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COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
34th session
Agenda item 6

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RECORD OF DECISIONS OF THE THIRTY-FOURTH SESSION OF THE EXECUTIVE COMMITTEE

(held on 23 and 27 October 2006)

Chairman: Captain Carlos Ormaechea (Uruguay)
Vice-Chairman: Rear-Admiral Giancarlo Olimbo (Italy)

Opening of the session

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 92FUND/EXC.34/1.

2 Examination of credentials

2.1 The Executive Committee recalled that the 1992 Fund Assembly had, at its March 2005 session, decided to establish, at each session, a Credentials Committee composed of five members elected by the Assembly on the proposal of the Chairman, to examine the credentials of delegations of Member States and that, when the Executive Committee held sessions in conjunction with sessions of the Assembly, the Credentials Committee established by the Assembly should also examine the credentials of the Executive Committee (Executive Committee's Rules of Procedure, Rule (iv)).

2.2 The Executive Committee noted that, in accordance with Rule 10 of the Assembly's Rules of Procedure, at its 11th session the 1992 Fund Assembly had appointed the delegations of Algeria, Australia, Mexico, the Russian Federation and Sweden to the Credentials Committee.

2.3 The following members of the Executive Committee were present:

Algeria
Cameroon
Canada
China (Hong Kong Special Administrative Region)
Finland
France
Italy
Portugal
Republic of Korea
Russian Federation
Singapore
Spain
Turkey
United Kingdom
Uruguay

2.4 After having examined the credentials of the delegations of the members of the Executive Committee, the Credentials Committee reported in document 92FUND/EXC.34/2/1

that all the above-mentioned members of the Executive Committee had submitted credentials which were in order.

2.5 The following Member States were represented as observers:

Antigua and Barbuda	Ireland	New Zealand
Argentina	Israel	Nigeria
Australia	Japan	Norway
Bahamas	Latvia	Panama
Belgium	Liberia	Philippines
Colombia	Lithuania	Poland
Cyprus	Malaysia	Sri Lanka
Denmark	Malta	Sweden
Estonia	Marshall Islands	United Arab Emirates
Gabon	Mexico	Vanuatu
Germany	Monaco	Venezuela
Ghana	Morocco	
Greece	Netherlands	

2.6 The following non-Member States were represented as observers:

Brazil	Peru
Ecuador	Saudi Arabia

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

Intergovernmental organisations:

International Oil Pollution Compensation Fund 1971 (1971 Fund)
International Oil Pollution Compensation Supplementary Fund 2003 (Supplementary Fund)
Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea (REMPEC)

International non-governmental organisations:

BIMCO
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 Ltd (ITOPF)
International Union of Marine Insurance (IUMI)
Oil Companies International Marine Forum (OCIMF)

3 Incidents involving the 1992 Fund

3.1 Overview

The Executive Committee took note of document 92FUND/EXC.34/3, which contained summaries of the situation in respect of all eight incidents dealt with by the 1992 Fund since the Committee's 30th session, held in October 2005.

3.2 Incidents in Germany and Sweden

3.2.1 The Executive Committee took note of the information contained in document 92FUND/EXC.34/4 in respect of an incident in Germany and an incident in Sweden.

INCIDENT IN GERMANY

The incident

3.2.2 It was recalled that from 20 June to 10 July 1996 crude oil had polluted the German coastline and a number of German islands close to the border with Denmark in the North Sea, that the German authorities had undertaken clean-up operations at sea and on shore and that some 1 574 tonnes of oil and sand mixture had been removed from the beaches.

Legal actions

3.2.3 It was recalled that in July 1998 the Federal Republic of Germany had brought legal actions in the Court of first instance in Flensburg against the owner of the Russian tanker *Kuzbass* (88 692 GT) and his insurer, the West of England Ship Owners' Mutual Insurance Association (Luxembourg) (West of England Club), claiming compensation for the cost of the clean-up operations for an amount of DM2.6 million or €1.3 million (£881 000). It was also recalled that the 1992 Fund had been notified in November 1998 of the legal actions and that in August 1999 the 1992 Fund had intervened in the proceedings in order to protect its interests. It was further recalled that in order to prevent their claims against the Fund becoming time-barred at the expiry of the six-year period from the date of the incident, the German authorities had taken legal action against the 1992 Fund in June 2002.

3.2.4 The Committee recalled that in December 2002 the Court of first instance had rendered a part-judgement holding that the owner of the *Kuzbass* and the West of England Club were jointly and severally liable for the pollution damage. It was recalled, however, that the Court had acknowledged that the German authorities had failed to provide conclusive evidence that the *Kuzbass* was the vessel responsible, but had considered that the circumstantial evidence pointed overwhelmingly to that conclusion.

3.2.5 It was recalled that the shipowner and the West of England Club had appealed against the judgement arguing that the *Kuzbass* could not have reached the alleged dumping area in the time available, that the chemical analyses of the pollution samples did not provide conclusive proof that the oil had originated from the *Kuzbass* and that there had been three other vessels in the southern North Sea at the relevant time that had previously carried cargoes of Libyan crude oil and which could therefore have caused the pollution.

3.2.6 The Committee recalled that at a hearing in December 2004, the Schleswig-Holstein Appeal Court had indicated that on the basis of the evidence submitted to date, it was far from convinced that the *Kuzbass* had been the source of the pollution, drawing particular attention to other potential ship sources that the German authorities had failed to investigate. It was recalled that the Court had raised doubts regarding the correctness of the circumstantial evidence and the Court of first instance's interpretation of that evidence. It was also recalled that the Court had stated that on the basis of the documentation submitted to date, the prospects of the shipowner/West of England Club succeeding in the appeal were significantly better than those of the German Government and had strongly recommended that the parties reached an out-of-court settlement to the effect that the shipowner and the West of England Club would pay the German Government €120 000 (£81 000) and that the recoverable costs would be shared between the German Government and the shipowner/West of England Club on a 92%-8% basis.

3.2.7 It was recalled that at the March 2005 session of the Executive Committee the Director had proposed that, in the light of the evidence available and the indications by the Court of Appeal

as regards the probable outcome of the legal proceedings, he should be authorised to reach out-of-court settlements with the other parties. The Committee recalled that whilst there had been good grounds for suspecting that the *Kuzbass* had been the source of the pollution, the evidence had been largely circumstantial, and that in presenting their case the German authorities had sought to convince the Court of first instance that this evidence was sufficient to switch the burden on the shipowner to prove that the *Kuzbass* was not the source of the pollution. It was also recalled that the shipowner and the West of England Club had made a proposal for an out-of-court settlement involving all parties whereby the shipowner and the West of England Club would pay 18% and the 1992 Fund 82% of any proven losses suffered by the Federal Republic of Germany as a result of the incident. It was further recalled that the 1992 Fund had received documentation in support of the claim by the German Government, that the Government would, under German law, be entitled to interest at the legal rate on any proven losses and that any settlement agreement would have to include the question of apportionment of the legal costs incurred by the respective parties.

3.2.8 It was recalled that the Committee had decided to authorise the Director to seek an out-of-court settlement with all other parties involved (ie, the Federal Republic of Germany, the shipowner and the West of England Club) and conclude such a settlement on behalf of the 1992 Fund, provided the amount to be paid by the shipowner and the West of England Club was increased above the 18% originally offered.

3.2.9 The Committee recalled that following the March 2005 session the West of England Club and the shipowner had increased their offer from 18% to 20% and that the Director had, in the light of the decision by the Executive Committee, decided to accept the proposed settlement offer.

3.2.10 It was noted that the 1992 Fund and the West of England Club, with the assistance of ITOPF, had assessed the claim submitted by the German authorities at DM2.1 million or €1.1 million (£745 000) and that it was expected that a settlement agreement between the Fund and the West of England Club and the German Government would be reached in the near future.

3.2.11 The German delegation thanked the Secretariat for its efforts in resolving the outstanding issues regarding this incident. That delegation stated that the Federal Government had not been heavily involved, but that there had always been a good co-operation between the responsible German authorities and the Secretariat. That delegation stated further that it was pleased with the outcome and expressed the hope that the claim by the German authorities would be settled in the near future.

INCIDENT IN SWEDEN

The incident

3.2.12 It was recalled that between 23 September and early October 2000 persistent oil had landed on the shores of Fårö and Gotska sandön, two islands to the north of Gotland in the Baltic Sea, and thereafter on several islands in the Stockholm archipelago. It was also recalled that the Swedish Coastguard, the Swedish Rescue Service Agency and local authorities had undertaken clean-up operations, which had resulted in the collection of some 20m³ of oil from the sea and from the shore.

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

3.2.14 It was recalled that the *Alambra* was entered in the London Steam-Ship Owners' Mutual Insurance Association Ltd (London Club) and that the shipowner and the insurer had maintained that the oil had not originated from the *Alambra*.

Legal actions against the shipowner/Club and the Fund

3.2.15 It was recalled that in September 2003 the Swedish Government had taken legal action in the Stockholm District Court against the shipowner and the London Club maintaining that the oil in question had originated from the *Alambra* and claiming compensation totalling SEK 5 260 364 (£388 000) for clean-up costs. It was further recalled that the Government had also taken legal action against the 1992 Fund as a protective measure to prevent its claim against the Fund becoming time-barred, invoking the liability of the 1992 Fund to compensate the Government if neither the shipowner nor the London Club were to be held liable to pay compensation.

3.2.16 It was noted that in June 2006 the Swedish Government, the shipowner and the London Club had reached an out-of-court settlement without any admission of liability by any party. The Committee noted that as a consequence of this agreement the pending legal actions against the shipowner and the London Club had been withdrawn. It was noted that also in June 2006, the Swedish Government and the 1992 Fund had concluded a settlement agreement whereby the Swedish Government agreed to pay the 1992 Fund SEK 79 000 (£5 900) corresponding to all of the Fund's legal and expert costs. The Committee noted that as a result of these agreements the proceedings pending in the Court against the Fund had been withdrawn and the case was therefore closed as far as the Fund was concerned.

3.3 *Dolly*

The incident

3.3.1 The Executive Committee took note of the developments regarding the *Dolly* incident as set out in document 92FUND/EXC.34/5.

3.3.2 It was recalled that the *Dolly* had sunk on 5 November 1999 in 20 metres depth in Robert Bay, Martinique, whilst carrying some 200 tonnes of bitumen. The Committee recalled that there was a national park, a coral reef and mariculture near the grounding site, that artisanal fishing was carried out in the area and that there were fears that fishing and mariculture would be affected if the bitumen were to escape.

3.3.3 It was recalled that the *Dolly* was originally a general cargo vessel, but that special tanks for carrying bitumen had been fitted, together with a cargo heating system.

3.3.4 It was recalled that the ship did not have any liability insurance. It was also recalled that the shipowner, a company in St Lucia, had been ordered by the authorities to remove the wreck but that it had not complied with the order, probably due to lack of financial resources.

3.3.5 The Committee recalled that since the shipowner had not taken any measures to prevent pollution, the French authorities had arranged for the removal of 3.5 tonnes of bunker oil and had requested three international salvage companies to investigate what measures could be taken to eliminate the threat of pollution by bitumen. It was recalled that these companies had submitted their proposals on the basis of diving inspections of the wreck carried out in October and November 2000 and that the French authorities had provided the 1992 Fund with copies of the proposals.

3.3.6 It was recalled that in July 2001 the Committee had concurred with the Director's opinion that, in view of the location of the wreck in an environmentally sensitive area, an operation to remove the threat of pollution by the bitumen would in principle constitute 'preventive measures' as defined in the 1992 Conventions and that the Committee had instructed the

Director to examine with the 1992 Fund's experts and the French authorities the proposed measures to remove the bitumen.

3.3.7 It was recalled that in July 2001 the Director had informed the French Government of the Fund's experts' opinion on the various proposals and had also stressed that any claims presented by the French authorities in respect of operations on the wreck of the *Dolly* would be examined against the 1992 Fund's admissibility criteria and that the Fund would not approve the costs of the operation in advance of the work being carried out.

3.3.8 It was recalled that in August 2004 the French authorities had informed the 1992 Fund that a contract had been awarded to a consortium comprising a French diving company and the managers of a yacht marina in Martinique. It was recalled that operations had commenced in October 2004, but that as a result of heavy sea conditions and a number of unforeseen practical problems, removal of the three tanks containing the bitumen from the hold had taken longer than planned and had proved more difficult than anticipated. It was recalled that by mid-December the contractors had removed the tanks from the hold with the aid of floatation bags and had laid them on the seabed near to the wreck where they had been left until March 2005 when the weather would be more conducive to towing the tanks to the dry dock.

3.3.9 The Committee recalled that operations had been resumed in March 2005 as planned but that as a result of further technical problems the towing of the tanks to shore and the removal of the bitumen had not been completed until July 2005.

