

CMI NEWS LETTER

Vigilandum est semper; multae insidiae sunt bonis.

COMITE MARITIME INTERNATIONAL

NO. 3 - SEPTEMBER / DECEMBER 2014

News from the CMI:

- The 2015 Istanbul Colloquium, by Stuart Hetherington
- [Minutes of deliberations of the CMI Executive Council held by email conference during the week commencing 24 November 2014, chaired by the President from his office in Sydney](#)

News from Intergovernmental and International Organizations:

- [News from IOPC Funds](#)
- [Report on the 17 April 2015 Session of the IOPC Funds' governing bodies and the Special Session of former 1971 Fund Member States, by Rosalie Balkin](#)
- [Paper presented to the 17 April 2015 Special Session to commemorate the 1971 Fund, by Måns Jacobsson](#)

NEWS FROM THE CMI

THE 2015 ISTANBUL COLLOQUIUM

This edition of the newsletter goes to print shortly prior to the Istanbul Colloquium. That will be the last opportunity, at a large gathering of CMI members, to debate the issues that are being considered by the International Working Group and the International Sub-Committee on the Review of the Rules of General Average before next year's Conference in New York. In addition to that, Patrick Griggs and the Offshore Activities IWG has gathered together a range of speakers of high eminence to discuss various aspects of the offshore industry. Our Turkish hosts have also put together a

programme in which we will learn much about the challenges faced by Turkey as a coastal State in managing the Turkish Straits.

The social highlight of the Istanbul Colloquium will, in my anticipation, be a dinner cruise on the Bosphorus.

With over 200 delegates it promises to be a high quality Colloquium in a part of the world where maritime legal history developed significantly.

I look forward to seeing many of you in Istanbul in a few days time.

STUART HETHERINGTON
President

**MINUTES OF DELIBERATIONS OF THE CMI EXECUTIVE COUNCIL HELD BY EMAIL
CONFERENCE DURING THE WEEK COMMENCING 24 NOVEMBER 2014,
CHAired BY THE PRESIDENT FROM HIS OFFICE IN SYDNEY**

Participating:

<i>President:</i>	STUART HETHERINGTON
<i>Past-President:</i>	KARL-JOHAN GOMBRII
<i>Vice-Presidents:</i>	GIORGIO BERLINGIERI CHRISTOPHER DAVIS
<i>Secretary-General:</i>	JOHN HARE
<i>Administrator:</i>	LAWRENCE TEH
<i>Treasurer/Head Office Director:</i>	BENOIT GOEMANS
<i>Councillors:</i>	ANN FENECH TOMOTAKA FUJITA LOUIS MBANEFO JORGE RADOVICH ANDREW TAYLOR DIHUANG SONG DIETER SCHWAMPE ALEXANDER VON ZIEGLER

Paragraph numbers of these minutes correspond to the Agenda which was sent to all EXCO members, with supporting annexures, during the week prior to 24 November. The President, in preparation for this eMeeting, explained the procedures to be adopted. In essence, EXCO members were enjoined to peruse the documentation and submit first round comments to him and to the Secretary-General by close of business Tuesday 25th November. The responses were then collated and circulated to EXCO members the following day, for further second round comments the day after. Upon close of these second round comments, the President submitted a Final Round Document, with conclusions. It is upon these documents, and particularly the latter, that these minutes are prepared.

1. Opening remarks by the President

The President welcomed EXCO members to this virtual eMeeting, thanking those who had submitted the reports that were annexed to the Agenda, and which are Annexures to these minutes.

A particular welcome was given to Ann Fenech as a new member of the Executive Council, and to Anne Verlinde, whose appointment as Administrative Assistant to the CMI was made permanent during the course of the meeting, and whose efforts for the Comité thus far were warmly applauded. The President also made particular mention of the continuing sterling work being put in for the CMI by Taco van der Valk, especially in relation to Young CMI, General Average and LinkedIn.

Conclusion:

President's Opening remarks
Noted with thanks.

2. Minutes of Executive Council meetings in Hamburg on Sunday, 15 June 2014 and Tuesday, 17 2014 at the Atlantic hotel

Resolved: That the draft Minutes of Executive Council Meeting held in Hamburg on 15 and 17 June 2014 at the Atlantic Hotel be approved, corrected as follows:

- (i) On page 7 under 6(d) insert the words "until recently chaired" instead of "chairs" and
- (ii) On page 8 under 6(g) delete the sentence which refers to Dieter Schwampe and the German Inland Waterways.

3. Financial report

(a) Role of Treasurer/Accounts

Benoit Goemans informed EXCO that Peter Verstuyft, his approved successor as Treasurer, had been asked to stay on with the Belgian Shipowners' Association until mid-2015, and that he, Benoit, was prepared to continue as CMI Treasurer until that time to ensure an orderly handover. He indicated however that the burden of his CMI duties on his own firm was considerable, and he asked that the Treasurer be paid an additional stipend of Euro 6.050 to cover these costs for the first semester until his retirement.

There was a chorus of appreciation for Benoit's gesture and unqualified support for his request for the additional stipend. The views are best summarised by the words of Vice-President Berlingieri:

Benoit is a pillar of CMI. He, and another pillar of CMI, the Belgian MLA, carefully dealt with his succession recommending the CEO of the Belgian Shipowners' Association who is to carry on with that position until May 2015. Benoit therefore responsibly accepted to keep on until Peter Verstuyft retires from the Belgian Shipowners Association.

Resolved: That an additional Euro 6.050 be paid to the Treasurer for the first half of 2015.

The Treasurer tabled summary accounts to date, which were noted and approved.

Investment Policy: Report of Andrew Taylor & Måns Jacobsson tabled.

The Treasurer pointed out that the CMI Auditors had also recommended that the CMI operate with the Euro as its single currency. There was broad support and appreciation for the guidelines as tabled, with Song Dihuang commenting that it may suit the CMI to reimburse expenses only in Euro, allowing the claimant to bear any exchange risks, and possibly lowering commissions on transfers in other currencies.

Resolved: That the CMI adopt the Investment Policy Report as Guidelines for the future investment policy of the Comité.

(b) Composition of Audit Committee

EXCO noted the resignation of Karl-Johan Gombrii from the Audit Committee, and expressed much appreciation for his past role on the Committee.

Resolved: That the Audit Committee shall comprise Måns Jacobsson, Chair, and members the President (ex-officio), Peter Cullen, Andrew Taylor and Luc Grellet.

4. Hamburg Conference financial results: report of John Hare tabled

The report (and considerable further comments from John Hare) was noted and thanks recorded to him, Tilo Wallrabenstein and DVIS for a most successful conference on all levels. It was further noted that despite considerable sponsorship the overall result did not achieve the surplus which had been anticipated and the cost to CMI of holding annual meetings was noted with concern. There was support for John Hare's suggestion that he, Anne Verlinde and the Treasurer carry out an informal audit of the last three meetings in Beijing, Dublin and Hamburg so that there can be a better understanding of the costing of CMI events in an historical context.

Despite a desire to seek to generate a greater return from such meetings in order to cover more of the costs which CMI absorbs from such meetings it was recognised that this is dependent on raising substantial sponsorship (which may be easier in some countries

than others) and might deter registrants if the registration fees have to be raised. It was suggested that a pre-requisite of considering the approach of a host country might be its ability to raise considerable sponsorship.

John Hare raised the issue of the frequency of CMI events and the considerable strain and demands put on administration and finances by having major events annually. The question was raised whether the Constitution could be amended to allow for Assembly meetings every other year, rather than annually. The suggestion was made that the Constitution Committee should examine whether a change to the Constitution could be made. There was acknowledgement that such a change would also affect the electoral process for EXCO members.

