



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
6th session
Agenda item 5

92FUND/EXC.6/5
15 February 2000
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RECORD OF DECISIONS OF THE SIXTH SESSION OF THE EXECUTIVE COMMITTEE

(held on 15 February 2000)

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.6/1.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

Canada	Latvia	Spain
Denmark	Liberia	Tunisia
France	Marshall Islands	United Kingdom
Germany	Mexico	Venezuela
Greece	Republic of Korea	

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:

Belgium	Cyprus	Japan
China (Hong Kong Special Administrative Region)	Finland	Netherlands
Croatia	Grenada	Norway
	Ireland	Sweden

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:

Dominican Republic	Malta	Poland
Italy	Panama	Vanuatu

Other States

Chile	India	Russian Federation
Côte d'Ivoire	Indonesia	Saudi Arabia
Gabon	Portugal	Turkey
Georgia		

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

Intergovernmental organisations:

European Commission
International Oil Pollution Compensation Fund 1971 (1971 Fund)
International Maritime Organization (IMO)

International non-governmental organisations:

Cristal Ltd
Comité Maritime International (CMI)
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 Erika incident

3.1 The Executive Committee took note of the information contained in documents 92FUND.EXC.6/2 and 92FUND/EXC.6/2/Add.1 prepared by the Director concerning the *Erika* incident which had occurred off the coast of Brittany (France) on 12 December 1999.

3.2 The French delegation introduced document 92FUND/EXC.6/2/1 containing further information concerning this incident.

3.3 The Executive Committee expressed its sympathy with the French Government and the victims of the pollution caused by the *Erika* incident. The Committee emphasised the importance of compensation being paid as soon as possible to the victims. The Committee also expressed its gratitude to the Governments which had assisted the French authorities to combat the oil spill and to the volunteers who had assisted in the beach clean-up.

Applicability of Conventions

- 3.4 It was noted that the *Erika* was registered in Malta which at the time of the incident was a Party to the 1969 Civil Liability Convention and the 1971 Fund Convention but not to the 1992 Conventions. It was also noted that France had become Party to the 1992 Civil Liability Convention and the 1992 Fund Convention on 30 May 1996, and had denounced the 1969 Civil Liability Convention and the 1971 Fund Convention with effect from 15 May 1998. The Executive Committee agreed with the Director that, since there was no treaty relationship between France and Malta, only the 1992 Conventions were applicable to the *Erika* incident.

Oil removal operations

- 3.5 It was noted that the *Erika* had broken in two parts, that these parts had sunk in about 120 metres of water and that they contained a total of some 15 000 tonnes of heavy fuel oil. It was further noted that Total Fina SA ('Total') had entered into an agreement with the French Government under which Total undertook to carry out inspections of the two parts of the wreck and any operations to prevent further oil from escaping, including any oil removal operations, and to finance directly any such inspection and operations.
- 3.6 The Committee was informed that it had been decided to set up a group of three technical experts to advise the French Government and Total on the technical merits of the operations, in particular on technical issues where there was disagreement between the Government and Total. The Committee noted that the Director had been approached by Total with a request that the 1992 Fund should nominate a technical expert as a member of the Group.
- 3.7 The Committee agreed with the Director that the 1992 Fund should accept Total's request and nominate such an expert. The Committee also agreed with the Director that the expert nominated by the Fund would act solely as an adviser in his personal capacity and that he would not in any way engage or commit the 1992 Fund. It was emphasised that Total's claim for reimbursement of the costs incurred for removal of the oil from the wreck or to prevent further pollution would be assessed as any other claim, ie on the basis of the criteria of the technical reasonableness of the operations.

Claims Handling Office

- 3.8 The Executive Committee noted that the 1992 Fund and the liability insurer of the *Erika*, the Steamship Mutual Underwriting Association (Bermuda) Ltd ('Steamship Mutual'), had established a Claims Handling Office in Lorient (France), that a number of claims had recently been received in the Claims Handling Office and that the Fund and the insurer had engaged a number of technical experts to examine the claims.

Settlement of claims

- 3.9 The Executive Committee authorised the Director to make final settlements on behalf of the 1992 Fund of all claims arising out of this incident, to the extent that the claims did not give rise to questions of principle which had not previously been decided by the Committee.