Legal action

3.3.10 It was recalled that in October 2002 the French Government had taken legal action against the shipowner and the 1992 Fund claiming provisionally FFr1.2 million or €232 000 (£160 000) in respect of the costs of removing the bunker oil from the *Dolly*, stating in the writ of summons that further costs in excess of €2 million (£1.3 million) would be claimed in respect of the removal of the cargo.

3.3.11 The Committee noted that in March 2006 the French Government had submitted a claim for €1 388 361 (£980 000) for the costs of removing the bunker fuel and the bitumen cargo from the wreck and that in June 2006 the claim had been increased to €1 457 753 (£1 030 000) to take into account additional costs arising from the technical and meteorological problems.

3.3.12 It was noted that the shipowner had not had the financial resources to pay any compensation and that the ship did not have any liability insurance and that for these reasons the Director had decided that the 1992 Fund should compensate the French Government under Article 4.1(b) of the 1992 Fund Convention.

3.3.13 The Committee noted that in August 2006 the Director had approved the claim for €1 457 753 (£1 030 000) as claimed and that the settlement amount had been paid to the French Government on 6 October 2006. It was noted that as a result of the settlement of the claim the French Government had undertaken to withdraw its legal action against the Fund.

3.3.14 The French delegation confirmed that the French Government had withdrawn the legal action against the 1992 Fund. That delegation thanked the Director and the Secretariat for dealing with the claim in an effective and rapid way.

3.4 *Erika*

3.4.1 The Executive Committee took note of the developments regarding the *Erika* incident as set out in documents 92FUND/EXC.34/6, 92FUND/EXC.34/6/Add.1, 92FUND/EXC.34/6/Add.2 and 92FUND/EXC.34/6/Add.3.

Maximum amount available for compensation

3.4.2 It was recalled that the maximum amount available for compensation under the 1992 Civil Liability Convention and the 1992 Fund Convention (135 million SDR) had been calculated by the Director, following the instructions by the Executive Committee, at FFr1 211 966 811 corresponding to €184 763 149 (£125 million).

Shipowner's limitation fund

3.4.3 It was recalled that at the request of the shipowner, the Commercial Court in Nantes had issued an order in March 2000 opening limitation proceedings. It was also recalled that the Court had determined the limitation amount applicable to the *Erika* at FFr84 247 733 corresponding to €12 843 484 (£8.7 million) and had declared that the shipowner had constituted the limitation fund by means of a letter of guarantee issued by the shipowner's liability insurer, the Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual).

3.4.4 The Committee recalled that in 2002 the limitation fund had been transferred from the Commercial Court in Nantes to the Commercial Court in Rennes. It was also recalled that in January 2006 the limitation fund had again been transferred, this time to the Commercial Court in Saint-Brieuc.

Undertakings by Total SA and the French Government

3.4.5 The Committee recalled that Total SA had undertaken not to pursue claims against the 1992 Fund or against the limitation fund constituted by the shipowner or his insurer relating to its costs arising from operations in respect of the wreck, the clean-up of shorelines and disposal of oily waste, and a publicity campaign to restore the image of the Atlantic coast, if and to the extent that the presentation of such claims would result in the total amount of all claims arising out of this incident exceeding the maximum amount of compensation available under the 1992 Conventions.

3.4.6 It was recalled that the French Government had also undertaken 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, but that the French Government's claims would rank before any claims by Total SA if funds were available after all other claims had been paid in full.

Claims situation

3.4.7 The Committee noted that as at 15 September 2006, 6 991 claims for compensation had been submitted for a total of €387 million (£262 million) and that 98.4% of the claims had been assessed. It was noted that some 1 060 claims totalling €24 million (£16.2 million) had been rejected.

3.4.8 It was noted that as at 21 October 2006 payments of compensation had been made in respect of 5 656 claims for a total of €127.8 million (£87 million), out of which Steamship Mutual had paid €12.8 million (£8.8 million) and the 1992 Fund €115 million (£78.2 million).

Payments to the French Government

3.4.9 It was recalled that at its October 2003 session the Executive Committee had authorised the Director to make payments to the French State to the extent that he considered that there was a sufficient margin between the total amount of compensation available and the Fund's exposure in respect of other claims (document 92FUND/EXC.22/14, paragraph 3.4.11).

3.4.10 It was recalled that in December 2003 the Director had decided that there was a sufficient margin to enable the 1992 Fund to commence payments to the French State and that the Fund had initially paid €10.1 million (£7.0 million), corresponding to the French Government's subrogated claim in respect of the supplementary payments to claimants in the tourism sector, followed in October 2004 by a further payment of €6.0 million (£4.2 million) relating to the French Government's supplementary payments made under the scheme to provide emergency payments to claimants in the fishery, mariculture and salt producing sectors administered by OFIMER. It was also recalled that in December 2005 the 1992 Fund had made a payment on account to the French State of €15 million (£10.3 million) towards the costs incurred by the French authorities in the clean-up response.

3.4.11 The Committee noted that, having again revised the assessment of the total level of admissible claims in September 2006, the Director had considered that there was a sufficient margin to make a further payment of €10 million (£6.8 million) to the French State towards the costs incurred by the French authorities in the clean-up response and that a payment of that amount had been made to the State on 20 October 2006.

3.4.12 The French delegation thanked the Director for the latest payment to the French Government and asked to be kept informed of developments with regard to court judgements in respect of claims against the Fund.

Cause of the incident

3.4.13 It was recalled that the Malta Maritime Authority (MMA) had issued an investigation report on the cause of the incident in September 2000 and that the French Permanent Commission of Enquiry into Accidents at Sea (La Commission Permanente d'enquête sur les évènements de la mer) (CPEM) had published its investigation report on the incident in December 2000 (document 92FUND/EXC.14/5/Add.1; cf also Annual Report 2001, pages 118 and 119).

3.4.14 It was also recalled that criminal charges had been brought against the master of the *Erika*, the representative of the registered owner (Tevere Shipping), the president of the management company (Panship Management and Services Srl), the management company itself, the deputy manager of Centre Régional Opérationnel de Surveillance et de Sauvetage (CROSS), three officers of the French Navy who were responsible for controlling the traffic off the coast of Brittany, the classification society Registro Italiano Navale (RINA) and one of RINA's managers, Total SA and some of its senior staff. The Committee noted that the trial was scheduled to start on 12 February 2007.

3.4.15 It was further recalled that in January 2000, at the request of Total International Limited (Total) which had owned the cargo onboard the *Erika* and Total's insurers and other interested parties, the Commercial Court in Dunkirk had established a panel of experts to investigate the circumstances and the cause of the incident and to re-construct the process of the break up of the internal structures of the *Erika*. It was noted that the panel had consisted of four maritime experts assisted by a specialist in naval architecture and classification society procedures, a specialist in metallurgy and a number of technicians at the Institute of Welding (L'Institut de soudures) in Paris who had been consulted in relation to structural studies and calculations.

3.4.16 The Committee noted that the panel had submitted its report in November 2005.

3.4.17 It was noted that in the report the experts had expressed the opinion that the *Erika*'s internal structures had been in conformity with the 1973 rules of Nippon Kaiji Kyokai, the classification society that had monitored the ship while being built. It was also noted that based on documentation provided by RINA, they had confirmed that the ship's internal structures had been in conformity with RINA's classification rules as applicable in 1998 but that based on the measurements and calculations conducted on the wreck and on steel fragments retrieved from

the wreck, the thickness of the steel structures of the *Erika* when RINA had taken over the ship had been below the permissible limits.

3.4.18 The Committee noted that the experts had also concluded that the process of breaking up of the *Erika* could be summarised as follows:

- The internal structures supporting the shell plating adjacent to number 2 starboard ballast tank and the longitudinal bulkhead between number 3 centre cargo tank and number 2 starboard ballast tank that were badly corroded developed cracks. The cracks on the shell plating were below the water line and allowed seawater to gain ingress into the number 2 starboard ballast tank. This flooding was coupled with the flow of cargo from number 3 centre tank into number 2 starboard ballast tank.

- The flooding led to the deterioration of the internal structures in number 2 starboard ballast tank including the detachment of a section of the shell plating adjacent to the ballast tank. This allowed an increase in the rate of flooding of the tank which contributed to the excessive hydrodynamic stresses on the remaining internal structures in the ballast tank.

- These excessive stresses, in addition to the bending moments created by the swell, caused the *Erika* to fold outwards resulting in the buckling of the deck plating in this area and the breaking of the ship's bottom. This caused the bow and stern sections to separate.

3.4.19 It was noted that in the experts' view the master and the crew had dealt with this situation in a professional manner and that even if the master had been able to comprehend fully the situation that had been developing, it would not have had any impact on the unfolding of the events which had led to the loss of the ship and that during the course of the incident, the master had complied with the shipboard oil pollution emergency plan except in two respects, namely failure to inform the French authorities that oil was being spilt from the *Erika* and failure to make contact with the technical adviser of RINA.

3.4.20 It was noted that as regards Total, the experts had expressed the view that neither at the time of chartering nor during the vetting inspection would it have been possible for Total to detect the state of corrosion of the internal structures of the *Erika*.

3.4.21 The Committee noted that the experts had also stated that Panship as the technical manager of the *Erika*, which had determined and supervised repairs carried out during the summer of 1998, would have been aware of the deterioration of the internal structures identified in their report and that RINA, as the classification society, would have also been aware of the deterioration as it had been responsible for checking the work that had been carried out in accordance with its classification rules. It was noted that the experts had also suggested that RINA had not followed the normal procedures for the issue of classification certificates in respect of the annual survey in August/November 1999.

3.4.22 It was noted that the experts had also concluded that the parties that had responded to the casualty had not been in a position to influence the fate of the *Erika* and that based on the condition of the internal structures of the ship when it had departed from Dunkirk, the *Erika* had been destined to break up considering the heavy weather at the time.

Recourse actions taken by the 1992 Fund

3.4.23 It was recalled that at its October 2002 session (document 92FUND/EXC.18/14, paragraphs 3.4.30 and 3.4.32) the Executive Committee had decided to authorise the Director to challenge the shipowner's right to limit his liability under the 1992 Civil Liability Convention and to take recourse actions as a protective measure before the expiry of the three-year time-bar period against the following parties:

Tevere Shipping Co Ltd (the registered owner of the *Erika*)
Steamship Mutual (liability insurer of the *Erika*)
Panship Management and Services Srl (manager of the *Erika*)
Selmont International Inc (time charterer of the *Erika*)
TotalFinaElf SA (holding company)
Total Raffinage Distribution SA (shipper)
Total International Ltd (seller of cargo)
Total Transport Corporation (voyage charterer of the *Erika*)
RINA Spa/Registro Italiano Navale (classification society)

3.4.24 It was also recalled that on 11 December 2002 the 1992 the Fund had brought actions in the Civil Court (Tribunal de Grande Instance) in Lorient against the parties listed in paragraph 3.4.23 above.

3.4.25 It was further recalled that after the Committee's October 2002 session the Director had been made aware of the fact that the classification society Bureau Veritas had inspected the *Erika* prior to the transfer of class to RINA, that he had decided that the 1992 Fund should take recourse action, as a protective measure, against Bureau Veritas, and that this action had also been brought in the Civil Court in Lorient on 11 December 2002.

3.4.26 The Committee recalled that as mentioned in paragraph 3.4.14 above, criminal charges had been brought against, *inter alia*, the deputy manager of CROSS and three officers of the French Navy. It was noted that if they were to be found guilty there might be grounds for the 1992 Fund to take recourse action against the French State, but that it was not possible for the 1992 Fund to decide whether there were grounds for such an action until the trial in the criminal proceedings had taken place.

3.4.27 It was recalled that under French law the general time-bar period in commercial matters was – subject to many exceptions – ten years and that in matters involving the liability of public bodies, in order to prevent a claim for compensation becoming time-barred, the French Administration should be notified of such a claim by 31 December of the fourth year after the event that gave rise to a claim, ie in the case of the *Erika* incident by 31 December 2003. The Committee recalled that the 1992 Fund had made such a notification in December 2003 and that the French State had accepted that this notification had the effect of interrupting the time bar.

3.4.28 It was noted that on the basis of the investigating reports by MMA, CPEM and in particular the report of the panel of experts established by the Commercial Court in Dunkirk, the 1992 Fund would have grounds for pursuing the recourse actions commenced by it in 2002 against some of the parties referred to in paragraphs 3.4.23 and 3.4.26, whereas there appeared to be no such grounds for pursuing recourse action against others.

3.4.29 It was noted, however, that during the criminal proceedings referred to in paragraph 3.4.14 above new evidence might come to light which could be important for the Fund in its decision relating to recourse actions. Based on these considerations the Executive Committee decided, as proposed by the Director, to defer its decision as to whether to pursue recourse actions against all or some of the parties referred to in paragraphs 3.4.23, 3.4.25 and 3.4.26.