Leaving aside the Assembly meetings there was considerable support for the view that CMI meetings should not be held each year. Indeed the 1997 Future of CMI discussed the frequency of meetings and the general view seemed to be that the preferred arrangements were one Colloquium or Symposium between conferences. Unfortunately we had the problem of the incompleteness of the Judicial Sales topic in Beijing and invitations to hold meetings in Dublin, Hamburg and Istanbul - largely because of the particular anniversary of its existence of the Irish MLA and the strong desires of Germany and Turkey to host a CMI event. The tenor of responses is that we should, after New York, return to the previous frequency of meetings. The over frequency of CMI meetings, it was suggested, could diminish the CMI brand and aggregate the risks to CMI. It was suggested that the earlier pattern could be revisited of combining an Assembly with just ISC and IWG meetings (in London and Antwerp) or simply a short seminar organized by the MLA in which the Assembly is held. (although video conferencing could be considered), that it is probably beneficial for some form of meeting to be held annually or risk MLAs losing interest, but that at the end of the day it is the substance and work product of such meetings that was important.

Conclusion: Hamburg and future conference costing The report of John Hare on the final costing of Hamburg 2014 was noted and approved.

John Hare will conduct an informal audit of past CMI events to gain better understanding of costing in context.

The CMI will after New York look to revert to pre-Beijing schedules of a major event every four years and one intermediate event, with Assembly and possible low-key accompanying local events in between.

The Constitution Committee will report to Istanbul on the constitutional implications of holding an Assembly less frequently than annually.

5. *Collection of financial contributions: report of Chris Davis tabled*

Chris Davis reported further that the Colombian Maritime Law Association had confirmed its intention to remit EUR 1,200 for 2012 and 2013 subscriptions by mid-December 2014, and to pay future amounts on a timely basis. No response had been received from Venezuela (which continues to experience severe political and currency exchange problems), Jorge Radovich is following up with Dominican Republic and Uruguay, and Giorgio Berlingieri is following up with Portugal. Korea (ROK) is being advised its request for reduced subscription level will be considered at EXCO and Assembly meetings in Istanbul (June 2015).

Chris Davis confirmed that Russia's debt results from current year (2014) and 50% balance owed from a settlement negotiated by Karl Gombrii a few years ago in respect of the older subscriptions. We had issues following up with NMLAs after Pascale Stercx resigned but with Anne Verlinde's able assistance the situation has improved considerably. EXCO has traditionally been accommodating and flexible in allowing delayed payments (as well as accepting payment in instalments and forgiving a portion of outstanding where appropriate, e.g. NMLA demonstrates it is experiencing financial difficulties. Andrew Taylor cautioned that if and when we revisit the issue of subscriptions and their possible increase, It is inevitable that we will need to look at whether MLAs are in the right categories.

Conclusion: Collection of Outstanding CMI Subscriptions

Chris Davis's report was noted with appreciation. With Anne Verlinde's assistance greater follow-up is being undertaken with defaulting MLAs. Giorgio Berlingieri's correspondence with the Portuguese MLA (which is struggling to attract membership) was also noted.

It was also noted in particular that the Russian MLAs debt needs to be dealt with and the level of contributions (upwards or downwards) need to be reviewed by the Management Committee when it meets in February, especially in the context of the foreshadowed increase of subscriptions to be discussed in Istanbul.

Resolved: That the bad debts of the MLAs of Costa Rica, Guatemala, Morocco, Netherlands Antilles and Tunisia be written off, in light of their expulsions.

6. *Membership*

Correspondence with Pakistan and Bulgaria tabled.

Conclusion: Expulsion of Members

The correspondence from the President to the MLAs

of Pakistan and Bulgaria warning of possible expulsion at the next Assembly Meeting in Istanbul was noted.

7. *Employment of Anne Verlinde*

Conclusion: Anne Verlinde

The meeting unanimously approved the engagement of Anne Verlinde and welcomed her to the CMI, with thanks for her valuable contribution already.

Resolution: Confirmation of the employment of Anne Verlinde, in accordance with the Agreement negotiated with her and forwarded to EXCO by the President's email dated 21 November 2014.

8. *Executive Council elections at Assembly meeting in Istanbul in June 2015*

The following appointments will be required at the Istanbul Assembly:

- Retirement of Benoit Goemans and appointment of Treasurer
- The President: Stuart Hetherington - available for a second term
- Vice President: Giorgio Berlingieri - available for a second term
- Two Executive Councillors as replacements for Louis Mbanefo and Andrew Taylor whose second terms expire in 2015.
- Tomotaka Fujita: Executive Councillor- available for a second term.

Conclusion: 2015 CMI Elections

The positions that need to be elected at the next Assembly Meeting were noted. The Secretary-General and the Administrator are required to attend to administrative procedures for election and re-election of office bearers as required by the Constitution.

9. *Colloquium in Istanbul, turkey - June 7 to 9 2015: John Hare report attaching contracts with event organisers Etix and Sheraton hotel – tabled*

Conclusion: CMI 2015 Istanbul

John Hare's reports on developments and progress in the preparations for the Istanbul Colloquium were noted with appreciation and thanks.

10. *New York Conference 2016 – Report from Vince Foley tabled.*

Chris Davis reported further that he had attended a planning committee meeting held in Philadelphia on 23 October 2014, and that arrangements for the CMI 2016 Conference in New York are well in hand (and that the anticipated level of sponsorship revenue looks

promising). He and John Hare will attend next planning committee meeting scheduled in conjunction with US MLA meeting in early May 2015.

Apropos a request for clarification of the extent to which the two events – the CMI Conference and MLAUS Spring Meeting – are just parallel and to what extent they are a joint event, John Hare reported that the idea was that we would dovetail the Spring Meeting committee work with the current CMI work in progress. Where possible, we would be running parallel sessions for the days that the conference and spring meetings overlap. To that end, the CMI and MLAUS Presidents have written to all our IWGs and all the MLAUS working committees asking them to explore common ground that could be brought into the programme for New York. Chris Davis confirmed that EXCO has substantial influence (and primary responsibility) over the content of the Conference work programme since this is a CMI event that is taking place in NYC in conjunction with MLAUS Spring meeting. However, we are also seeking input from MLAUS on topics that are of interest to both organizations (in an effort to highlight relevance of CMI).

Conclusion: CMI 2016 New York

The email report of Vince Foley of the MLAUS was noted, in particular the arrangements which are in place to raise sponsorship (USD\$175,000) and in respect of the work programme the linkage between CMI IWGs and ISCs and the MLAUS Committees which the Presidents of CMI and MLAUS had put in train. Some views were expressed that the level of sponsorship sought should be higher. The manner in which registration fees are to be fixed for the common events will be discussed at the next planning meeting of the MLAUS which will take place in early May 2015 (in conjunction with the MLAUS Spring meeting) to be attended by both John Hare and Chris Davis (and possibly Alexander von Ziegler).

It is noted that the two events are separate but, unlike in their usual Spring meeting, the MLAUS Committees, it is hoped, will be held in the same venue (Hilton Hotel) and as joint sessions with CMI events. Similarly those attending MLAUS Committee meetings will be able to attend the social events (at a separate fee if they do not register for the CMI Conference).

11. *Review of registration fee for consultative members: John Hare recommendations tabled*

After considerable exchange pointing out the value of the attendance of delegates from our Consultative Members at CMI events, but with an acceptance that there should be some limit on the concessions allowed.
Resolved: Consultative Members Concessions

- (a) That item 5(e) of the Guidelines for Conferences on the CMI website be amended to read:
CMI Consultative Members shall be entitled to nominate one representative to attend any CMI Conference at a 50% rebate of the conference registration fee (but the representative shall pay for his/her own travel and accommodation).

and

- (b) That the question of whether this concession should be applied to all CMI meetings rather than just conferences should be revisited by EXCO in Istanbul.