Level of payments

- 3.10 The Executive Committee noted that significant claims were expected in respect of the clean-up operations at sea and on shore and in respect of losses in the fishery and tourism sectors.
- 3.11 It was noted that Total had in a letter to the Director undertaken not to pursue the claims relating to the cost of any inspections and the operations in respect of the wreck referred to in paragraph 3.5 above against the 1992 Fund or against the limitation fund relating to the *Erika* if and to the extent that the presentation of such claims would result in the total amount of the claims arising out of this incident exceeding the maximum amount of compensation available

under the 1992 Conventions, ie 135 million SDR. The Committee also noted that Total had made a corresponding undertaking in respect of the cost of the collection and disposal of the oily waste generated by the clean-up operations, the cost of its participation in the beach clean-up up to a maximum of FF40 million and the cost of a publicity campaign to restore the tourist image of the Atlantic coast up to a maximum of FF30 million.

- 3.12 The French delegation informed the Committee that the French Government also undertook not to pursue claims for compensation against the 1992 Fund or the limitation fund established by the shipowner or his insurer if and to the extent that the presentation of such claims would result in the maximum amount available under the 1992 Conventions being exceeded. The delegation stated that this undertaking covered all the expenses incurred by the French State in combating the pollution, *inter alia* those expenses falling within the framework of Plan Polmar, including expenses incurred by local authorities paid or reimbursed through Plan Polmar. That delegation stated that the undertaking covered also all measures which the State might take in different sectors to reduce the consequences of the incident, including any publicity campaigns to this effect. That delegation made the point that the French Government's claims would rank before any claims by Total if funds would be available after all other claims had been paid in full. The French delegation mentioned that the French Government had taken steps to establish a procedure under which claimants whose claims had been assessed by the 1992 Fund's technical experts and approved by the Fund could obtain advance payments from Banque du développement des petites et moyennes entreprises.
- 3.13 The Committee recalled that the Assembly had taken the view that - like the 1971 Fund - the 1992 Fund should exercise caution in the payment of claims, if there was a risk that the total amount of the claims arising out of a particular incident might exceed the total amount of compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention, since under Article 4.5 of the 1992 Fund Convention all claimants have to be given equal treatment. It was also recalled that the Assembly had expressed the view that it was necessary 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 (document 92FUND/A.ES/2/6, paragraph 3.1.14).
- 3.14 The representative of the Steamship Mutual recognised that at this early stage it was not possible to predict the overall cost of clean-up and preventive measures and of economic losses resulting from the incident. He stated that, nevertheless, the Steamship Mutual would be prepared to make funds available for interim payments in appropriate cases. He mentioned that the Steamship Mutual was in the process of establishing a limitation fund reflecting the limitation of liability of the shipowner and the insurer under the 1992 Civil Liability Convention (approximately 9.15 million SDR or FF82 million). He stated that the Steamship Mutual believed that the limitation amount would be sufficient to provide funds for interim payments in appropriate cases up to the Executive Committee's next session in April 2000. The representative stated that such payments would be made on the basis of the advice of the technical experts engaged jointly by the Steamship Mutual and the 1992 Fund, subject to the claims being properly documented and admissible in principle in accordance with the criteria laid down by the 1992 Fund.
- 3.15 The Executive Committee expressed its appreciation of the position taken by the French Government and Total 'to stand last in the queue' for their claims. The Committee also expressed its satisfaction with the undertaking made by the Steamship Mutual as regards interim payments.
- 3.16 During the discussion it was emphasised that the 1992 Fund should make all efforts to make compensation available to victims as soon as possible, in order to demonstrate that the regime of compensation established by the 1992 Conventions worked satisfactorily and that there was no need to create any alternative liability scheme.

- 3.17 The Executive Committee noted that the Director was authorised, pursuant to Internal Regulation 7.9, to make provisional payments to victims to mitigate undue financial difficulties not exceeding a total of 6 million SDR (FFr54 million) for any one incident.
- 3.18 The Executive Committee shared the Director's view that it was not possible at this stage to make any meaningful estimate of the total amounts of the established claims and that this applied in particular to the claims in the fishery and tourism sectors. In view of this uncertainty, the Committee decided, therefore, that the Director's authority to make payments should for the time being be limited to provisional payments under Internal Regulation 7.9.
- 3.19 The Spanish delegation informed the Committee that claims might be submitted by Spanish fishermen who operated in the proximity of the area affected by the *Erika* incident.
- 3.20 The Director was instructed to collect as much information as possible on the likely level of the claims arising out of this incident, so as to enable the Committee to assess the situation as to the level of payments at its 7th session, to be held in the week commencing 3 April 2000.