Legal proceedings

3.4.30 The Committee recalled that the Conseil Général of Vendée and a number of other public and private bodies had brought actions in various courts against the shipowner, Steamship Mutual, companies in the Group Total SA and others requesting that the defendants should be held jointly and severally liable for any claims not covered by the 1992 Civil Liability Convention and that the 1992 Fund had requested to be allowed to intervene in the proceedings. It was noted that so far only procedural hearings had been held.

3.4.31 It was recalled that the French State had brought actions in the Civil Court in Lorient against Tevere Shipping Co Ltd, Panship Management and Services Srl, Steamship Mutual, Total Transport Corporation, Selmont International Inc, the limitation fund referred to in paragraph 3.4.3 above and the 1992 Fund, claiming €190.5 million (£132 million).

3.4.32 It was also recalled that four companies in the Group Total SA had taken legal actions in the Commercial Court in Rennes against the shipowner, Steamship Mutual, the 1992 Fund and others claiming €143 million (£97 million).

3.4.33 It was recalled that Steamship Mutual had brought action in the Commercial Court in Rennes against the 1992 Fund, requesting the Court, *inter alia*, to note that, in the fulfilment of its obligations under the 1992 Civil Liability Convention, Steamship Mutual had paid €12 843 484 (£8.7 million) corresponding to the limitation amount applicable to the shipowner, in agreement with the 1992 Fund and its Executive Committee, and had requested the Court to declare that it had fulfilled all its obligations under the 1992 Civil Liability Convention, that the limitation amount had been paid and that the shipowner was exonerated from his liability under the Convention. It was also recalled that Steamship Mutual had requested the Court to order the 1992 Fund to reimburse it any amount that the shipowner's insurer would have paid in excess of the limitation amount.

3.4.34 The Committee recalled that claims totalling €497 million (£337 million) had been lodged against the shipowner's limitation fund constituted by Steamship Mutual and that this amount included the claims by the French Government and Total SA. It was noted, however, that most of these claims, other than those of the French Government and Total SA, had been settled and that it appeared therefore that these claims should be withdrawn against the limitation fund to the extent that they related to the same loss or damage. It was also noted that the 1992 Fund had received from the liquidator of the limitation fund formal notifications of the claims lodged against that fund.

3.4.35 It was noted that legal actions against the shipowner, Steamship Mutual and the 1992 Fund had been taken by 796 claimants. The Committee noted that out-of-court settlements had been reached with 438 of these claimants, that the courts had rendered judgements in respect of 86 claims and that actions by 272 claimants (including 145 salt producers) were pending. It was noted that the total amount claimed in the pending actions, excluding the claims by the French State and Total SA, was €60 million (£41 million).

3.4.36 The Committee noted that the 1992 Fund would continue to hold discussions with claimants whose claims were not time-barred with the aim of arriving at out-of-court settlements if appropriate.

Court judgements in respect of claims against the 1992 Fund[<1>]

3.4.37 The Committee took note of 14 judgements in respect of claims against the 1992 Fund which had been made public since the Executive Committee's May 2006 session and which were summarised in documents 92FUND/EXC.34/6, 92FUND/EXC.34/6/Add.2 and 92FUND/EXC.34/6/Add.3. The Committee noted in particular the information given in respect of those judgements set out in paragraphs 3.4.38 to 3.4.46.

Commercial Court in Saintes

Manufacturer of nets and other fishing equipment

3.4.38 It was recalled that at its October 2000 session the Executive Committee had decided to reject a claim for a reduction in sales by a manufacturer of nets and other fishing equipment whose

[<1>] The judgements were rendered also against the shipowner and Steamship Mutual. In order not to burden the text in paragraphs 3.4.37-3.4.47 reference is made only to the 1992 Fund.

business was located some 100 kilometres south of the area affected by the oil spill and whose sales were to a large extent to businesses which in their turn sold nets and other fishing equipment to fishermen operating in the area affected by the oil spill (document 92FUND/EXC.9.12, paragraphs 3.6.35 and 3.6.36). It was recalled that the Committee had considered that, since the claimant's activity was located some distance outside the area affected by the oil spill, his business could not be considered an integral part of the economic activity in the affected area and that there was therefore not a reasonable degree of proximity between the alleged losses and the contamination.

3.4.39 The Committee noted that the claimant had pursued the claim before the Commercial Court in Saintes for an amount of €184 000 (£124 700) of which €119 000 (£80 700) was for loss of income and €65 000 (£44 000) was for financial losses as a result of the reduction of cash flow.

3.4.40 It was noted that the Court had issued a judgement in June 2006 stating that the criteria for admissibility of claims developed by the Fund did not have a binding effect on national Courts and that it was for the Court to interpret the concept of 'pollution damage' in the 1992 Conventions and to apply it in each individual case by determining whether there was a sufficient link of causation between the event and the damage. It was also noted that the Court had held that the claim satisfied the Fund's criteria for admissibility since the great majority of the claimant's clients were based in the affected area, that the sale of fishing nets represented a substantial part of his turnover, that the claimant did not have other sources of supply or business opportunities, that the claimant's business formed an integral part of the economic activity within the area affected and that the claimant had only included in its claim the activities which had a direct geographical link with the area affected by the spill.

3.4.41 It was noted that on the basis of the report of a court expert, the Court had accepted the part of the claim relating to loss of income for the amount claimed, ie €119 000 (£80 700) and had assessed the part of the claim relating to financial loss at €32 000 (£21 700) and that the Fund had been ordered to pay €151 000 (£102 300). The Committee noted that the Court had ordered the provisional execution of the judgement and that following a request by the claimant the Fund had paid the amount awarded by the court.

3.4.42 The Executive Committee noted that although the Court had taken a position different from that of the Fund as regards admissibility, it had nevertheless reached its decision on the basis of the Fund's criteria for admissibility of claims and had made a reasonable evaluation of the evidence provided by the claimant. As recommended by the Director, the Committee decided therefore that the 1992 Fund should not appeal against the judgement.

Commercial Court in Saint-Nazaire

Company selling water sports equipment

3.4.43 The Committee noted that the Commercial Court of Saint-Nazaire had issued a judgement in respect of a claim by a company selling water sports equipment for €35 487 (£24 000) for losses suffered in 2000 as a result of the *Erika* incident. It was noted that the company had a dual activity of selling sailboards, fittings and apparel and selling boats to individuals and sailing schools. It was also noted that although the Fund had accepted as admissible in principle the loss of income due to reduced sales of sailboards, fittings and apparel, it had rejected the claim for loss of sales of boats on the ground that the purchase of boats was a long-term investment and therefore less likely to be affected by a short-term event, such as the *Erika* incident, and that the sales were mostly aimed at sailing clubs and other business in the tourism industry (but not directly to tourists). It was noted that in its judgement the Court had stated that the rules adopted by the Fund, and reflected in the Claims Manual, did not categorically reject claims by those providing services to other business in the tourist industry (in the Fund's terminology 'second degree tourism claims') since the Manual stated that claims of this type would 'normally' not qualify for compensation and that the text allowed some margin to interpret that

compensation could be available to these claimants. It was further noted that the Court had considered that 20% of the boat sales were to individuals and that the claim in respect of reduction of such sales was admissible for compensation in principle. The Committee noted that the Court had also held that the other 80% of the boat sales were to sailing clubs and that the reduction of such sales was also admissible for compensation within the limit of the amounts available after compensation had been made to first degree claimants ('dans la limite disponible après indemnisations des victimes au premier degré'). It was noted that the Court had decided to request the Fund's experts to re-examine this part of the claim.

3.4.44 The Committee noted that the Director was considering whether to appeal against the judgement in the light of the statement by the Court that part of the claim, which was in the Fund's terminology a second degree tourism claim, was admissible 'within the limit of the amount available after compensation had been payable to all first degree claimants'. It was noted that in the Director's view this statement did not respect the principle laid down in the 1992 Conventions that claims were either admissible or not and that all claims should be treated equally (cf Article V.4 of the 1992 Civil Liability Convention and Article 4.5 of the 1992 Fund Convention).

Camp site operator

3.4.45 The Committee noted a judgement in respect of a claim by the operator of a camp site in Croisic for €252 462 (£171 000) in respect of losses in 2000. It was noted that the Fund had assessed the losses at €135 466 (£92 000), that an interim payment of €108 301 (£74 000) had been made to the claimant, but that the claimant had subsequently refused to accept the payment of the balance of €27 165 (£18 000) and had brought legal action against the Fund requesting compensation for €192 838 (£130 000).

3.4.46 The Committee noted that in its judgement the Court had awarded the claimant €192 554 minus the amount already paid by the Fund, and had held that the Fund, in its assessment of the claim, had incorrectly deducted the salary received by the claimant as a saved overhead. It was noted that the Director, in consultation with the Fund's French lawyer and experts, was considering whether or not to appeal against the judgement.

Director's analysis of the judgements rendered against the 1992 Fund

3.4.47 The Director referred to the fact that the 86 judgements had for the most part gone in the Fund's favour. He mentioned that some courts had applied the Fund's admissibility criteria, some had made the point that the criteria were not binding on the courts but provided a useful reference and others had ignored the criteria, but generally had reached the same conclusions that would have been reached on the basis of the criteria. The Director drew special attention to the fact that in four cases in which the judgements in the court of first instance had gone against the Fund, the Court of Appeal had recently overturned these judgements. He further stated that whilst he regretted that the Fund had found itself involved in such a large number of claims which had become the subject of legal proceedings, it was gratifying that the French courts had generally sided with the Fund. He thanked the Fund's French lawyer for his excellent work and his high success rate.

3.5 *Slops*

3.5.1 The Executive Committee took note of the information contained in document 92FUND/EXC.34/7 in respect of the *Slops* incident.

3.5.2 The Committee recalled that at its July 2000 session it had considered the question of whether the *Slops* fell within the definition of 'ship' under the 1992 Civil Liability Convention and the 1992 Fund Convention. It was recalled that the 1992 Fund Assembly had decided that offshore craft, namely floating storage units (FSUs) and floating production, storage and offloading units

(FPSOs), should be regarded as ships only when they carry oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operate. The Committee recalled that this decision had been taken on the basis of the conclusions of an Intersessional Working Group that had been set up by the Assembly to study this issue. It was also recalled that although the Working Group had mainly considered the applicability of the 1992 Conventions in respect of craft in the offshore oil industry, the Committee had considered that there was no significant difference between the storage and processing of crude oil in the offshore industry and the storage and processing of waste oils derived from shipping. It was further recalled that the Working Group had taken the view that in order to be regarded as a 'ship' under the 1992 Conventions, an offshore craft should, *inter alia*, have persistent oil on board as cargo or as bunkers (document 92FUND/A.4/21, paragraph 7.4.2).

3.5.3 It was recalled that the Executive Committee had decided that the floating waste oil reception facility *Slops* should not be considered a 'ship' for the purpose of the 1992 Civil Liability Convention and the 1992 Fund Convention and that these Conventions did not apply to this incident (document 92FUND/EXC.8/8, paragraph 4.3.8). It was recalled that the *Slops*, although originally designed and constructed for the carriage of oil in bulk as cargo, had undergone a major conversion, including the removal of its propeller and deactivation of its engine, since when it had remained permanently at anchor and used exclusively as a waste oil storage and processing unit.

3.5.4 The Committee recalled that in February 2002 two Greek companies had taken legal actions in the Court of first instance in Piraeus against the registered owner of the *Slops* and the 1992 Fund claiming compensation for costs of clean-up operations and preventive measures for €1 536 528 (£1.0 million) and €786 832 (£530 000) plus interest, respectively. It was recalled that in December 2002 the Court had rendered a default judgement against the registered owner for the amounts claimed. It was also recalled that as regards the action against the Fund, the Court had held that the *Slops* fell within the definition of 'ship' and had ordered the Fund to pay the companies the amount claimed, plus legal interest.

3.5.5 The Committee recalled that the 1992 Fund had appealed and that in February 2004 the Court of Appeal, which had interpreted the word 'ship' as defined in Article I.1 of the 1992 Civil Liability Convention as a seaborne unit which carried oil from place A to place B, had overturned the judgement of the Court of first instance and rejected the claims against the 1992 Fund on the grounds that the *Slops* did not meet the criteria required by the Conventions and therefore could not be considered a 'ship'.