12. *International Working Groups*

- (a) *Judicial Sales:* President's letter to IMO Legal Committee dated 24 October, and Giorgio Berlingieri report of World Maritime Day 2014 event and programme tabled;

Giorgio Berlingieri referred EXCO to his presentation "An update on the works of the Comité Maritime International and the Convention on foreign judicial sales of ships and its recognition" made the 8 October 2014 in Naples at the Conference "Shipping and the Law in recent and current market" which may be found in the website of the Italian MLA (www.aidim.org) under the page "Documents".

Alexander von Ziegler pointed out that this is most probably the most important CMI project at the moment as we have completed the CMI Beijing Draft in Hamburg and now CMI must show that it is able to introduce this document in due time in the International Diplomatic Platforms such as IMO. He informed that he and Tomotaka Fujita would be attending the Rotterdam Rules Expert Group meeting later in December.

Conclusion: Judicial Sales

The President's letter sending the draft Instrument to the IMO Legal Committee dated 24 October 2014 was noted, as was Giorgio Berlingieri's report on his recent discussions with Fred Kenney in Morocco. There was support for the:

- (i) Preparation of what might be termed an "explanatory memorandum" to accompany the text of the Instrument to highlight the procedural aspects of the Instrument to distinguish it from the Liens and Mortgages Convention of 1993; as well as emphasising the benefits of the Convention from the high level of recognition and elimination of uncertainty and inefficiency. The President will follow up with Henry Li and Jonathan Lux;
- (ii) The allocation of responsibility to individuals to lobby their national Governments;
- (iii) Following up IMO as well as other alternatives as proponents of the Instrument such as UNCITRAL and the Belgium Government.

(b) *Review of the Rules on General Average*: Email report of Bent Nielsen and attached emails of Taco Van der Valk and Kiran Khosla tabled.

After an exchange of comments from EXCO members the following conclusions were reached:

Conclusion: Review of the Rules on General Average

(i) The email report of Bent Nielsen dated 12 November was noted. He reported that since Hamburg a meeting had taken place at the offices of ICS on 29 July 2014, prior to an ICS meeting which was to take place on 8 September. The purpose of the further meeting with ICS was to clarify some of the matters discussed at Hamburg and in particular the proposed solution for salvage, which remains the most controversial. (A small subgroup of Richard Cornah, Ben Browne, Kiran Khosla and Taco van der Valk attended that meeting). There is to be a further meeting of the subgroup on 10 December at ICS's offices.

(ii) The email of Kiran Khosla dated 30 October 2014 was noted, in which the ICS discussions of 8 September were reported on. That meeting had voiced concerns that property underwriters were the proponents for change to the 1994 Rules, which are widely accepted. Accordingly its views are that the fundamental principles of YAR 1994 should be maintained. However, it was agreed that ICS should remain open to considering changes to address any practical difficulties in application of 1994 Rules. In relation to the two key issues the ICS Committee expressed the view that the issue concerning Rule XI(b) Wages and Maintenance of Crew at Port of Refuge should be retained in its present form and maintained its support for the current position in Rule VI on Salvage but noted the concerns of property underwriters and agreed that ICS should continue to participate in discussions to achieve a workable compromise. An alternative wording was forwarded to Bent Nielsen.

The ICS Committee also agreed that ICS should continue to participate in discussions on financial issues, such as commission, interest and currency.

(iii) Concerns were expressed by EXCO at the apparent desire to side line property insurers but supported the suggestion made by ICS that a "single consolidated list setting out progress so far on all points for review and clearly identifying what is and remains to be determined and the alternative options for consideration" should be produced.

(iv) For progress to be made towards finalization of reforms to the York Antwerp Rules in New York in June 2016, this project is to be given priority within the CMI. EXCO needs to have all papers available well before Istanbul for consideration by MLAs.

(c) *Cross-Border Insolvency*: Report of Chris Davis tabled

Giorgio Berlingieri alerted the meeting to a paper "*Defaulting shipowners and the regulation of their insolvency status*" that he had presented in Malta on 8 May 2014 on the occasion of a Conference for the XX Anniversary of the Maltese MLA and which may be found in the website of the Italian MLA (www.aidim.org) under the page "Documents" and among the documents under "Cross Border Insolvency" in the page "Works in progress" of the CMI website.

Conclusion: Cross-Border Insolvency

Chris Davis's report was noted with thanks. To date 14 MLAs have responded to the Questionnaire of May 2012. The IWG is considering how best to proceed with its work. Proposals under consideration include the drafting of a protocol to the UNCITRAL Model Law, developing a set of best practices, identifying conflicts between International Conventions and Cross Border Insolvency regimes, promoting certainty and uniformity in the legal effect of the sale of ships following a cross border insolvency. In addition court decisions from around the world are being collected and circulated.

(d) *Polar Shipping*: Report of Aldo Chircop tabled.

Conclusion: Polar Shipping

The report of Aldo Chircop was noted with thanks, the key points being:

- (i) He is working on an inventory of polar law shipping initiatives of pertinent organisations;
- (ii) The IWG is reviewing private maritime law conventions to ascertain their applicability to polar regions;
- (iii) A sub-group of the IWG is to prepare a working paper on how existing pollution liability regimes apply in Polar regimes, and to study:
 - issues regarding claims for preventive measures and pollution damage, logistics issues in that regard, disposal of oil options, capacity to deal with pollution issues and "reasonableness" issues in the context of the CLC and IOPC Funds frameworks and compensation, limitation and liability regimes, national laws, emergency response measures;
- (iv) Further consideration of the Polar Load Lines for Arctic Shipping issue discussed in Hamburg;
- (v) Applicability of collision avoidance regulations in Polar environments;
- (vi) Issues of seaworthiness in Arctic shipping;

The following meetings were referred to in this report:

- Ottawa: "Safe, efficient and sustainable shipping in the Arctic 8- 12 December 2014";
- 6th Arctic Shipping Summit: Ottawa 19 March 2015;
- WMU Conference in May 2015.

There was support for the inclusion of references to source materials, website and other works on the CMI site. John Hare is to consider this further.

Resolution: That Dr Young-Kil Park (Korea) and Gen Goto (Japan) be appointed to the Polar Shipping IWG.

(e) *Marine Insurance:* Report of Jo Grasso tabled.

Conclusion: Marine Insurance

The report of Chair Jo Grasso was noted with thanks. It was noted that he is to meet with Fred Kenney at the IMO to ascertain the utility of the CMI undertaking further work in the areas identified in Dieter's report of May 2014 and EXCO's suggestion at its June meeting that the IWG take up these issues with the IMO.

(f) *Offshore Activities:* Report of Patrick Griggs tabled.

John Hare pointed out that Messrs Griggs and Radovich are doing fine work preparing for Istanbul.

Conclusion: Offshore Activities

The report of Patrick Griggs was noted with thanks. This noted that 18 MLAs have responded to the Questionnaire; the IWG had received a copy of a current bilateral agreement between the USA and Mexico and the Norwegian Petroleum Act, as well as the IDDRI Study entitled "Seeing beyond the horizon of deepwater oil and gas: Strengthening the international regulation of offshore exploration"; the European Commission's report prepared by Bio by Deloitte entitled "Civil liability financial security and compensation claims for off shore oil and gas activities in the European Economic Area". The report also noted that the topic was not on the IMO agenda at present but was raised by Indonesia as a matter of "any other business" at the 101st Legal Committee meeting.