Publicity campaigns

- 3.21 The Executive Committee considered a request from the Département de Vendée that the 1992 Fund should pay the cost of a publicity campaign to counteract the negative consequences for the tourism industry of the *Erika* incident. The Committee noted that the Département de Vendée had stated that it did not have funds to cover this exceptional campaign, and that in view of the necessary preparations for such a campaign it was important that an agreement in principle could be reached with the 1992 Fund as soon as possible.
- 3.22 The Committee noted that the Ministry of Tourism was considering carrying out a co-ordinated publicity campaign covering the entire Atlantic coast and that some Départements other than Vendée were also considering carrying out marketing campaigns.
- 3.23 The Committee recalled that the Assemblies had decided that the cost of measures to prevent pure economic loss (ie losses suffered by persons who had not suffered damage to property) might be admissible for compensation if the following criteria were fulfilled:
- the cost of the proposed measures was reasonable
 - the cost of the measures was not disproportionate to the further damage or loss which they are intended to mitigate
 - the measures were appropriate and offered a reasonable prospect of being successful
 - in the case of a marketing campaign, the measures related to actual targeted markets.
- 3.24 The Committee also recalled the established policy that the 1992 Fund did not normally accept claims for measures to prevent pure economic loss until the measures had been carried out and that the Fund was cautious about advance payments, since it would not take on the role of a claimant's banker.
- 3.25 The Director stated that he accepted that it was important in the *Erika* case for a publicity campaign to be undertaken to counteract the impact on the tourism industry of the incident. He stated that in his view it would be necessary to make a careful analysis of which method was likely to be most efficient and cost-effective. The Director expressed the view that it was important that any marketing campaigns were well co-ordinated and that the French Government appeared to be best placed to ensure such co-ordination.
- 3.26 The Executive Committee accepted that in principle it appeared reasonable that measures should be taken to counteract the negative consequences for the tourism industry of the incident. The

Committee emphasised the need for co-ordination of any publicity campaigns to this effect and that the French Government should co-ordinate any such campaigns. The Committee considered that the French Government and the Director should work together on this issue.

Maximum amount payable under the 1992 Fund Convention

- 3.27 The Executive Committee noted that, pursuant to Article 4.4(e) of the 1992 Fund Convention, the maximum amount payable under the 1992 Fund Conventions, 135 million Special Drawing Rights (SDR), should be converted into national currency on the basis of the value of that currency by reference to the SDR on the date of the decision of the 1992 Fund Assembly as to the first date of payment of compensation.
- 3.28 It was noted that, once the Executive Committee had been established by the Assembly, decisions on payments of compensation would normally be taken by the Committee rather than by the Assembly. The Committee took the view therefore that the reference in Article 4.4(e) to the Assembly should be considered as referring to the Executive Committee.
- 3.29 The Executive Committee decided that, in accordance with the Assembly's decision in the *Nakhodka* case (document 92FUND/A.2/29, paragraph 17.2.8), 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 the date of the adoption of the Executive Committee's Record of Decisions of its 6th session, ie 15 February 2000^{<1>}.
- 3.30 Since the applicable currency rates would only be available on 17 February 2000, the Executive Committee instructed the Director to make the necessary calculations and report the result to the Committee's 7th session.

Funding of compensation payments

- 3.31 The Executive Committee noted the Director's intention to convene an extraordinary session of the 1992 Fund Assembly to be held during the week commencing 3 April 2000 to consider whether to make a special levy of contributions to an *Erika* Major Claims Fund payable during the second half of 2000 to enable the 1992 Fund to make prompt payments of compensation.

Cause of the incident

- 3.32 The Committee noted the information on the sequence of events leading to the incident and the investigations carried out into the cause of the incident. The Director was instructed to follow these investigations.
- 3.33 The delegation of Malta, speaking in its capacity of observer, drew attention to the fact that the Maltese authorities were also carrying out an investigation into the cause of the incident, since the *Erika* flew the Maltese flag.

4 Any other business

4.1 *Al Jaziah 1* incident

- 4.1.1 The Executive Committee took note of the information in document 92FUND/EXC.6/3 regarding the *Al Jaziah 1* incident which had occurred off Abu Dhabi (United Arab Emirates) on 24 January 2000.
- 4.1.2 It was noted that the United Arab Emirates was Party to both the 1971 Fund Convention and the 1992 Fund Convention, having not denounced the former when acceding to the latter. It was also

<1> A conversion on the basis of the rates applicable on 7 February 2000 would have given 135 million SDR = FFr1 209 266 694.

noted that the 1969 Civil Liability Convention and the 1971 Fund Convention had been incorporated into the law of the Emirates by a Federal Decree of 1983 and the 1992 Conventions by a Federal Decree of 1997, and that the former decree had not been repealed and appeared to be still in force. It was recalled that the 1992 Fund Convention did not contain any provisions governing the simultaneous application of these four instruments after the expiry of the transitional period on 15 May 1998.