3.5.6 It was recalled that the claimants had appealed to the Supreme Court arguing that the *Slops*, which by its construction had all the characteristics of a vessel carrying oil, had been anchored and used as a floating receiving and separating unit for oil products transferred from other vessels. It was recalled that the claimants had stated that as a result of fire, a large quantity of oil loaded in bulk as cargo in the vessel's cargo tanks had been spilled. The Committee also recalled that the claimants had maintained that the Court of Appeal had made an incorrect interpretation of the definition of 'ship' in the 1992 Civil Liability Convention and that the wording of the definition and its purpose was not only to prevent pollution but also to compensate victims of oil pollution and those who contributed to the prevention of such pollution. It was recalled that the claimants had further maintained that the definition of 'ship' also covered a craft which, by its construction, was designed to carry oil and which at the time of the incident did not perform voyages and (for a brief or longer period of time) was stationary, operating as a receiving and separating unit for oil or oily residues and carrying oil in its cargo tanks, particularly so when the craft had oily residues from the carriage on board and constituted a high risk of causing pollution in vital areas such as ports. It was also recalled that the claimants had expressed the view that the Court of Appeal had, in holding that it could not support the claimants' view that there were oil residues from the *Slops*' last voyage at the time of the incident, considered an issue that had not been pleaded. It was further recalled that the

claimants had argued that the definition of 'ship' introduced a rebuttable presumption that there were residues on board and that the 1992 Fund had not rebutted this presumption.

3.5.7 The Executive Committee recalled that the 1992 Fund had submitted pleadings to the Supreme Court in May 2005 maintaining that the Court of Appeal had interpreted the definition of 'ship' correctly and that the appeal should be dismissed. It was recalled that in its pleadings before the Supreme Court the Fund had put forward largely the same arguments as in the Court of Appeal, reiterating the point made to the Court of Appeal that it was not possible that the residues from previous voyages had remained onboard in view of the fact that the *Slops* had been converted to a floating oil recovery facility and maintaining that in any event the alleged rebuttable presumption would not apply in this case. It was also recalled that the Fund had drawn the Supreme Court's attention to Resolution N°8 adopted in May 2003 by the 1992 Fund Administrative Council in which the Council had expressed the view that the courts of States Parties to the 1992 Conventions should take into account the decisions of the governing bodies of the 1992 Fund and the 1971 Fund relating to the interpretation and application of the Conventions.

3.5.8 The Committee recalled that in support of its position the 1992 Fund had submitted to the Supreme Court an expert opinion by Dr Thomas A Mensah[<2>]. It was recalled that in his opinion, Dr Mensah had concluded that there was no basis, neither in the provisions and terms of the 1992 Civil Liability Convention and the 1992 Fund Convention or in international maritime law nor in the rules and principles of international law concerning the interpretation and application of treaties, for suggesting that the *Slops* could be considered as a 'ship' in relation to the incident. It was further recalled that, in his view, at the time of the incident the *Slops* did not meet any of the requirements for a ship as defined in Article I.1 of the 1992 Civil Liability Convention because it was not 'a seagoing vessel and seaborne craft… constructed or adapted for the carriage of oil in bulk as cargo', nor was it a ship that was 'actually carrying oil in bulk as cargo' or on 'any voyage following such carriage' and therefore pollution damage resulting from the incident could not be considered as falling within the scope of application of the 1992 Civil Liability Convention and there could be no obligation on the part of the 1992 Fund in respect of compensation for such pollution damage.

3.5.9 The Committee recalled that in September 2005 the five Supreme Court judges who had heard the case had concluded that the question as to whether or not the Court of Appeal had correctly interpreted and applied Article I.1 of the 1992 Civil Liability Convention should be referred to the Plenary Session of the Supreme Court. It was also recalled that under the Greek Code of Civil Procedure, in order for a judgement by a Division of the Supreme Court to be conclusive and binding, the judgement had to be decided by a majority of more than one vote. It was further recalled that it had appeared that three judges had been in favour of the claimants and two had been in favour of the 1992 Fund. It was also recalled that the other grounds of appeal put forward by the claimants had been rejected by the Supreme Court.

3.5.10 It was noted that at the plenary session, held in May 2006, the Supreme Court had been composed of 22 judges who had been chosen randomly and had only considered the issue of the interpretation and application of Article I.1 of the 1992 Civil Liability Convention.

3.5.11 The Committee noted that in accordance with the rules of procedure of the Supreme Court, the Attorney General of the Supreme Court had attended the session and made recommendations to the Court. It was noted that the Attorney General had concurred with the findings of the two dissenting judges in the Supreme Court that the *Slops* should not be considered a 'ship' as defined in the 1992 Conventions and had proposed the dismissal of the ground of appeal as being unfounded.

[<2>] Former Assistant Secretary-General of IMO, former President of the International Tribunal of the Law of the Sea in Hamburg (Germany).

3.5.12 It was noted that the Supreme Court had issued its judgement in June 2006. The Committee noted that the majority of the judges (17:5) had expressed the opinion that the provisions on the definition of 'ship' in the 1992 Conventions appeared to describe two types of 'ships', namely: (a) the type which was defined as 'any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo', and (b) the type which was defined as 'a ship capable of carrying oil in bulk and other cargoes…', in other words 'combination cargo' ships. It was noted that, relying principally on the grammatical phraseology used in defining a ship in the 1992 Conventions, the majority of the judges had concluded that the proviso referred only to combination cargo ships, ie those ships which were 'capable of carrying oil in bulk and other cargoes', rather than all ships in general, and that consequently there was no requirement for ships in the first category (tankers and seaborne craft) to be actually carrying oil in bulk as cargo in order to be characterised as a ship. The Committee noted that in the view of the majority of the judges, in order to fall within the definition of 'ship' it was sufficient for tankers and seaborne craft to have the capability of movement by self-propulsion or by way of towage, as well as the ability to carry oil in bulk as cargo, without it being necessary for the incident to have occurred during the carriage of oil in bulk as cargo, ie during the voyage.

3.5.13 It was noted that five judges had been of the opinion that in order to be regarded a 'ship' as defined in the 1992 Conventions, the craft must have been constructed or adapted for the carriage of oil in bulk as cargo, with an additional condition that if it was a floating storage unit, it must actually be carrying oil in bulk as cargo during the voyage in question or during a voyage immediately following the discharge of that oil, unless it was proven that following such unloading there were no oil residues in the vessel's tanks. The Committee noted that the dissenting judges had also stated that this interpretation resulted from the aim of the International Conventions, which referred to the carriage of oil in bulk as cargo.

3.5.14 The Committee noted that the majority of the judges had held that the Court of Appeal had contravened the substantive law provisions of the 1992 Conventions pertaining to the definition of 'ship'. It was also noted that the majority had held that at the time of the incident, the *Slops* should be regarded a 'ship' as defined in the 1992 Conventions as it had the character of a seaborne craft which, following its modification into a floating separating unit, stored oil products in bulk and, furthermore, it had the ability to move by towing with a consequent pollution risk without it being necessary for the incident to take place during the carriage of the oil in bulk.

3.5.15 It was noted that the Supreme Court, having decided that the 1992 Conventions were applicable to the incident, had held that the Court of Appeal's judgement should be set aside and the case be referred back to that Court to examine the merits of the substance of the dispute, ie the quantum of the claim, etc. It was noted, however, that the minority of the judges had considered that the appeal should be dismissed.

3.5.16 The Committee noted that the Director had requested ITOPF to examine the claim for the cost of clean-up and preventive measures (cf paragraph 3.5.4) and to assess the admissible quantum of the claim.

3.5.17 In response to questions as to whether the 1992 Fund had any further legal remedies such as referring the case to the European Court of Justice, or any alternative dispute settlement procedures, for example in accordance with Article 15 of the United Nations Law of the Sea, the Director stated that it was clear from the 1992 Conventions that the national courts had the final say on such matters and that alternative settlement procedures could only have been followed if all the parties had agreed. The Director further stated that the Fund had tried to impress upon the Supreme Court the importance of considering its decision in the context of the international regime rather than a national context so as to ensure a uniform application of the Conventions.

3.5.18 A number of delegations, whilst expressing their disappointment at the decision by the Supreme Court, expressed the view that one judgement should not deter the Fund from maintaining its policy as regards the interpretation of the 'ship' under the Conventions.

3.5.19 Other delegations considered that the decision by the Greek Supreme Court deserved further consideration, since courts in other Member States faced with the same issue might well refer to the precedent set by the Greek Court.

3.5.20 The point was made by some delegations that the decision by the Supreme Court was consistent with a minority of Member States that had participated in the intersessional Working Group that had been established to study the definition of 'ship' in the Conventions. Those delegations stated that they would not be averse to reconsidering the issue at a later stage, particularly if the Fund were to suffer another similar judgement which went against the Fund's policy.

3.6 *Prestige*

3.6.1 The Executive Committee took note of the information regarding the *Prestige* incident in documents 92FUND/EXC.34/8 presented by the Director and 92FUND/EXC.34/8/1 presented by the Spanish delegation.

AMOUNT AVAILABLE FOR COMPENSATION

3.6.2 It was recalled that the limitation amount applicable to the *Prestige* under the 1992 Civil Liability Convention was approximately 18.9 million SDR or €22 777 986 (£15.4 million) and that on 28 May 2003 the shipowner had deposited this amount with the Criminal Court in Corcubión (Spain) for the purpose of constituting the limitation fund required under the 1992 Civil Liability Convention.

3.6.3 It was also recalled that the maximum amount of compensation available under the 1992 Conventions in respect of this incident, 135 million SDR, corresponded to €171 520 703 (£116 million), including the amount actually paid by the shipowner and his insurer (Article 4.4 of the 1992 Fund Convention).

LEVEL OF PAYMENTS

Consideration in May 2003

3.6.4 It was recalled that at the Executive Committee's 21st session, held in May 2003, it had been decided that the 1992 Fund's payments should be limited to 15% of the loss or damage actually suffered by the respective claimants as assessed by the experts engaged by the 1992 Fund and the London Club (document 92FUND/EXC.21/5).

Consideration in October 2005

3.6.5 It was recalled that at its October 2005 session the Executive Committee had agreed to the Director's proposal as to the increase in the level of payments, the distribution of the amount payable by the 1992 Fund and the provisions of undertakings and guarantees by the Governments of France, Portugal and Spain and had decided as follows (document 92FUND/EXC.30/10, paragraph 3.7.73):

1. The level of the 1992 Fund's payments should be increased from 15% to 30% of the loss or damage actually suffered by the individual claimant as assessed by the experts appointed by the 1992 Fund and the London Club.

2. The amount of €133 840 000, representing the total amount payable by the 1992 Fund, minus a reserve of 10%, should be apportioned between the three States concerned as set out in the following table:

State	Apportionment (%)	Apportionment (amounts) (rounded figures)	Bank Guarantees[3]
Spain	85.90%	€115 000 000	€78 850 000
Portugal	0.55%	€740 000	€510 500
France	13.55%	€18 100 000	-
Total	100.00%	€133 840 000	-

3. The Director was authorised to pay the Spanish Government €57 365 000 (£39 million), subject to the Spanish Government undertaking to compensate all claimants who had suffered pollution damage in Spain for amounts no less than 30% of the loss or damage, repay to the 1992 Fund any amount due by it to the Fund if the Executive Committee were to decide to reduce the proportion payable by the Fund for damage in Spain and provide the 1992 Fund with a bank guarantee to cover the difference between the amount paid to it by the Fund and 15% of the assessed amount.

4. The Director was authorised to pay the Portuguese Government €740 000 (£509 000), subject to the Portuguese Government undertaking to repay to the 1992 Fund any amount due by it to the Fund if the Executive Committee were to decide to reduce the proportion payable by the Fund for damage in Portugal, to indemnify the Fund for any amounts that it had paid to other claimants for pollution damage in Portugal and to provide the 1992 Fund with a bank guarantee to cover the difference between the amount paid to it by the Fund and 15% of the assessed amount.

5. The Director was authorised to pay each claimant in France, except the French Government, 30% of the loss or damage as assessed by the 1992 Fund or as decided by a final judgement rendered by a competent court, subject to the French Government undertaking to accept a reduction in the compensation to which it would be entitled, up to the amount of its admissible claim, to protect the 1992 Fund against overpayment to claimants having suffered damage in France, if the Executive Committee were to decide to reduce the level of payments.

6. The bank guarantees to be provided by the Portuguese and Spanish Governments should be given by a financial institution which would have the financial standing laid down in the 1992 Fund's Internal Investment Guidelines and fulfil the other criteria and generally be to the satisfaction of the Director.

Developments after the October 2005 session

3.6.6 It was recalled that in December 2005 the Portuguese Government had informed the 1992 Fund that it would not provide any bank guarantee and would as a consequence only request payment of 15% of the assessed amount of its claim.

3.6.7 It was also recalled that in January 2006 the French Government had given the required undertaking in respect of its own claim.