Preparations are underway for part of the Colloquium in Istanbul to discuss this topic, in conjunction with the Scandinavian Institute of Maritime Law and the Istanbul Commerce University (Faculty of Law). The proposed programme was incorporated in the report. EXCO noted that the subject was also discussed at the World Maritime Day Conference in Mexico on 21 October 2014.

(g) *Rotterdam Rules:* Report of Tomotaka Fujita tabled.

Alexander Von Ziegler reported that he and Tomotaka Fujita will be attending the Rotterdam Rules Expert Group meeting later in December. The purpose of this meeting is to work on an "accession kit" assisting Governments in their implementation work of the Rotterdam Rules. In the opinion of UNCITRAL this may prove an important tool to facilitate ratification in some areas of the world. They will report further to EXCO after this meeting.

Tomotaka Fujita supported the inclusion of Ms. Miriam Goldby to IWG. She is an expert on E-Commerce in the area of maritime law and will help the IWG to monitor the work of UNCITRAL IV. She is now writing her report of the recent session of UNCITRAL IV to share with us. He reported further that in July, Nader Ibrahim (Egypt) sent us a message on a possible "regular moot based on the application of the RR and arbitration". Tomotaka will meet him at the December UNCITRAL meeting and will report the progress.

Conclusion: Rotterdam Rules

The report of Tomotaka Fujita was noted with thanks. It reported that the intergovernmental agency review in the United States had been completed in May 2014; that he and Lawrence Teh had participated in the UNCITRAL Regional Centre for Asia and the Pacific (RCAP) seminar at Macau on October 17 and 18 and that UNCITRAL Working Group IV which is studying "electronic transferable records" met in May and November 2014. The report also noted that UNCITRAL is convening an expert group meeting in December 2014 to draft an "Accession Kit of the Rotterdam Rules" (which Alexander Von Ziegler will also attend) and there will be a RCAP session at the 7th Asian Maritime Law Conference in Singapore in April 2015. EXCO commented that the International Group is not against the Rotterdam Rules but is in "wait and see" mode. Tomotaka Fujita also reported that Ms Miriam Goldby is going to assist the IWG in monitoring the work of UNCITRAL IV. Consideration can be given to her joining the IWG in Istanbul. Tomotaka also reported that Nader Ibrahim (Egypt) had been in contact to advise that there is to be a moot based on the application of the Rotterdam Rules and Arbitration.

(b) *Fair Treatment of Seafarers:* Report of Olivia Murray tabled.

Conclusion: Fair Treatment of Seafarers

The report of Olivia Murray was noted with thanks. This reported that work continues with Seafarers' Rights International (SRI) which made a submission to the IMO Legal Committee in April 2014.

A questionnaire prepared by CMI and SRI was sent to Governments and the responses will be analysed and a further report sent to the IMO Legal Committee in 2015. It was noted that Kofi Mbiah is keen on the issue of an effective implementation of the IMO Guidelines and it had been pointed out to him by Giorgio that 2006 MLC safeguards seafarers on board and ashore in foreign vessels. It was also suggested that Olivia Murray be asked to report on the results of the Questionnaire (SRI/CMI) in Istanbul. (Perhaps in conjunction with Ms Vanessa Kamesha Stewart (see item 21 below) whose topic of specialty is Fair Treatment of Seafarers.)

- (i) *Acts of Piracy and Maritime Violence*: Report of Andrew Taylor tabled.

Conclusion: Acts of Piracy and Maritime Violence

The report of Andrew Taylor was noted with thanks.

This report noted:

- (i) The UN General Secretary's report of 16 October 2014 which had praised the anti-piracy activities by member States but recommended that more States criminalise piracy on the basis of UNCLOS, that Somalia's efforts in areas of governance, rule of law and economic development needed international support, efforts to build regional capacity to combat illicit financial flows need to continue and the international community needed to support regional efforts to implement 2050 Africa's integrated maritime strategy.
- (ii) The International Maritime Bureau had reported that piracy worldwide was falling;
- (iii) The IWG will continue to monitor developments but there is limited scope for further work by it at this stage.

13. *Potential New IWGs*

(a) *Cape Town Convention*

Conclusion: Cape Town Convention

In his Opening Remarks, the President commented that he had asked Ann Fenech to chair a proposed new IWG to gather information in response to the request from UNIDROIT which had previously been reported on. He recorded that we are looking for a volunteer who has an interest in shipping registration to act as Rapporteur and that Ann Fenech has had preliminary contact with Andrew Tetley of Reed Smith's office in Paris. Mr Tetley wrote a very learned article on the Convention some years ago. He would be an invaluable member of an IWG. John Hare reported that he was in contact with the Chair of the Convention Committee, Prof Sir Roy Goode, of Oxford and that he is to meet with the professor during his next visit to Oxford.

Resolved: That an IWG on the Cape Town Convention be established with Ann Fenech as chair. It was noted that Andrew Tetley would be a worthy member of the IWG, and Anne Fenech is tasked with reporting to EXCO on the future composition of this IWG.

- (b) *Practice and Procedures in relation to Arrest of ships*: Memorandum from Stuart Hetherington and draft Questionnaire tabled.

Conclusion: Practice and Procedure in relation to arrest of ships

The President's recommendation and Questionnaire prepared by Giorgio Berlingieri, Ann Fenech and the President were noted.

Resolved: To appoint a new IWG on Practice & Procedure in relation to arrest of ships to be chaired by Giorgio Berlingieri with Aleka Sheppard as Rapporteur and members: Chris Davis, Karl Gombrii and Ann Fenech with the mandate described on page 1 of the draft Questionnaire attached to the papers for this meeting (with possible enlargement of IWG to take account of differing legal systems.)

Noted for the consideration of the IWG that Olaf Hartenstein of the German MLA would like to join the IWG.

- (c) *Restatement of the General Principles of the Lex Maritima*: Report of John Hare tabled.

Giorgio Berlingieri expressed concerns about the scope of the proposed IWG, saying that it is not clear to him what is meant by Lex Maritima nor what the IWG is aiming at. He abstained from voting. Alex von Ziegler commented that it would be important to define at an early stage what the scope of this IWG will be. However, at the beginning it will be best to keep the scope as open as possible as to gain a broad view on the subject. This may possibly be reflected in the terms of references to this IWG.

He also agreed with the suggestion by John Hare to finalise the composition of the IWG at the Istanbul Colloquium / EXCO.

Conclusion: Restatement of the General Principles of the Lex Maritima

The note prepared by John Hare for this meeting was noted.

Resolved: To appoint an IWG chaired by Eric Van Hooydonk with Jesus Casas Robla as Rapporteur, Tomotaka Fujita, John Hare, Alexander von Ziegler and Gustavo Omaña Pares as members.

14. *Ad hoc Committees*

- (a) *Arbitration*: Email from Luc Grellet dated 6 November 2014 tabled.

- (b) *Classification Societies*: Report of John Hare tabled.

Conclusion: Ad hoc Committees – Arbitration and Classification Societies

- (a) Noted the email report of Luc Grellet which expressed the hope that a Questionnaire could be sent out early next year.
- (b) Noted the report of John Hare on informal discussions with some EXCO members and the President of the MLAUS. The ad hoc committee of the Secretary-General, Karl Gombrii and Alexander Von Ziegler will report further in Istanbul.

15. *Standing Committees*

(a) *Jurisprudence on Maritime Conventions*

Correspondence from Stuart Hetherington to MLAs attaching advertisement from National University of Singapore and emails between Stuart Hetherington and Stephen Girvin between 5 August and 11 September 2014 and emails between Gregory Timagenis, Taco Van der Valk with Stephen Girvin tabled;

Conclusion: Jurisprudence on Maritime Conventions

Noted the letter from the President to MLAs dated 11 November 2014 and the correspondence between the President and Stephen Girvin between 5 August and 29 October 2014.