- 4.1.3 It was also noted that the *Al Jaziah I* was allegedly registered in Honduras which was a Party to the 1969 Civil Liability Convention but not to the 1992 Civil Liability Convention. The Committee took the view that, if the ship was in fact registered in Honduras, the United Arab Emirates would be under a treaty obligation to apply the 1969 Civil Liability Convention in respect of the shipowner's liability.
- 4.1.4 The Executive Committee instructed the Director to study further the application of the four treaties in question to this incident.
- 4.1.5 The Committee took note of the fact that the Director had raised the issue as to whether the *Al Jaziah I* would fall within the definition of 'ship' under either or both of the 1969/1971 Conventions and the 1992 Conventions, in particular whether the *Al Jaziah I* could be considered as a 'seagoing craft'. It was noted that a preliminary survey of the vessel carried out by the 1992 Fund's local surveyor after the refloating indicated that the vessel had carried no navigation equipment and that the low forecastle of the vessel suggested that it was not designed as a seagoing craft.
- 4.1.6 The Committee agreed with the Director that it was not possible to take a decision on this issue without further information about the vessel.

4.2 Dolly incident

The Director informed the Executive Committee of the *Dolly* incident which occurred on 5 November 1999 in Martinique. The Committee noted that the Director had informed the French Government that the 1992 Fund reserved its position as to whether the *Dolly* fell within the definition of 'ship' laid down in the 1992 Civil Liability Convention and the 1992 Fund Convention and whether therefore the 1992 Fund Convention applied to the incident.

4.3 Revision of the maximum amount of compensation available under the 1992 Conventions

- 4.3.1 The United Kingdom delegation drew attention to the fact that in some recent cases the compensation regime established by the international conventions had worked as a result of States, P & I insurers and (in the *Erika* case) private companies having made funds available to make provisional payments to claimants in financial difficulties. That delegation made the point that the *Nakhodka* and *Erika* incidents had shown that even with the higher amount of compensation available under the 1992 Conventions, there were still difficulties in providing rapid compensation to victims. That delegation drew attention to the fact that the limits in the 1992 Conventions were the same as those set out in the 1984 Protocols to the 1969 and 1971 Conventions. For this reason, the United Kingdom delegation formally requested that the 1992 Fund Assembly should include in the agenda for its extraordinary session, to be held in April 2000, the question of an increase of the limits of compensation laid down in the 1992 Conventions by means of the special procedure for amending these limits.
- 4.3.2 Several delegations supported the request made by the United Kingdom delegation.
- 4.3.3 Some delegations drew attention to the fact that the decision on the amendment of the limits would be taken by the Legal Committee of the International Maritime Organization but agreed that a preliminary discussion in the 1992 Fund Assembly would be necessary in order to assess the experience gained by the 1992 Fund from recent incidents.

4.4 Status of the Conventions

The Executive Committee took note of the information in document 92FUND/EXC.6/4 regarding the status of the 1971 and 1992 Fund Conventions. It was noted that the 1992 Fund Convention had entered into force for 41 States, that a further 12 States had deposited instruments of accession and that consequently the 1992 Fund would have 53 members by February 2001. It was also noted that 43 States were still Parties to the 1971 Fund Convention, that nine of these States had deposited instruments of denunciation and that the 1971 Fund would have 34 members by February 2001. It was further noted that three States which had ratified the 1992 Convention had not denounced the 1971 Fund Convention.

4.5 Diplomatic Conference to amend Article 43.1 of the 1971 Fund Convention

4.5.1 It was recalled that at its 62nd session held in October 1999, the 1971 Fund Executive Committee acting on behalf of the 1971 Fund Assembly had elaborated a draft Protocol to amend Article 43.1 of the 1971 Fund Convention to the effect that that Convention would be terminated well before the number of Contracting States fell below three, which is the present threshold. It was also recalled that the 1971 Fund Executive Committee had requested that IMO should convene urgently a Diplomatic Conference for the purpose of adopting such a Protocol.

4.5.2 The Director informed the Committee that the IMO Assembly had approved at its November 1999 session the 1971 Fund's request, and that the Diplomatic Conference would be held in the week commencing 25 September 2000.

4.6 Relocation of the IOPC Funds' offices

The Director informed the Committee that on 11 February 2000 he had signed the necessary documents relating to the lease of the IOPC Funds' new premises in Portland House, Stag Place, London SW1, that the refurbishment was being carried out and that the removal of the IOPC Funds' offices to the new premises was expected to take place by the end of May or beginning of June 2000.

5 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.6/WP.1, was adopted, subject to certain amendments.