3.6.8 The Committee recalled that in March 2006 the Spanish Government had given the required undertaking and bank guarantee, and that as a consequence a payment of €56 365 000 (£38.5 million) had been made to the Spanish Government in March 2006. It was recalled that, as requested by the Spanish Government, the 1992 Fund had retained €1 million in order to make payments at the level of 30% of the assessed amounts in respect of the individual claims that had been submitted to the Claims Handling Office in Spain, that these payments would be

[3] The amounts of the bank guarantees correspond to the differences between the apportioned amounts and 15% of the assessed amounts, ie Spain €115 000 000 - €36 150 000 (€241 million at 15%) = €78 850 000; Portugal €740 000 - €229 500 (€1 530 000 at 15%) = €510 500.

made on behalf of the Spanish Government in compliance with its undertaking, and that any amount left after paying all the claimants in the Claims Handling Office would be returned to the Spanish Government. It was also recalled that if the amount of €1 million were to be insufficient to pay all the claimants who had submitted claims to the Claims Handling Office, the Spanish Government had undertaken to make payments to these claimants up to 30% of the amount assessed by the London Club and the 1992 Fund.

3.6.9 The Committee recalled that since the conditions required had been met, the Director had increased the level of payments to 30% of the established claims for damage in Spain and in France (except in respect of the French Government's claim), with effect from 5 April 2006.

CLAIMS FOR COMPENSATION

Spain

3.6.10 It was noted that the Claims Handling Office in La Coruña had received 838 claims totalling €613 million (£415 million), including nine claims from the Spanish Government totalling €560 million (£379 million) submitted during the period October 2003 – August 2006. It was recalled that in September 2005 a group of 58 associations from Galicia, Asturias and Cantabria representing 13 600 fishermen and shellfish harvesters had withdrawn a claim for €132 million (£89 million) against the 1992 Fund, since the associations had signed settlement agreements with the Spanish State on behalf of the victims and that a number of other claimants who had settled with the Spanish Government under the Royal Decrees referred to in paragraph 3.6.26 had also withdrawn their claims.

3.6.11 The Committee recalled that the claims by the Spanish Government related to costs incurred in respect of at sea and onshore clean-up operations, removal of the oil from the wreck, compensation payments to fishermen and shellfish harvesters, tax relief for businesses affected by the spill, administration costs, costs relating to publicity campaigns and costs incurred by local authorities and paid by the Government. It was recalled that the claims originally included items for the cost of clean-up operations in the Atlantic National Park amounting to €11.9 million (£8.1 million) but that these items had been withdrawn since funding for these operations had been obtained from another source. It was also recalled that the claim for the removal of the oil from the wreck, initially for €109 million (£74 million), had been reduced to €24 million (£16.3 million) to take account of funding obtained from another source.

3.6.12 It was recalled that the first claim received from the Spanish Government in October 2003 for €383.7 million (£260 million) had been assessed on an interim basis by the Director in December 2003 at €107 million (£72.5 million), and that the 1992 Fund had made a payment of €16 050 000 (£11.1 million), corresponding to 15% of the interim assessment. The Committee recalled that the Director had also made a general assessment of the total of the admissible damage in Spain, concluding that the admissible damage would be at least €303 million (£205 million) and that on that basis, and as authorised by the Assembly, the Director had made an additional payment of €41 505 000 (£28.5 million), corresponding to the difference between 15% of €383.7 million or €57 555 000 and 15% of the preliminarily assessed amount of the Government's claim, €16 050 000. It was recalled that that payment had been made against the provision by the Spanish Government of a bank guarantee covering the above-mentioned difference (ie €41 505 000) from the Instituto de Credito Oficial, a Spanish bank with high standing in the financial market, and an undertaking by the Spanish Government to repay any amount of the payment decided by the Executive Committee or the Assembly.

3.6.13 It was recalled that since December 2003, a number of meetings had been held with representatives of the Spanish Government. It was noted that a considerable amount of further information had been provided in support of its claims, that cooperation with representatives of the Spanish Government was continuing and that progress was being made on the assessment of all the claims submitted by the Government.

3.6.14 It was noted that of the other claims submitted 72.5% had been assessed, that many of the remaining claims lacked sufficient supporting documentation and that further documentation had been requested from the claimants. It was also noted that 507 of these other claims, totalling €37.1 million (£25 million), had been approved for €3.4 million (£2.3 million) and that interim payments totalling €470 567 (£300 000) had been made in respect of 242 of the assessed claims[<4>], mainly at 30% of the assessed amount. The Committee noted that the remaining approved claims awaited a response from the claimants or were being reassessed following claimants' disagreements with the assessed amounts. It was also noted that 157 claims totalling €23.7 million (£16 million) had been rejected, the majority because the claimant had not demonstrated that a loss had been suffered.

3.6.15 It was recalled that at the Executive Committee's May 2004 session the Spanish delegation had stated that 67 towns had requested compensation totalling €37.6 million (£25.4 million) and that the four affected regions had estimated their damage at €150 million (£102 million). The Committee noted that in August 2006, the Spanish Government had submitted to the Claims Handling Office a claim for the costs incurred by the 67 towns that had been paid by the Government, 51 in Galicia, 14 in Asturias and two in Cantabria, for a total of €5.8 million (£3.9 million) and that the 1992 Fund's experts were examining the claim.

3.6.16 The Committee also noted that in May 2006 the Spanish Government had submitted to the 1992 Fund a claim for the costs incurred in the payment of the claims assessed by the Consorcio de Compensación de Seguros (Consorcio)[<5>] (cf paragraphs 3.6.29 – 3.6.30).

3.6.17 The Spanish delegation stated that claims had recently been submitted to the 1992 Fund's Claims Handling Office in La Coruña for payments to the regions of Galicia and Asturias, for €28 million (£19 million) and €3.3 million (£2.2 million) respectively.

3.6.18 That delegation also stated that, based on an examination and analysis of the documentation already submitted for the costs of cleaning and recuperation of the shore, and the submission of the new claim in respect of the payments by the Spanish Government to the regions of Galicia and Asturias, which also included costs of cleaning and recuperation of the shore, and the approval of other sources of funding, it had been necessary to adjust the initial claim under those headings. The Spanish delegation also stated that after the adjustments indicated above, the claim for the work of cleaning and recuperation of the shore, including the payments to the regions of Galicia and Asturias, had been reduced by €19 million (£12.8 million) and that consequently, the total figure for the Spanish claims was now €559.8 million (£379 million) excluding the following outstanding matters: the payments by the Spanish Government to the other regions affected by the *Prestige* incident (Cantabria and the Basque Country), the treatment of residues and the individual assessments by the Consorcio.

France

3.6.19 The Committee noted that 472 claims totalling €118.4 million (£80.2 million) had been received by the Claims Handling Office in Bordeaux, that 82% of the claims had been assessed and that many of the remaining claims lacked sufficient supporting documentation, which had been requested from the claimants. It was noted that 391 claims had been assessed at €45 million (£30.5 million), that 384 claims had been approved for €44.5 million (£30 million) and that interim payments totalling €2.4 million (£1.6 million) had been made at 30% of the assessed amounts in respect of 238 of the approved claims. It was noted that the remaining approved claims awaited a response from the claimants or were being re-examined following the claimants' disagreement with the assessed amount. It was also noted that 44 claims totalling

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<4> Compensation payments made by the Spanish Government to claimants have been deducted when calculating the interim payments.

<5> A state-owned insurance organisation set up to pay claims for damage not normally covered by commercial insurance policies, such as damage due to terrorist activities or natural disasters.

€2.1 million (£1.4 million) had been rejected because the claimants had not demonstrated that a loss had been suffered due to the incident.

3.6.20 It was recalled that 121 claims had been submitted by oyster farmers totalling €1.6 million (£1.1 million) for losses allegedly suffered as a result of market resistance due to the pollution. It was noted that the experts engaged by the London Club and the 1992 Fund had examined these claims, that 117 of them, totalling €1.1 million (£750 000), had been assessed at €394 595 (£267 000) and that payments totalling €65 847 (£44 600) had been made in respect of 109 of these claims at 30% of the assessed amounts. It was also noted that four claims were not supported by any documentation and that requests had been made to these claimants to provide detailed information to support their claims.

3.6.21 The Committee noted that the Claims Handling Office had received 194 tourism-related claims totalling €25.2 million (£17.1 million), that 163 of these claims had been assessed at a total of €8.8 million (£6 million), that 158 had been approved for €8.6 million (£5.8 million) and that interim payments totalling €1.8 million (£1.2 million) had been made at 30% of the assessed amounts in respect of 93 claims.

3.6.22 It was recalled that in May 2004, the French Government had submitted a claim for €67.5 million (£45.7 million) in relation to the costs incurred for clean-up and preventive measures and that the 1992 Fund and the London Club had provisionally assessed the claim at €31.2 million (£21.1 million). The Committee recalled that a request for further information had been sent to the French Government in August 2005 in order to enable the experts appointed by the 1992 Fund and the London Club to complete the assessment, that such information and further supporting documentation had been received in February 2006, and that the Fund's experts were carrying out a detailed assessment of the claim.

3.6.23 It was also recalled that a further 57 claims, totalling €10.5 million (£7.1 million), had been submitted by local authorities for costs of clean-up operations, that 26 of these claims had been assessed and approved at €3.4 million (£2.3 million) and that interim payments totalling €303 891 (£200 000) had been made in respect of 21 claims at 30% of the assessed amounts.

Portugal

3.6.24 The Committee recalled that in December 2003 the Portuguese Government had submitted a claim for €3.3 million (£2.2 million) in respect of the costs incurred in clean-up and preventive measures, that in February 2005 the Portuguese Government had provided the 1992 Fund with additional documentation in support of its claim and that the additional documentation included a supplementary claim for €1 million (£680 000), also in respect of clean-up and preventive measures. It was recalled that the claims had been finally assessed at €2.2 million (£1.5 million). The Committee noted that the Portuguese Government had accepted this assessment, and that since the Government had decided not to submit a bank guarantee (cf paragraph 3.6.6 above), the 1992 Fund had made a payment to the Government of €328 488 (£222 600) in August 2006 corresponding to 15% of the final assessment, but that this did not preclude the payment of further compensation to the Portuguese Government in the event that the Executive Committee were to increase the level of payments unconditionally.

PAYMENTS AND OTHER FINANCIAL ASSISTANCE BY THE SPANISH AUTHORITIES

3.6.25 It was recalled that the Spanish Government and regional authorities had made payments of €40 (£27) per day to all those directly affected by the fishing bans, including shellfish harvesters, inshore fishermen and associated onshore workers with a high dependency on the closed fisheries, such as fish vendors, fishing net repairers and employees of fishing co-operatives, fish markets and ice factories. It was further recalled that some of these payments had been included in subrogated claims by the Spanish authorities pursuant to Article 9.3 of the 1992 Fund Convention. It was also recalled that the Spanish Government had provided aid to

other individuals and businesses affected by the oil spill in the form of loans, tax relief and waivers of social security payments.

3.6.26 It was recalled that in June 2003 and July 2004 the Spanish Government had adopted legislation in the form of two Royal Decrees (Real Decreto-Ley) making available a total amount of €249.5 million (£172 million) to compensate in full certain categories of victims of the pollution and that to receive compensation the claimants had to renounce the right to claim compensation in any other way in relation to the *Prestige* incident and to transfer their rights of compensation to the Spanish Government. It was also recalled that the Decrees had provided that the assessment of claims would be made following the criteria used to apply the 1992 Civil Liability and Fund Conventions.

3.6.27 It was recalled that at the February 2004 session of the Executive Committee the Spanish delegation had informed the Committee that the Spanish Government had received almost 29 000 claims for compensation from victims of the *Prestige* incident who wished to use the payment mechanism set out in the first Royal Decree, of which some 22 800 related to groups of workers in the fisheries sector, which would be assessed by means of a system using either a formula or scale ('estimación objetiva') and that some 5 000 claims of other groups would be subject to individual assessments.

3.6.28 It was also recalled that in May 2005 the Spanish Government had informed the 1992 Fund that agreements had been reached with some 19 500 workers in the fisheries sector and that payments totalling some €88 million (£60.5 million) had been made to them under the Royal Decrees.

3.6.29 It was recalled that the 1992 Fund had been informed by the Spanish Government in 2004 that claims, which under the Decrees would be subject to individual assessment, would be assessed by the Consorcio. It was noted that as at 15 September 2006, 971 claims totalling €230 million (£156 million) had been received by the Consorcio. The Committee recalled that since the Royal Decrees provided that the assessment of claims would be made following the criteria used to apply the 1992 Civil Liability and Fund Conventions, meetings had been held between representatives of the Consorcio and of the 1992 Fund to discuss the criteria.