Resolved:

- (i) To make a contribution of Euro 5,000 towards engagement of publication editor by Centre for Maritime Law, National University of Singapore
- (ii) Appointment of Editorial Board consisting of Stephen Girvin (Chair), Giorgio Berlingieri and Taco van der Valk.

(b) *Implementing and Promoting the Ratification of Maritime Conventions*

Unfortunately there was nothing to report on this topic, although as Chris Davis noted it is important and requires CMI's attention.

- (c) *Young CMI:* Email report of Taco Van der Valk and correspondence concerning Young Maritime Lawyers Network Group tabled;

Conclusion: Young CMI

The email report of Taco van der Valk dated 7 November 2014 was noted with grateful thanks to him. The report noted the content of the Young CMI programme in Hamburg; the existence of Young Lawyers groups in Norway and Denmark; the existence of 845 members to the CMI LinkedIn group; his desire that the Rapporteurs of CMI IWGs and ISC give regular updates to that group, and preparations being underway for Istanbul. He also referred to the Transport Law Commission of the AIJA (Association International Des Jeunes Avocats).

(d) *Constitution Committee;*

Conclusion: Constitution Committee

Noted that Benoit is to step down as Chair and be replaced by Jean-Francois Peters. The continuing members are thus Benoit Goemans, Patrice Rembauville-Nicolle and John Hare.

Noted also that Frank Wiswall is to step down from this Committee after many years' service. The thanks of the CMI are extended to Frank Wiswall for all the work he has done in relation to the Constitution.

- (e) *General Average Interest Rates:* Emails from Andrew Taylor, Taco Van der Valk and Bent Nielsen tabled;

Conclusion: General Average Interest Rates

The emails exchanged between Bent Nielsen, Andrew Taylor and Taco van der Valk were noted, advising that no change needed to be made to the rate of interest set in Hamburg at the Assembly (2.75%).

- (f) *Planning Committee:* Report of John Hare tabled.

Conclusion: Planning Committee

The report of John Hare was noted with thanks as was the suggestion made by Giorgio Berlingieri in a paper concerning collision entitled "Investigation on possible new areas in which further attempts to reach uniformity may be worthy of consideration".

The Planning Committee will consider this further.

16. *New topics proposed by:*

- (a) The MLA of the United States: Letter from the President of the MLAUS tabled (and see John Hare's note at Agenda item 15(f));

The letter from the President of the MLAUS was noted. It suggested that the CMI study the meaning and use of the terms "ship", "vessel", "watercraft" or other relevant terms, for example, when applied to registration documentation and mortgage of ships, their application to civil and criminal statutes to vessels and crew, and insurance on vessels as they move around the world or in changing uses, such as use as FPSOs, lay-up or permanent mooring; as well as the effects of gross tonnage, length or area of usage under different statutes.

Despite some hesitancy about proposed efforts to try to encapsulate dynamic law into static definitions it was noted that differing definitions of the same word could in the same jurisdiction reflect the political intent of the legislature, there was broad support for investigation of this subject

Conclusion: The Ship Defined

EXCO supported undertaking study in this area. It was noted however that differing definitions in any one particular jurisdiction reflect the underlying political objectives behind the enactments. It was also noted that the meaning of ship had been discussed at the IBA Conference 2014, and may be a topic being considered by IMO Legal Committee and has relevance to offshore crafts and the application of international conventions. Resolution: That the CMI shall undertake research into the definitions of a ship, vessel and similar legal terms in various maritime jurisdictions, and into the legal significance thereof, as a new project to lead up to the New York Conference; that the Secretary-General convene and

chair a start-up Ad hoc Committee for this purpose, and shall invite the President of the US MLA to nominate a US member for that committee. The start-up committee shall then make recommendations to EXCO as to further membership and shall formulate for the approval of EXCO, its terms of reference. Once the membership is expanded by EXCO, EXCO may consider upgrading the committee to an International Working Group.

(b) *Unmanned ships*: Email from Tom Birch Reynardson tabled;

Conclusion: Unmanned ships

The emails from Tom Birch Reynardson were noted with thanks. They suggested that this may be a topic for consideration by the CMI. It was mentioned that the topic was discussed at the IBA Maritime and Transport Committees in Tokyo in October and that MUMIN (Maritime Unmanned Navigation through Intelligence in Networks) has three German partners. *Resolved*: That Tom Birch Reynardson and Dieter Schwampe be asked to monitor developments in relation to unmanned ships and report.

17. Publications

(a) *Year Book and News Letter*

Conclusion: Yearbook and News Letter

Giorgio Berlingieri noted that Newsletter 1-2/2014 is on the website and Yearbook 2014 is almost ready for publication. Also noted that Anne Verlinde is trained to make corrections to the website.

It was queried whether CMI should look to publishing materials in the Far East.

EXCO members unanimously expressed thanks to Giorgio for all his work in preparing these publications.

(b) *Handbook on Maritime Conventions*

The email from Frank Wiswall dated 26 September 2014 was noted with much appreciation. Suggestions have been passed on to Frank Wiswall for possible additions to the text.

18. CMI Regional Office in Singapore: email report of Lawrence Teh tabled and see agenda item 24

Lawrence Teh reported that the Singapore representative office was last renewed for the period of 26 April 2014 – 25 April 2015. It will next need to be renewed at least 7 days before the expiry date i.e. before 18 April 2015. Around 2 months before the expiry date, the Singapore authorities will send the President and Sarah Chan of Rodyk's an email notification to renew. Sarah Chan will also diarise this to make sure it is not overlooked.

Lawrence reported further that there should not be obstacles to renewal for one more year in April 2015. A representative office can operate for up to 3 years from commencement before it needs to be upgraded to a permanent establishment to continue activities in Singapore. CMI's representative office commenced in April 2013 and should therefore be able to remain as such until April 2016 (this is of course subject to IE Singapore's general right to evaluate at each renewal). The representative office will then need to be upgraded to a branch office before April 2016.

Conclusion: Lawrence Teh's emailed reports dated 29 October and 2 November 2014 were noted with thanks as was his reminder that the representative office will need to be renewed in April 2015. It was suggested that a memorandum be prepared for NMLAs on what the representative office has done so far and what are its projects and activities. This can be prepared for either the next News Letter or Assembly in Istanbul.

19. EU representation: email from John Hare to Vincent Power tabled.

John Hare reported that Vincent Power had replied enthusiastically to the effect that he will prepare a short report for this eMeeting of EXCO, but none was received in time for inclusion in this eMeeting.

Conclusion: CMI EU Rapporteur

John Hare's email to Vincent Power dated 1 November 2014 encouraging him to prepare reports was noted. He will follow the matter up for a response from Mr Power.

20. CMI - The future

Conclusion: The Future

The President's report of his conversation with Liz Burrell and the difficulties she has encountered in the absence of face to face meetings of her Committee was noted, as was his encouragement to her to have a meeting in Istanbul if enough of her Committee attend.

21. IMLI and Ravenna Prizes

The IMLI Prize winner was Ms Vanessa Kamesha Stewart from Jamaica. There was no Ravenna Prize this year.

Conclusion: The winner of the IMLI Prize was noted and congratulations have been conveyed to her by CMI. It was noted that she will be attending the Istanbul Colloquium.

22. *IMO Prize: Letter from the IMO dated 20 June 2014 tabled.*

Conclusion: It was noted that the IMO Prize had been awarded to a Mexican lawyer.

23. *Correspondence*

(a) Letter from United Nations Panel of Experts 30 September 2014 and CMI response 1 October 2014 tabled;

Andrew Taylor congratulated the President for an excellent letter to the UN. He cautioned that the CMI should keep well away from political matters.

