminal on the northern shore of Sydney Harbour (Australia), when approximately 250 tonnes of oil escaped into the sea through an open sea valve. It was noted that the spill took place close to the central business district of Sydney, and that the area included the Harbour Bridge and the Opera House.

4.9.2 The Committee noted that clean-up operations were co-ordinated by the Sydney Port Corporation and a number of Australian Maritime Authorities including the National Response Team. It was noted that, although the terminal jetty and the ship were quickly surrounded by booms, not all the oil was contained and a wide area of the harbour was polluted. It was further noted that one week after the incident, virtually all on-water recovery operations were completed. It was also noted that most shorelines were left to clean naturally, although some sensitive areas and a few high amenity areas were flushed with seawater from fire hoses to refloat the stranded oil so that it could be recovered using skimmers.

4.9.3 The Executive Committee noted that claims had been presented in respect of the cost of cleaning the hulls of yachts and a large number of commercial vessels that had been oiled, that claims were expected from the Sydney Opera House and a number of other public venues such as waterfront restaurants in the affected area which had been disrupted due to the pungent vapours produced by the oil during the first few hours of the spill. It was noted that a voluntary fishing ban had been imposed by the New South Wales Fishing Association following the incident and that the ban had affected primarily the commercial fin-fish fishery.

4.9.4 The Committee noted that the shipowner's insurer had estimated that claims for clean-up costs, associated claims in respect of oiled vessels and claims for loss of income incurred by public venues would be in the region of US$2.8 million (£1.8 million).

4.9.5 The Committee noted that the limitation amount applicable to the *Laura d'Amato* was 24 million SDR (£29 million), and acknowledged that it was highly unlikely, therefore, that the 1992 Fund would be called upon to pay any compensation as a result of this incident.

4.9.6 The Australian delegation stated that the authorities in New South Wales intended to prosecute the shipowner and that there had been much interest shown in respect of compensation.

5 Future sessions

5.1 The Executive Committee decided to hold a session during the week of 3 - 7 April 2000 and, if required, a session during the week of 14 - 18 February 2000.

5.2 It was decided that the Committee would hold its normal autumn session during the week of 23 - 27 October 2000.

6 Any other business

No items were raised under this agenda item.

7 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.4/WP.1, was adopted, subject to certain amendments.