3.6.30 The Committee recalled that the Consorcio had requested the assistance of the experts appointed by the London Club and the 1992 Fund in the assessment of 241 of these claims for a total of €47.8 million (£32 million). It was recalled that a number of the claims that had been referred to these experts were not supported by sufficient evidence to demonstrate the loss claimed and that the Consorcio had requested further evidence and information from the claimants. It was noted that the experts of the Consorcio and the experts appointed by the London Club and the 1992 Fund had made joint assessments of 194 claims, 187 of which, for €20.3 million (£13.8 million), had been approved by the 1992 Fund and the London Club for €2.4 million (£1.6 million). It was noted that 134 claims, included in the 241 claims which the Consorcio had requested assistance with, had also been submitted directly to the Claims Handling Office and that details of the assessments of 83 of these claims had been provided to the Consorcio.

3.6.31 It was recalled that at the Executive Committee's May 2006 session the Spanish delegation had informed the Committee that 381 of the claims assessed by the Consorcio had been rejected due to lack of supporting documentation or lack of evidence of the loss and that, from the assessment of 90% of the claims examined through this procedure, it could be deduced that the maximum amount to be paid by the Spanish Government in respect of these claims would be some €50 million (£34 million).

PAYMENTS AND OTHER FINANCIAL ASSISTANCE BY THE FRENCH AUTHORITIES

3.6.32 The Committee recalled that the French Government had introduced a scheme to provide payments in excess of the amounts paid by the 1992 Fund to claimants in the fishery and shellfish harvesting sectors who had made a request to that effect by 13 December 2004 and that payments had been made in January 2005 to 175 claimants for a total amount of €1.15 million (£780 000).

3.6.33 It was recalled that the French Government had informed the Director that these payments were advances on the payments to be made by the 1992 Fund and were to be repaid by the claimants and that the Government would not pursue subrogated claims against the 1992 Fund in respect of the payments made.

INVESTIGATIONS INTO THE CAUSE OF THE INCIDENT

3.6.34 The Committee recalled that investigations into the cause of the incident had been carried out by the Bahamas Maritime Authority (ie the authority of the Flag State) (document 92FUND/EXC.28/5, paragraphs 13.1.1 – 13.1.7), the Spanish Ministry of Public Works (Ministerio de Fomento) (document 92FUND/EXC.29/4, paragraphs 13.2.1 – 13.2.5) and the French Ministry of Transport and the Sea (document 92FUND/EXC.29/4, paragraphs 13.4.1 -13.4.10).

3.6.35 It was recalled that the Criminal Court in Corcubión in Spain was carrying out an investigation into the cause of the incident in the context of criminal proceedings. It was in particular recalled that the Court was investigating the role of the master of the *Prestige*, of a civil servant who had been involved in the decision not to allow the ship into a port of refuge in Spain and of a manager of the ship's management company.

3.6.36 It was also recalled that an examining magistrate in Brest was carrying out a criminal investigation into the cause of the incident.

3.6.37 The Committee noted that the 1992 Fund continued to follow the ongoing investigations through its Spanish and French lawyers.

COURT ACTIONS

Spain

3.6.38 The Committee noted that some 2 360 claims had been lodged in the legal proceedings before the Criminal Court in Corcubión (Spain) and that 378 of these claims involved persons who had submitted claims directly to the London Club and 1992 Fund through the Claims Handling Office in La Coruña. It also noted that details of the losses allegedly suffered in respect of some of these court actions had been provided to the Court and were being examined by the experts engaged by the London Club and the 1992 Fund. It was recalled that in September 2005, the largest group of victims in the fisheries, shellfish harvesting and fish-farming sector had submitted a document to the Instructing Magistrate in Corcubión in which it was stated that the group members had signed settlement agreements with the Spanish State, and that in accordance with those agreements, any action or compensation to which these victims could be entitled as a result of the *Prestige* incident, against the Spanish State as well as against the 1992 Fund, were withdrawn. It was also recalled that the withdrawal affected some 13 700 persons, covering approximately 75% of the fisheries sector affected by the *Prestige* incident. It was further recalled that a number of other claimants who had settled with the Spanish Government under the Royal Decrees had withdrawn their claims from the court proceedings.

3.6.39 It was recalled that the Spanish Government had taken legal action in the Criminal Court in Corcubión on its own behalf and on behalf of regional and local authorities as well as on behalf of 971 other claimants or groups of claimants. The Committee noted that a number of other

claimants had also taken legal actions and that the Court was assessing whether these claimants were eligible to join the proceedings.

France

3.6.40 The Committee noted that the French Government and 224 other claimants had taken legal action against the shipowner, the London Club and the 1992 Fund in 15 courts in France requesting compensation totalling some €130 million (£88 million), including €67.7 million (£45.9 million) claimed by the Government.

3.6.41 It was noted that in March 2003 two oyster farmers unions and an association had brought an action, included in the actions referred in paragraph 3.6.40, against the shipowner, the London Club, the owner of the cargo/charterer of the vessel, the Spanish State, the American Bureau of Shipping (ABS), the classification society of the *Prestige* and Bureau Veritas, the classification society that had certified the *Prestige* before ABS and that in June 2006 the Fund had been joined in the proceedings as a defendant.

Portugal

3.6.42 The Committee noted that the Portuguese State had taken legal action in the Maritime Court in Lisbon against the shipowner, the London Club and the 1992 Fund claiming compensation for €4.3 million (£2.9 million) but that following the settlement of the claim referred to in paragraph 3.6.24, the Portuguese State had applied to the court for the action to be withdrawn.

United States

3.6.43 The Committee recalled that the Spanish State had taken legal action against ABS before the Federal Court of first instance in New York requesting compensation for all damage caused by the incident, estimated initially to exceed US$700 million (£374 million) and estimated later to exceed US$1 000 million (£534 million), and that the Spanish State had maintained, *inter alia*, that ABS had been negligent in the inspection of the *Prestige* and had failed to detect corrosion, permanent deformation, defective materials and fatigue in the vessel and had been negligent in granting classification.

3.6.44 It was recalled that ABS had denied the allegation made by the Spanish State and had in its turn taken action against the State, arguing that if the State had suffered damage this was caused in whole or in part by its own negligence. It was also recalled that ABS had made a counterclaim requesting that the State be ordered to indemnify ABS for any amount that ABS might be obliged to pay pursuant to any judgement against it in relation to the *Prestige* incident. The Committee recalled that the New York Court had dismissed the counterclaim by ABS on the ground that the Spanish State was entitled to sovereign immunity and that ABS had sought reconsideration by the Court or permission to appeal.

3.6.45 The Committee recalled that in August 2005 ABS had submitted a request to the New York Court for a summary judgement dismissing the Spanish State's action, arguing that it was an agent or servant of the shipowner and that therefore in accordance with Article III.4(a) of the 1992 Civil Liability Convention no claim for compensation for pollution damage could be made against it unless the damage resulted from ABS's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. It recalled that ABS had also maintained that since the United States was not a Contracting State to the Civil Liability Convention and the pollution damage had occurred in Spain, the United States Courts were not competent to hear the case. It was noted that the Court had not yet taken a decision on the request.

3.6.46 The Committee noted that in July 2006 the New York Court had confirmed its decision on the Spanish State's entitlement to sovereign immunity, but had granted ABS permission to resubmit

its counterclaim on different grounds. It noted that the Court had stated that the protection of foreign states from suit was subject to certain exceptions, mainly that a foreign state would be susceptible to a counterclaim if that claim arose out of the same transaction that was the subject matter of the claim by the foreign state or to the extent that the counterclaim did not seek relief exceeding in amount or differing in kind from that sought by the foreign state. It was noted that the Court had also stated that although both sets of claims related to the *Prestige* incident, they did not arise from the same transaction; whereas ABS's claim was based on the alleged duties of the Spanish State in connection with vessels in distress, the Spanish State's claim was based on ABS's deviation from the proper practices of classification societies.

3.6.47 It was noted that in July 2006 ABS had resubmitted its counterclaim requesting that ABS should be indemnified by the Spanish State in the event that any third party obtained a judgement against ABS as a result of the incident, but that in September 2006 the Spanish State had requested that the ABS counterclaim should be dismissed on the grounds of the Court's lack of jurisdiction on the matter. The Committee noted that the New York Court had not yet taken any decision in respect of this request.

3.6.48 The Committee recalled that as part of the discovery procedure in the New York litigation, ABS had requested production by the Spanish State of all documents and material forming part of the file of the Criminal Court in Corcubión investigating the *Prestige* incident, as well as all the documents and material reviewed by the Spanish Permanent Commission for the Investigation of Maritime Accidents. It was recalled that the Spanish State had responded, asserting that the requested documents and material were protected from disclosure by privilege under Spanish procedural law. It was also recalled that ABS had opposed the assertion of privilege and that in a decision rendered in August 2005, after having taken into account the various competing interests involved, the judge supervising discovery had denied the Spanish State's assertion of privilege, ordering the production of the documents. It was further recalled that the judge had then denied Spain's request for reconsideration and that the Spanish State had appealed against this decision.

3.6.49 It was recalled that in September 2005, the Spanish State had submitted a petition to the Criminal Court in Corcubión maintaining that these documents and material were privileged under Spanish procedural law and could not be provided to ABS and had requested the Criminal Court to take a decision on this issue. It was also recalled that in a decision rendered in September 2005, the Court had decided that these documents and material were privileged to the parties who had joined in the criminal proceedings and should therefore not be made available to ABS.

3.6.50 The Committee noted that in a decision rendered in August 2006, the New York Court had rejected the appeal by the Spanish State, considering that both parties to the proceedings should have access to the same material and that failure by the Spanish State to make the documents and material requested available to ABS would place ABS in a situation of unfair disadvantage in that it would affect ABS's right of defence. It also noted that the Court had ordered the Spanish State to produce the documents and material by 30 September 2006.

3.6.51 It was noted that the Spanish State had reviewed its position and that in August 2006 it had submitted a request to the Court in Corcubión to be authorised to disclose to ABS the documents and material referred to in paragraph 3.6.48. It was noted that reference had been made to the fact that the decision of the New York Court was final and not subject to appeal. It was also noted that the Spanish State had argued that the decisions by the New York Court and the Corcubión Court had placed the Spanish State in a difficult position in that a New York Court had ordered the State to do something, namely to disclose all documents in the Corcubión Court file, and the Court in Corcubión had ordered the State to do the contrary, namely not to disclose those documents. It was also noted that the point had been made that a State was represented by civil servants, who had the obligation to comply with all court decisions. It was further noted that the Spanish State had mentioned that a confidentiality agreement had been

concluded between the State and ABS in respect of any documents and material disclosed. The Committee noted that the Spanish State had further argued that if the documents and materials requested were not made available, it would damage the Spanish State's position before the New York Court.

3.6.52 The Spanish delegation confirmed that in a decision rendered in September 2006 the Court of Corcubión had authorised the disclosure of all the documentation relevant to the *Prestige* incident case to the New York Court.

3.6.53 The Committee recalled that regional authorities of the Basque Region (Spain) had taken legal action against ABS in the Federal Court of first instance in Houston, Texas, claiming compensation for clean-up costs and payments made to individuals and businesses for US$50 million (£26.7 million) and arguing, *inter alia*, that ABS had been in breach of its duty to inspect the *Prestige* adequately and had classified the vessel as seaworthy when it was not. It was recalled that this legal action had been transferred to the New York Court dealing with the claim by the Spanish State.

3.6.54 It was noted that as a result of a settlement with the Spanish State the Basque Region had requested the Court to dismiss its action without prejudice, in order to protect its right to pursue a further action for indirect damages that could be caused by the *Prestige* incident and that had not been compensated through the settlement agreement with the Spanish Government. It was noted, however, that in August 2006 the New York Court had dismissed the action by the Basque Region with prejudice and that therefore the Basque Region would not be able to pursue future actions against ABS in the United States in relation to the *Prestige* incident.

3.6.55 It was noted that in June 2006 the Spanish State had submitted a request to the New York Court that the Court should order ABS to produce financial records, arguing that these records would demonstrate that ABS had diverted revenue and resources, and that, as a result, ABS had not adequately addressed surveyor training and staffing deficiencies. It was noted that ABS had maintained that the financial records were not relevant at the liability stage of the litigation.

3.6.56 The Committee noted that the New York Court had denied the Spanish State's request, stating that the financial records were not relevant to the issue of whether or not there were deficiencies in ABS's performance in respect of the *Prestige*, that the litigation in question concerned the design, construction, operation, maintenance and inspection of the *Prestige* and that discovery in this case should be limited to records containing information relating to the allegations in the complaint and the circumstances surrounding the *Prestige* incident. It was noted that the Spanish State had not appealed against this decision.

3.6.57 The Director was instructed to continue to follow the ongoing litigation in the United States, monitor the ongoing investigations into the cause of the incident and take any steps necessary to protect the 1992 Fund's interests in any relevant jurisdiction.