(b) Dr Aboubacar Fall dated 28 October 2014 tabled;

(c) Email Anne Verlinde dated 14 November 2014 tabled.

Conclusion: Correspondence

The correspondence entered into with the United Nations Panel of Experts, the letter from our new member, Senegal, and from Anne Verlinde concerning publications received in Antwerp were noted. In relation to the latter it was noted that she will be asked to copy the contents pages/indexes of publications she receives to EXCO for their interest.

24. *Meetings attended by EXCO Members*

- Attendance by Lawrence Teh at Japanese MLA 11 September 2014.
- Attendance by Giorgio Berlingieri at the IMO Meeting in Morocco 27-28 October 2014.
- Attendance by Chris Davis at 21st World Maritime Day Conference, Mexico City: Programme tabled.
- Attendance by Chris Davis at MLA US Fall meeting, Philadelphia 22-24 October 2014.
- Attendance by Lawrence Teh and Tomotaka Fujita at UNCITRAL Conference at the University of Macau 17 to 18 October 2014 “Trade Development through the Harmonisation of Commercial Law”.
- Attendance by Lawrence Teh at Indonesian MLA: Ship Arrest Tea Talk 29 October 2014.
- Attendance by Chris Davis and Giorgio Berlingieri at IIDM XIX Congress, Portugal November 2014.
- Attendance by Giorgio Berlingieri at the IIDM XIX Congress, reported by e-mail 24 November 2014 tabled. The slides regarding V-P Berlingieri’s presentation were tabled. An e-mail re Places of Refuge from a participant to the Congress was tabled.
- Attendance by Chris Davis at the IIDM Congress in Lisbon at which Kofi Mbiah, the Chairman of the IMO Legal Committee, made a point of stating during his presentation that “IMO needs the expertise that the CMI has built up over the years” (in the context of the future work programme of the IMO Legal Committee).

- Attendance by Chris Davis at Tulane Law School/Offshore Industry seminar in New Orleans on 13 November 2014 (presented paper on piracy and included work of CMI and Andrew’s IWG).
- Attendance by Dieter Schwampe at the International Union of Marine Insurance (IUMI) Annual Conference, 21-24 September 2014, Hong Kong, Presentation: “*The English Court of Appeal in the “LEHMANN TIMBER“ case – just another interesting court decision, or reason for cargo underwriters’ concerns?*”.
- Attendance by Dieter Schwampe at the Association International de Droit des Assurances (AIDA), World Congress, 28 September-2 October 2014, Rome, Session Chair “*Preventive Measures in Marine Insurance*”.
- Attendance by Dieter Schwampe at the International Bar Association (IBA), Annual Conference, 19-24 October 2014, Tokyo.
- Attendance by Jorge Radovich at a Seminar on Collision of vessels, organized by the Argentine MLA in the Sheraton Libertador Hotel, Buenos Aires, August 27 and 28, 2014. He acted as Director of Debate.
- Attendance by Jorge Radovich at the XIX Conference of the Iberoamerican Institute of Maritime Law, Lisbon, with Councillors Berlingieri and Davis. Paper delivered entitled “Has the IMO to be involved in the drafting of an international convention to regulate the Offshore Activity”.

Conclusion: Attendance by EXCO members at international events.

The large number of meetings attended and participated in by members of the Executive Council were noted and appreciated.

25. *Future maritime events*

- European Shipping Week - March 2 to 6, 2015 in Brussels.
- 6th Arctic Shipping Summit: Montreal 18-19 March 2015.
- Singapore MLAs 7th Asian Maritime Law Conference (approx 20 April 2015). Alexander von Ziegler may attend, and volunteered to participate in the Rotterdam Rules meetings.
- MLA US Spring Meeting, 29 April/1 May 2015. (John Hare and Chris Davis attending).
- Chris Davis - Panama Maritime XII: 12-15 April 2015 (Chris Davis invited to speak).
- Song Dihuang reported that The China MLA will host its 8th International Conference on Maritime Law on 14-16 October 2015 in Dalian China. They are likely to invite the CMI to attend the conference, and in the past, it is usually the president and/or secretary general to attend the conference. John

Hare reported that he had been invited to attend during and after the Hamburg Conference, and that he awaited confirmation of arrangements for his visit. The China MLA had suggested he also visit Beijing. Song Dihuang suggested that if the CMI does have a representative, it would be sensible to arrange for a meeting of CMI with relevant Chinese government officials (like Ministry of Department, and Ministry of Commerce) in order to better publicise CMI and promote the conventions by CMI. He suggested that EXCO should consider arranging for a meeting of CMI with local Chinese government officials on how we promote Rotterdam Rules and/or Judicial Sale (if IMO have not yet decided to take the project). It was recalled that Karl-Johan Gombrii had intended to do so at the CMI Conference in Beijing in 2012, but was unable to do so because of the time constraint.

Conclusion: Forthcoming conferences and China MLA Dalian Conference

The forthcoming meetings of interest to CMI were noted. John Hare will report further on discussions between himself and the China MLA re attendance at Dalian.

26. *Future CMI meetings*

- Meeting of the Management Committee in Antwerp - February 22 and 23 2015.
- EXCO meeting: June 7, 2015 Istanbul.

Conclusion: Future EXCO meetings

The Future CMI meetings were noted.

27. *General Business*

John Hare reported further in relation to the Hamburg Conference audio visual recordings that they were

being uploaded to Vzaar, the hosting platform that we use for our Video Library. The CMI account on Vzaar had apparently been suspended for non payment, and unfortunately the existing video files (Prof Martin Davies' lectures and the Environmental Salvage presentation) have been deleted. We will have to try to relocate them from source

Meantime, John Hare has paid the subscription, and the CMI Vzaar account is again active.

John raised the further possibility of putting all the presentations and the powerpoints on a flashdrive and making it available to those who have no internet connections, or slow connections. He addressed the query of whether it is possible to incorporate the powerpoints of the various speakers into their speeches. He reported that it was easier and cheaper to make the ppt files available for easy download with the recordings, and then open a second window to view both simultaneously.

John undertook to prepare a To Do list that incorporates outstanding items from Hamburg, and things arising from this EXCO eMeeting and to send it out with his Secretary-General reports.

He suggested also that it would be useful to set up a Dropbox facility for the private use of EXCO so that whenever we wish to share documents we can make them available to all of EXCO. It would be essential that this be a private access Dropbox account, and there should be no charge unless we need to expand its capacity.

Conclusion: General business

John Hare's report on the Audio-Visual recordings of Hamburg Conference was warmly applauded. He is to go ahead with a To Do list and with setting up a DropBox private file sharing facility for EXCO.

STUART HETHERINGTON
President

JOHN HARE
Secretary-General

NEWS FROM INTERGOVERNMENTAL AND INTERNATIONAL ORGANIZATIONS

NEWS FROM IOPC FUND

REPORT OF THE APRIL 2015 SESSIONS OF THE IOPC FUNDS' GOVERNING BODIES AND THE SPECIAL SESSION OF FORMER 1971 FUND MEMBER STATES

IOPC Funds' Special Session

At the request of the Director of the IOPC Funds, the Secretary-General of IMO convened a final meeting of all former Member States of the 1971 Fund on 17 April 2015, the purpose of which was to approve the final Financial Statements.

On the same day, the Funds organised a special session followed by a lunchtime reception to commemorate the achievements of the 1971 Fund over the 36 years of its existence.

The speakers included the first two Directors of the 1971 Fund, Dr Reinhard Ganten and Mr Mans Jacobsson, who spoke respectively about the early days of the Fund and developing Fund policy. Other speakers were Dr Rosalie Balkin "The international compensation regime from the IMO perspective"; Dr Karen Purnell "Working with the experts, the early days" and Mr Alfred Popp "The role of Member States: a delegate's perspective". Captain David Bruce, former Chairman of the 1971 Fund Administrative Council, delivered the closing remarks.

April 2015 Sessions of the IOPC Funds' Governing Bodies

The IOPC Funds' Governing Bodies (the 1992 Fund Administrative Council, the 1992 Executive Committee and the Working Group) met at IMO Headquarters from 20 to 23 April, 2015.

Report of the Director

The Director, Mr Jose Maura, delivered his report on the activities of the Fund since the previous session. In so doing he noted that the difficult decision taken in 2014 to wind up the 1971 Fund had created a divide between the Fund and the International Group of P&I Associations (the International Group) which he hoped would be speedily mended. In this regard a good start had been made with discussions scheduled for May 2015 on the issue of interim payments.

Incidents involving the Fund

He then reported on two new incidents-the first involved the *OT Southern Star 7*, which had occurred in the Bangladesh Sundarbans (involving an oil spill in the world's largest mangrove forest which spans the Indo-Bangla border). The second, the *Al Yarmouk*, involved a collision between an oil tanker and a bulk carrier in the Malacca Straits.

The meeting then discussed the progress of other incidents currently being dealt with by the Fund. These included:

- the appeal before the Spanish Supreme Court in the case of the *Prestige*, in which the Fund was participating, as a party with strict civil liability under the 1992 Fund Convention;
- the *Volgoneft 139*, in which discussions with the Russian Government were ongoing;
- the *Hebei Spirit*, the Korean Government noting its expectation that all legal proceedings would be concluded by the end of 2016 and that the total expected compensation bill was likely to amount to KRW 421 000 million (or 76.5% of the total available under the 1992 CLC and 1992 Fund Convention);
- the *MT Pavit*, the first incident to occur in India, which was unlikely however to involve either the Clubs or the Fund in compensation as the vessel was not carrying residues of a persistent mineral oil in bulk as cargo, as defined in the 1992 CLC, and there was no proof that the incident had caused a grave and imminent threat of oil pollution damage;
- the *Alfa I*, in which there was a difference of opinion between the insurers and the Fund regarding the issue of liability;
- the *Nesa R3*, in which the Fund had paid compensation in respect of admissible losses and was now seeking reimbursement from the shipowner; and the
- the *Shoku Maru*, where the claims submitted had not exceeded the limitation applicable under the 1992 CLC and therefore the Fund was unlikely to be able to pay compensation to victims of this spill.

Guidelines for presenting claims for clean up and preventive measures

The 1992 Fund administrative Council approved revised guidelines for presenting claims for clean up and preventive measures, which will now be published by the Fund.

Guidance for Member States- Management of fisheries closures and restrictions

The Director produced a comprehensive set of draft guidelines to address the issue of managing fisheries closures and restrictions. A number of suggestions were made and the guidelines will be further discussed at the October 2015 session of the 1992 Fund Assembly.

Interim payments

A number of issues regarding the question of interim payments was discussed, on the basis of written submissions made by both the Fund and the International Group. These included the Director's authority to make provisional payments under the Fund's regulations; the financial ability of and the risks faced by the 1992 Fund when making such payments; and the concerns of the Clubs in light of the *Nissos Amorgos* incident and the winding up of the 1971 Fund.

The 1992 Fund Administrative Council noted the positive response to the proposed meeting between the Director and the International Group in May 2015 and that it was in the interest of both parties to reach a solution.

Discussions at the meeting of the Legal Committee on the interpretation of the 1971 and 1992 Fund Conventions

The Director reported on discussions on the interpretation of the 1971 and 1992 Fund Conventions, at the meeting of the Legal Committee, held a week previously, at which the delegation of the United Kingdom had requested the Committee to provide a definitive opinion on the question whether liability fell on contributors in those states that were

members of the 1971 Fund on the date of the incident or on the date before the Convention ceased to be in force. This advice was requested taking into account that the relevant provisions of the 1992 Fund Convention were similar to those of the 1971 Fund Convention.

The upshot of the Legal Committee's discussions was that, although there was a desire for clarity, the 1992 Fund Assembly rather than the Committee was the most suitable body for considering the issue. Moreover, there was no need or urgency to provide such an interpretation as the 1971 Fund had been wound up. The 1992 Fund Administrative Council took note of this information and agreed that this subject might be considered at some future time.

Definition of "ship"

The 1992 Fund seventh intersessional Working Group held its fourth meeting on 22 April 2015. It was noted that, in keeping with past practice, the Report of that meeting would be prepared by the Director, in consultation with the Working Group's Chairman and issued at a later date. The Report will be considered by the 1992 Fund Assembly at its next regular session in October 2015.

ROSALIE BALKIN

CMI Observer Delegate to the IOPC Funds

PAPER PRESENTED TO THE 17 APRIL 2015 SPECIAL SESSION TO COMMEMORATE THE 1971 FUND

Developing IOPC Funds' policy

I have been invited to deal with the development of the IOPC Funds' policy. In order to be able to address this issue, I believe that it is necessary to take as starting point the purpose for which the Funds were established, namely to provide compensation for oil pollution damage resulting from tanker oil spills. The definition in the Civil Liability and Fund Conventions of pollution damage is therefore of paramount importance. That definition is, however, not very helpful for the decision making, since it states simply that pollution damage is damage by contamination. Also other definitions in the Conventions are not very precise, and there are hardly any provisions dealing with the handling of compensation claims.

It has been suggested that this lack of detailed provisions constitutes a weakness of the international compensation regime. In my view, however, it has proved very fortunate that the drafters of the Conventions did not lay down precise definitions and

detailed procedural provisions, since this has enabled the Funds, through their governing bodies composed of representatives of the governments of the States Parties, to develop the regime in the light of experience.

The 1971 Fund bodies had during the period up to 1984 taken important decisions on the interpretation of the definition of pollution damage and on the procedures for claims handling, in particular in relation to the *Antonio Gramsci* incident which affected my own country Sweden, the *Tanio* incident in France and several incidents in Japan. When I took over the post over Director on 1 January 1985, I was well aware of the decisions on matters of principle that had already been taken, since I had attended practically all meetings of the governing bodies and chaired several Intersessional Working Groups, and I expected to be able to base my work on these decisions. But I soon became aware that things were not that simple.

Already in March 1985, i.e. less than three months

after my having taken up the post of Director, the 1971 Fund was confronted with the *Patmos* incident in Italy which gave rise to a number of tricky issues, for instance the conversion of gold francs into Italian lire, the admissibility of claims for environmental damage and the relationship between salvage and preventive measures. A few years later a series of major incidents resulted in a multitude of claims which gave rise to important questions of principle, the *Rio Orinoco* in Canada, the *Agip Abruzzo* and the *Haven* in Italy, the *Aegean Sea* in Spain and the *Braer* off the Shetland islands in the United Kingdom.

Up to that time the Executive Committee had addressed important questions of principle as and when they arose. I believe that this was the right approach in the early days. Against the background of these incidents the 1971 Fund Assembly decided, however, that it was time to take a more systematic approach to the Fund's policy in respect of the admissibility of claims. In 1993 – after the *Aegean Sea* and *Braer* incidents – the Assembly therefore set up an Intersessional Working Group with the mandate to establish the general criteria for the admissibility of claims within the scope of the 1969 and 1971 Conventions and the recently adopted 1992 Protocols to these Conventions, in particular as regards pure economic loss and environmental damage.