3.7 *N°7 Kwang Min*

3.7.1 The Executive Committee took note of the developments regarding the *N°7 Kwang Min* incident as set out in document 92FUND/EXC.34/9.

Claims for compensation

3.7.2 The Committee noted that 12 claims totalling Won 2.7 billion (£1.9 million) in respect of costs of clean-up and preventive measures had been settled for Won 1.9 billion (£1.1 million), that one claim had been rejected and that there were no further claims for clean-up costs.

3.7.3 It was recalled that the owners of six live seafood restaurants located in the polluted area had submitted claims totalling Won 163 million (£95 000) for alleged mortalities of fish as a result of oil entering their aquaria via submerged seawater intakes, for loss of earnings as a result of

cancellations of bookings and other unspecified damages and that the claims had been settled at Won 3.1 million (£1 860).

3.7.4 It was noted that claims totalling Won 154 million (£90 000) by 81 women divers for loss of earnings due to interruption of their shellfish harvesting and sales activities had been settled for Won 36 million (£20 000). It was also noted that further fishery claims totalling Won 93 million (£82 000) by ten boat owners had been settled at Won 51 million (£28 000).

3.7.5 It was also noted that claims by nine seaweed (sea mustard) culturists totalling Won 371 million (£327 000) for property damage and production disruption had been assessed at Won 42 million (£37 000) and that one claim had been rejected. The Committee noted that six of the claimants had settled their claims for Won 22 million (£12 000). It was noted, however, that two claimants who had initially agreed with the assessed amount, at a later stage had refused to accept the proposed settlement and had commenced legal actions against the owners of the two vessels involved in the incident.

Legal actions

3.7.6 The Committee noted that the results of the investigation into the cause of the incident by the Busan Maritime Safety Tribunal had concluded that the liability ratio between the owner of the *Nº7 Kwang Min* and the owner of the fishing vessel *Chil Yang Nº1* was 40:60.

3.7.7 It was noted that upon investigations by the Fund's Korean lawyer into the financial status of the owner of the fishing vessel *Chil Yang Nº1* it had emerged that he owned a building, the value of which was unknown, but that it was estimated to exceed the limitation amount applicable to the vessel under the Korean Commercial Code, ie 83 000 SDR (£65 000).

3.7.8 It was noted that the two seaweed culturists referred to in paragraph 3.7.5 had commenced legal actions against the owners of the two vessels involved in the incident.

3.7.9 The Committee noted that the 1992 Fund had intervened as an independent party in these legal actions against the owners of the two vessels with a view to recovering the sums paid in compensation for this incident.

3.7.10 The Korean delegation thanked the Secretariat for the document and for the way in which it had handled the incident. That delegation considered that it was highly appropriate for the Fund to intervene in the legal proceedings against the owner of the other vessel.

3.8 *Al Jaziah 1*

3.8.1 The Executive Committee took note of the information contained in document 92FUND/EXC.34/10 (cf document 71FUND/AC.20/13/2) concerning the *Al Jaziah 1* incident which had occurred in the United Arab Emirates (UAE) and which involved both the 1992 and the 1971 Funds.

3.8.2 It was recalled that the *Al Jaziah 1* had not been covered by any liability insurance, that claims totalling £1.1 million had been submitted to the Funds in relation to clean-up and pollution prevention and that these claims had been settled at £920 000 and had been paid by the Funds. The Committee recalled that the Funds would not be required to make any further compensation payments.

3.8.3 It was recalled that, at their October 2002 sessions, the governing bodies of the 1992 and 1971 Funds had decided that the Funds should pursue recourse action against the shipowner (document 92FUND/EXC.18/14, paragraph 3.5.9, cf document 71FUND/AC.9/20, paragraph 15.10.10).

3.8.4 The Executive Committee recalled that the Funds had commenced legal action in the Abu Dhabi Court of first instance against the shipowning company and its sole proprietor in January 2003, requesting that the defendants be ordered to pay Dhs 6.4 million (£920 000) to the Funds, the amount to be distributed equally between the 1992 Fund and the 1971 Fund.

3.8.5 It was recalled that in November 2003 the Abu Dhabi Court of first instance had issued a preliminary judgement appointing an expert to investigate the nature of the incident and the payments made by the Funds. It was also recalled that the Funds and their lawyers had met with the expert on two occasions and had provided supplementary information as requested by the expert.

3.8.6 The Committee recalled that in August 2005, the Funds' lawyers in the UAE had reported that the expert had informed the Court that he could not complete his report due to other commitments. It was also noted that in September 2005 the Court had appointed a new expert and that in October 2005 the Funds and their lawyers had met with him and provided all the information requested by him in order for him to be able to complete his report.

3.8.7 The Committee noted that the expert had submitted his report to the Court in July 2006 and that the expert's report had confirmed the following:

- The incident had caused pollution damage to various parties within the Emirate of Abu Dhabi.
- The Funds had paid a total of Dhs 6.4 million (£920 000) in compensation to those affected by the pollution.
- The ship had not been registered as an oil tanker and its insurance policies had expired.
- The shipowner was liable for the damage caused by the incident.

3.8.8 It was noted that the expert had appeared to suggest that the Funds had paid claims without scrutinising them. It was also noted that the expert had made the point that there was gross negligence on the part of the UAE authorities in permitting the ship, which was not a tanker, to load a cargo of oil and allowing it to depart in inclement weather. It was noted that the expert had suggested that the lack of appropriate legislation in the UAE dealing with the licensing authority and loading facilities had contributed directly to the incident. It was further noted that the expert had concluded that considering the lack of such legislation, the UAE authorities should be partly liable for paying compensation for the damage arising from this incident.

3.8.9 The Committee noted that in September 2006 the Funds had submitted a memorandum to the Court which set out their comments on the expert's report. The Committee also noted that the Funds had agreed with the main conclusions reached by the expert set out in paragraph 3.8.7 above.

3.8.10 It was noted that in the memorandum, the Funds had commented on the expert's view in relation to the payments made to claimants. It was further noted that the Funds had explained that all claims had been assessed on the basis of the admissibility criteria established by the Funds' Member States. It was also noted that the Funds had stated that the expert's opinion that the UAE authorities should be partly liable for this incident was incorrect since under the Conventions the shipowner had strict liability. It was noted that the Funds had therefore requested the Court to hold the shipowner solely liable for the damage arising from this incident and to order the sole proprietor of the shipowning entity to pay the Funds Dhs 6.4 million (£920 000).

3.8.11 It was noted that at a hearing in October 2006 the shipowner had submitted a memorandum to the Court setting out his comments on the expert's report. It was also noted that the next

hearing was scheduled for 29 November 2006 when it was expected that the Court would render its final judgement.

3.9 *Solar 1*

3.9.1 The Executive Committee took note of the information regarding the *Solar 1* incident as set out in documents 92FUND/EXC.34/11 and 92FUND/EXC.34/11/Add.1.

The incident

3.9.2 The Committee noted that on 11 August 2006 the Philippines registered tanker *Solar 1*, (998 GT), laden with a cargo of 2 081 tonnes of industrial fuel oil, had sunk in heavy weather in the Guimaras Straits, some ten nautical miles south of Guimaras Island, Republic of Philippines.

3.9.3 It was noted that an unknown, but substantial quantity of oil had been released from the vessel after it had sunk and that the sunken wreck continued to release oil, albeit in ever decreasing quantities. It was also noted that the Philippines National Mapping and Resource Information Authority (NAMRIA) had undertaken a bathymetric survey of the area of the sinking, and had located the vessel in 630 metres of water, almost immediately below the location of surfacing oil.

3.9.4 The Committee noted that the *Solar 1* was entered with the Shipowners' Mutual Protection and Indemnity Association (Luxembourg) (Shipowners' Club). It was noted that the Shipowners' Club and the 1992 Fund had jointly requested experts from the International Tanker Owners Pollution Federation Limited (ITOPF) to travel to the Philippines.

3.9.5 It was also noted that the 1992 Fund had engaged a lawyer in the Philippines to assist it in dealing with any legal issues which may arise from the incident.

The 1992 Conventions and STOPIA 2006

3.9.6 The Committee noted that the Republic of the Philippines was a party to the 1992 Civil Liability and Fund Conventions. It was noted that the limitation amount applicable to the *Solar 1* in accordance with the 1992 Civil Liability Convention was 4.51 million SDR (£3.6 million) but that the owner of the *Solar 1* was a party to the Small Tanker Oil Pollution Indemnification Agreement 2006 (STOPIA 2006) whereby the limitation amount applicable to the tanker under that Convention was increased, on a voluntary basis, to 20 million SDR (£15.8 million). It was noted, however, that the 1992 Fund continued to be liable to compensate claimants if and to the extent that the total amount of admissible claims exceeded the limitation amount applicable to the *Solar 1* under the Convention. It was noted that the 1992 Fund had legally enforceable rights of indemnification from the shipowner of the difference between the limitation amount applicable to the tanker under the 1992 Civil Liability Convention and the total amount of admissible claims or 20 million SDR (£15.8 million), whichever is the less.

3.9.7 The Committee noted that it had been agreed between the Director and the Shipowners' Club that the 1992 Fund should assume responsibility for compensation payments once the Club had paid compensation up to the limitation amount applicable to the *Solar 1* under the 1992 Civil Liability Convention and that the 1992 Fund would then seek regular reimbursements from the Club up to the STOPIA limit, payments to be made by the Club within two weeks of being invoiced by the Fund. It was noted that if this procedure was followed it should not be necessary for the Fund to levy contributions unless the total amount of admissible claims exceeded the STOPIA 2006 limit.

Clean-up operations

3.9.8 It was noted that the Philippine Coast Guard, as the lead government agency for spill response in the Philippines, had taken overall control of the clean-up operations. It was noted that the at sea response had focused on the application of chemical dispersants to the freshly released oil using a light aircraft and vessels. It was also noted that the shipowner had entered into agreements with three commercial contractors to provide tugs and response equipment, including the light aircraft.

3.9.9 It was noted that attempts had been made to protect some sensitive sites using commercial booms and home made booms constructed from wire netting and indigenous materials such as banana leaves and coconut husks.

3.9.10 It was noted that Petron Corporation, the charterer of the *Solar 1*, had assumed the responsibility for organising and managing the shoreline clean-up, which had been largely undertaken by residents of affected villages recruited by Petron under a 'cash for work' programme. It was also noted that around 1 500 individual residents had participated in the shoreline clean-up at the height of the response and that by 29 September 2006 a total of some 36 000 man-days had been expended in these operations.

3.9.11 It was noted that shoreline clean-up had been undertaken using predominantly manual methods. It was also noted that by 29 September 2006 approximately 1 800 tonnes of oily waste had been generated through shoreline cleaning and that the waste had been collected from various sites for eventual transportation to a cement factory where it would be used as an alternative fuel and raw material in the production of cement.

Impact of the spill

3.9.12 The Committee noted that the Guimaras Straits contained a group of islands, the shorelines of which included sandy beaches, rocky shores, coral reefs, seagrass beds and mangroves and that the south-west coast of Guimaras Island contained a national marine reserve and an aquaculture research centre. It was noted that the area supported an important small-scale fishery, that coastal and onshore aquaculture were widespread and that the area also supported a modest tourism industry.

3.9.13 It was noted that about 124 km of shoreline and around 500 hectares of mangrove had been polluted to varying degrees. The Committee noted that the Department of Environment and Natural Resources (DENR) and researchers from the University of the Philippines in Visayas had embarked on a study of the short and long-term effects of the oil on the mangrove trees and that ITOPF experts had been advising them on the types of studies that would meet the 1992 Fund's admissibility criteria.

3.9.14 It was noted that the oil spill had had a major impact on small scale fisheries on the Guimaras Island and that around 2 000 individuals engaged in fishing had been directly affected by the pollution either as a result of contamination of their fishing gear or the presence of oil in their fishing grounds. It was also noted that a further 2 000 individuals engaged in fishing off parts of the island that were not polluted had reported difficulties in selling their catch due to public perception that all fish from Guimaras Island might be tainted. The Committee noted that those people in the fishing community who had participated in the shoreline clean-up operations and had received regular payments from Petron Corporation, had not suffered serious financial hardship, but that if fishing were not to be resumed soon after the clean-up operations were completed, that situation could change.

3.9.15 The Committee noted that the spill had also impacted aquaculture facilities and that the Bureau of Fisheries and Aquatic Resources had reported that about 90 operators of fishponds had been affected to varying degrees. It was noted that some operators had decided to harvest

their fish early due to fears of contamination as a result of which the fish had not reached their normal market size and that there had been a few reports of mortalities of fish. It was noted that heavy oiling of ponds had not been widespread.