After a very thorough analysis of the issues involved, the Working Group submitted its report to the Assembly for consideration at its October 1994 session. The Working Group expressed the view that the adoption of criteria for the admissibility of claims would contribute to consistency in the Fund's decisions and would also allow claimants to foresee with a certain degree of certainty whether a particular claim would be admissible. It was at the same time emphasized that it was essential that the criteria would allow the Fund certain flexibility, enabling it to take into account new situations and new types of claim. The Assembly endorsed by consensus the Working Group's conclusions that were then reflected in a new expanded edition of the 1971 Fund's Claims Manual published in June 1995.

It should be mentioned that at its first session after the entry into force of the 1992 Fund Convention, the 1992 Fund Assembly decided that the Report of the Intersessional Working Group should form the basis of the 1992 Fund policy, in order to ensure consistency between the decisions of the two organisations.

One of the most important results of the Working Group's study was the development of criteria for the admissibility of claims for pure economic loss, i.e. losses suffered by somebody who has not also sustained damage to his property or another

recognized legal right. This was not a new question, because pure economic loss claims had been dealt with by the 1971 Fund already in the *Tanio* case in the early 1980ies. It is a difficult issue, because the approach to such claims varies between jurisdictions. In countries whose legal systems are based on common law claims for pure economic loss are in principle not admissible, whereas in many countries belonging to the continental legal system pure economic loss is not considered as a separate type of damage and is therefore dealt with according to the same principles as any other damage. It was thus necessary for the Working Group to find a solution acceptable to all Fund Member States. The Working Group concluded that in order for such a claim to be admissible, there should be a sufficiently close link of causation between the contamination and the loss or damage, and some factors were set out that should be taken into account in the consideration of whether this requirement was fulfilled.

A very important concept in the Conventions is that of preventive measures, i.e. reasonable measures to prevent or minimize pollution damage. It had been generally accepted from the early days of the 1971 Fund that clean-up operations at sea and on shore fell within this concept, provided the operations were objectively reasonable. It was recognized that the drafters of the 1969 and 1971 Conventions had had in mind measures to prevent or minimize physical damage and had not contemplated that measures taken to prevent pure economic loss fell within that concept. Nevertheless, it was decided that since the definition of preventive measures did not make any distinction between various interests to be protected, also measures to prevent or minimize pure economic loss fell, in principle, within the concept of preventive measures.

An important issue which had arisen in the context of the *Patmos* and *Rio Orinoco* incidents was the relationship between salvage and preventive measures. The policy finally adopted was that if operations which are technically salvage have the primary purpose to prevent or minimize pollution, the operations fall within the definition of preventive measures, whereas if they have another purpose, e.g. to save the ship and cargo, they do not, the so called *primary purpose test*. If the operations are undertaken both for preventing pollution and for saving the ship and cargo, but it is not possible to establish with any certainty the primary purpose, the costs are apportioned between pollution prevention and salvage, the *dual purpose test*. A further important policy decision was that compensation for preventive measures associated with salvage should not be assessed on the basis of the criteria applied for determining salvage awards, but the compensation

should be limited to costs including a reasonable element of profit.

The Working Group had also addressed the issue of claims for environmental damage. With the exception of one dissenting delegation, there was general consensus that the policy adopted by the 1971 Fund already in 1980 which had been codified in the 1992 Protocols should be maintained, namely that compensation should be limited to actual economic losses and actual costs for reinstatement of the marine environment and that damage to the ecosystem as such was not admissible for compensation.

Another difficult issue was how to apply the criterion of *reasonableness* in the definition of preventive measures to operations carried out or ordered by a government or other public authority. There was general agreement in the Working Group that the reasonableness of the operations should be determined on the basis of objective technical criteria. This position has thereafter been reiterated by the governing bodies many times, e.g. in relation to the Spanish Government's claim for the costs of removing the oil from the wreck of the *Prestige*.

After 1994 the 1971 Fund, and from 1996 also the 1992 Fund, have dealt with tens of thousands of claims relating to in particular pure economic loss. As a result the Funds have developed and refined the criteria adopted by the Intersessional Working Group for the admissibility of compensation claims, for example in respect of so called second degree claims in the tourism sector, costs of reinstatement of the marine environment and costs of environmental studies. It is interesting to note, however, that the criteria adopted in 1994, i.e. more than 20 years ago, and the principles underlying these criteria, still form the basis of Fund policy.

An important policy decision by the 1971 Fund Assembly was that the Fund should take legal action against other parties who had caused or contributed to pollution damage for the purpose of recovering the amounts paid by the Fund in compensation. The 1971 Fund took recourse actions in a number of cases, which led to out-of-court settlements resulting in the recovery of significant amounts. The most important 1971 Fund case in this regard was the *Sea Empress* incident which occurred in 1996 in the entrance to Milford Haven in Wales where the Fund recovered Lit. 20 million from the Milford Haven Port Authority.

In order to facilitate prompt payment of compensation, the 1971 Fund and the P&I Clubs developed, with only very limited support in the text of the Conventions, a procedure for interim payments which I believe has worked very well in most cases. In recent years the P&I Clubs have however

expressed concern that the procedure as applied exposed the Clubs to certain risks of overpayment. So far no solution has been found that meets this concern. I understand that this issue is to be discussed by the 1992 Fund Assembly next week.

In this context I would like to emphasize the importance of the excellent co-operation that has existed over the years between the P&I Clubs and the Funds. Certain events associated with the *Nissos Amorgos* case and the liquidation of the 1971 Fund have, however, caused tensions as regards this longstanding relationship. I trust that the Funds and the Clubs will be able to re-establish this important relationship, in order to ensure the efficient operation of the international compensation regime.

When the 1971 Fund Convention entered into force, there were 14 States parties. Today, as we know, the 1992 Fund has 114 Member States and the Supplementary Fund 31 Member States. I believe that the continuous increase in the number of Fund Member States shows that States have in general considered this regime, which is certainly by no means perfect, has been working reasonable well in most cases.

It is in fact an extraordinary achievement that such a large number of States with different legal traditions and on different levels of economic development have been able to agree on the criteria for admissibility of compensation claims. I believe that one reason for this is that the Funds have always endeavoured, and with very few exceptions succeeded, to take decisions by consensus. It is also remarkable that, on the basis of these criteria, the Funds have been able to reach out-of-court settlements in respect of the overwhelming majority of the compensation claims. Although national courts have sometimes not accepted the Funds' interpretation of the Conventions or the Funds' application of these criteria in individual cases – we have to admit this – national courts have largely accepted the position taken by the Funds as regards the admissibility of compensation claims.

It is also encouraging to note that the regime administered by the Funds has been used as a model for other similar compensation systems. I refer in particular to the HNS Convention and the Bunkers Convention. When the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy was revised in 2004, some of the principles developed by the Funds for the admissibility of claims inspired similar solutions in respect of that Convention.

To conclude, I must admit that it is with some nostalgia that I face the demise of the 1971 Fund which constituted an innovation not only in the field of maritime law but also in respect of international co-operation in general. My nostalgia is perhaps not

surprising, since I witnessed the birth, or rather the conception, of the organisation at the 1971 Diplomatic Conference and was heavily involved in its work, first as a Swedish delegate and then as Director for nearly 22 years. It is indeed the end of an era. In my view we are not here today to celebrate the liquidation of the 1971 Fund, but rather to be proud of the success of the 1971 Fund and its successor the 1992 Fund, and consequently of the international regime based on the Civil Liability and Fund Conventions.

I am convinced that the offspring of the 1971 Fund will continue to develop the IOPC Funds' policy as required, and this not only in fair winds but also when the sailing becomes rough, to the benefit of society and in particular to the benefit of innocent victims of tanker oil pollution.

MÅNS JACOBSSON

*Director of the 1971, 1992
and Supplementary Fund 1985-2006*