3.9.16 It was noted that significant areas of seaweed culture had been reported to have been affected by the oil and that there was a strong likelihood that the oil from the *Solar 1* had been responsible for most of the damage observed in crops in the polluted area.

3.9.17 The Committee noted that a fishery expert from Ireland and an aquaculture expert from the United Kingdom with experience of working in the Philippines had been engaged by the Shipowners' Club and the 1992 Fund to attend on site to make an overall assessment of the losses and to advise claimants on the submission of claims in the fishery sector.

3.9.18 It was noted that Guimaras Island was very dependent on its beaches to attract visitors and that as a consequence the spill had had a major impact on tourist businesses. The Committee noted that tourism experts from the United Kingdom engaged by the Shipowners' Club and the 1992 Fund who had been used by the Fund in previous incidents, had travelled to the affected area and had met with many potential claimants to gain a better understanding of the nature of their businesses and the impact of the spill on their operations and to advise them on how to submit their claims for compensation.

3.9.19 It was noted that there were about 80 tourist businesses on Guimaras Island and its surrounding islets, more than half of which were operations loosely referred to as beach resorts. It was also noted that about 25 of them were located in the polluted part of the island but that in view of the small size of the island it was likely that those outside the contaminated area had also been affected by a downturn in visitors. It was further noted that most of these businesses were small, privately owned enterprises with relatively low revenue levels and that many were experiencing considerable hardship. It was noted that there were a few resorts located on small islets off Guimaras Island, which generally offered a rather higher standard of facilities, cater for a higher percentage of foreign markets and had a totally different operating profile to those located on Guimaras.

3.9.20 The Committee noted that in view of the extremely negative media attention that the incident had attracted, it would, in the Director's view be commercially beneficial for the tourism sector to mount a well planned and co-ordinated marketing campaign once the clean up had been completed in order to mitigate tourism losses.

Visit to the Philippines by the 1992 Fund and the Shipowners' Club

3.9.21 The Committee noted that the Deputy Director/Technical Adviser and one of the Claims Managers together with a representative of the Shipowners' Club had visited the Philippines to meet with representatives of the central government, provincial governments and claimants. It was noted that the meetings had been arranged by representatives of Petron Corporation who had accompanied the Club and the Fund throughout their visit.

3.9.22 It was noted that the primary purpose of their visit to the affected area was to hold a series of claims workshops for claimants in the fishery, mariculture and tourism sectors, as well as for those involved in the clean-up response and the assessment of the environmental impact of the spill. It was also noted that the Fund and the Club representatives had explored with claimants the most effective way of receiving and processing their claims.

Claims for compensation

3.9.23 The Committee noted that as at 20 October 2006 the Shipowners' Club had made interim payments to three contractors totalling US$486 000 (£259 000) in respect of clean-up costs, and that an interim claim by Petron Corporation for Philippines Pesos (PHP) 80.1 million

(£850 000) for the costs of shoreline clean up was being assessed by ITOPF. It was noted that the Shipowners' Club had paid ¥45.1 million (£204 000) for the cost of the underwater survey of the wreck.

3.9.24 It was noted that as at 20 October 2006 the Governor of Guimaras Province had collated some 3 000 claims registration forms from fishermen and that these forms would be handed over to the fishery expert appointed by the Fund and the Club as soon as the remaining forms have been received by the Governor.

3.9.25 It was also noted that 23 claims totalling PHP435 000 (£4 600) from tourism businesses had been submitted by 20 October 2006 and that these claims were being assessed by the tourism experts appointed by the Fund and the Club.

3.9.26 The Committee noted that it was too early to predict accurately the total damages resulting from the incident but that preliminary estimates indicated that it would be in the region of US$5-8 million (£2.8-4.4 million), excluding the costs of removing any remaining cargo from the wreck.

3.9.27 The Philippines expressed its appreciation for the pro-active approach and assistance provided by the Fund Secretariat.

Proposed operation to remove the remaining cargo from the vessel

3.9.28 It was noted that the Shipowners' Club had contracted a Japanese salvage company to undertake an underwater survey of the vessel using a remotely operated vehicle (ROV), in order to search for the vessel to confirm its location, depth and orientation and to assess the risk of further pollution. It was also noted that the Shipowners' Club and the 1992 Fund had jointly appointed a marine casualty and salvage expert from London Offshore Consultants Asia (LOC Asia) to attend on-site to supervise the under-water survey and to interpret the survey findings.

3.9.29 The Committee noted that the vessel had been found in an upright condition on a seabed slope of 6º and with a trim by the stern of about 10º. It was noted that a triangular puncture type hole with base dimensions of about 28cm and height of about 15cm had been found on the port side aft of the bulkhead between No.1 ballast tank and the port anchor chain locker, that both the port and starboard shell plating showed signs of crumpling but no signs of cracks and that there were no obvious signs of indentations, folds or cracks on the main deck. It was noted that all lids of cargo tank hatches had been found to be closed with the exception of No.4 port, the lid of which was partially ajar and that no oil was seen emanating from this tank, which indicated that the entire contents were missing. It was noted that oil had been found to be leaking to varying degrees from pipes and vents and the tanklid of No.2 port cargo tank but that following the closure of a number of vent valves by the ROV the total leakage had been reduced to roughly 20 litres per hour.

3.9.30 The Committee noted that the Shipowners' Club and the 1992 Fund had requested experts from ITOPF and LOC Asia to assess the pollution risk posed by the wreck of the *Solar 1*. It was noted that the apparent lack of damage to the main deck and the upper hull of the wreck and the absence of visible oil staining or oil collections around the structure suggested that there had not been a major release of oil from the cargo tanks and that the majority of oil might still be on board, although that this was not entirely consistent with observations of the oil at sea shortly after the incident and the extent of shoreline contamination, which had suggested that at least 50% of the cargo of 2 081 tonnes of oil had escaped. It was also noted that the experts had stated that without knowing the circumstances under which the vessel had sunk it was impossible to assess what kind of hidden structural damage had occurred and whether this could have resulted in substantial amounts of cargo being released. It was noted that the experts had considered whether it would be possible to quantify the remaining oil in the wreck using non-intrusive neutron bombardment technology, but that the technique would necessitate

the excavation of the sediment around the hull with the attendant risk of disturbing the vessel. It was further noted that the experts had considered that on the basis of the underwater survey the vessel appeared to be in a stable position and that under the prevailing conditions, movement of the vessel was unlikely, but that the vessel was located in a seismically active area, having experienced two major seismic events in the last 50 years.

3.9.31 It was noted that the experts were of the view that whilst the most likely outcome of leaving the oil in the vessel would be the gradual release of oil over many years through pinholes and cracks as a result of corrosion, a major release of oil due to the effects of a severe seismic event on the structure or stability of the vessel could not be ruled out. It was noted that the experts had considered the sensitivity of Guimaras Island and its vulnerability to pollution from the vessel during the south-west monsoon as demonstrated by the oil released following the incident, which had had a significant effect on economic resources, although it was too early to say what the environmental consequences had been.

3.9.32 The Committee noted that the experts had concluded that provided that the cost of an operation to remove as much of the remaining cargo from the vessel was not disproportionate to the risks of pollution damage resulting from the further release of oil, such an operation would, in their opinion, be justified.

Consideration by the Director

3.9.33 The Committee noted that on the basis of the information available the Director was of the view that it could not be ruled out that a substantial quantity of oil remained in the wreck. It was noted that the Shipowners' Club and the Fund had explored the possibility of undertaking a study to measure the quantity of oil remaining on board using non-intrusive technology but that indications were that the cost of such a study would be in the region of US$3-4 million (£1.7-2.2 million). It was further noted that in order to measure the oil in the vessel it would be necessary to excavate the sediment in which the stern section was embedded and that this could destabilise the vessel with the attendant risk of a significant release of oil and that for these reasons in the Director's view a study aimed at quantifying the remaining oil on board would not be justified.

3.9.34 The Committee noted that given the circumstances, in particular the likelihood that a significant quantity of oil remained on board and the fact that the vessel was located in a seismically active area and in close proximity to sensitive economic and environmental resources, the Director had agreed with the experts from ITOPF and LOC Asia that provided that the cost of an operation to remove as much of the remaining cargo as possible was not disproportionate to the risks of pollution damage resulting from further releases of oil, such a removal operation would be reasonable and the cost of the operation would qualify for compensation.

3.9.35 It was noted that early indications had indicated that the costs of operations to quantify and remove any remaining oil would be between US$8-12 million (£4.4-6.7 million) depending on the quantity of oil found on board. The Deputy Director stated, however, that on the basis of new proposals for the oil removal operation alone, that the final cost would be closer to US$8 million (£4.4 million) and possibly less.

3.9.36 The Committee noted that early estimates suggested that the level of the losses already sustained from the pollution from the *Solar 1* would be in the range US$5-8 million (£2.8-4.4 million), that pollution damage to aquaculture ponds had not been very severe as a result of earlier damage to the ponds caused by a passing typhoon, that the incident had occurred outside the peak tourism and fishing seasons and that a further substantial spill of oil would have the potential to cause at least as much pollution damage as had already occurred.

Executive Committee's consideration

3.9.37 The Spanish delegation expressed its regret regarding the *Solar 1* incident and offered the Philippines delegation its whole support. The Spanish delegation also thanked the Director for having acted promptly, especially in view of the local circumstances and pointed out that this was a proactive way of working that Spain supported whole-heartedly.

3.9.38 The Spanish delegation also expressed the opinion that a passive attitude to an environmental risk such as that presented by oil residues in a wreck was unthinkable, particularly when it had been demonstrated that eliminating this risk was technically feasible. That delegation therefore proposed that, having a wreck with oil confined in its tanks, its extraction should be considered as the first option, so as to avoid future risks. The Spanish delegation considered, nevertheless, that it was premature for the Committee to take a decision at the current session on the admissibility of a claim for the cost of extraction of the oil from the wreck, for three reasons. Firstly, the Assembly would be debating during the same week the Fund's admissibility criteria for this type of operations and in the view of the Spanish delegation it was necessary to know what criteria the Assembly would adopt for this type of operations. Secondly, no claim had yet been submitted and the Fund's procedures required a claim to be presented before its admissibility could be considered, since otherwise there would be a contradiction and in any case a radical change of policy by the IOPC Funds, ie to decide beforehand on questions of admissibility. Thirdly, there was a lack of information, in particular as regards the estimated quantity of fuel remaining in the wreck of the *Solar 1*.

3.9.39 As regards the reasonableness of the costs, the Spanish delegation drew the Committee's attention to the fact that since no study had been presented, the cost was uncertain and the reasonableness of the cost could not be supported by the global cost of the operation, which in this case, although relatively small, should be proportional to the existing risk, ie to the volume of oil remaining in the wreck, since the risks grew exponentially the greater the quantity of oil.

3.9.40 The Spanish delegation also pointed out that the arguments presented in the document in support of the potential danger were, to some extent, the same that were employed in the case of the *Prestige* incident, but in the opposite sense in that in the case of the *Solar I* a leak of one or two litres per hour at a distance of ten miles from the coast was considered to pose a risk during a south west monsoon, whereas in the case of the *Prestige* a leak of 3000 litres per hour at a distance of 100 miles from the coast was not considered dangerous during south west currents which had caused recurrent pollution on the French coast before the oil was extracted from the wreck.

3.9.41 In the view of the Spanish delegation, the document seemed to give the impression that the social or political conditions could influence the proposal before the Committee, since it seemed an inconsistency to state that the pollution from the ship was stabilized, but that the people of Guimaras Island were very worried because there might be a spill.

3.9.42 In conclusion, the Spanish delegation underlined that it was in favour of introducing flexible criteria for the admissibility of the costs for operations of oil extraction as a preventive measure as a general principle of the Funds, but that on the other hand it considered that it was necessary to introduce objective admissibility in order to avoid subjective decisions and recognised especially the proactive approach and the assistance which the Director of the Fund had offered to the victims of this incident and to the Government of the Philippines, which should be a model of action for the Fund in all cases where there were maritime accidents causing pollution. That delegation reiterated its conviction that in the 21st century, and with the technological advances, the operations of extraction such as the *Solar 1*should be considered as preventive measures admissible under the Conventions, and that Spain would support any project presented in this sense. The Spanish delegation reiterated its offer of collaboration to the Government of the Philippines with respect to the experience acquired by Spain in the presentation of technical documents to the IOPC Funds.

3.9.43 All delegations which responded to the intervention by the Spanish delegation considered that the decision as regards the admissibility of a claim relating to removal of the oil from the *Solar 1* incident had to be made on the basis of the existing admissibility criteria. Those delegations did not support the view expressed by the Spanish delegation that the decision should be deferred until after the Assembly had reviewed the Fund's admissibility criteria, since any change of the Fund's policy could only be taken into account in respect of future incidents and could not be applied retroactively.

3.9.44 A large number of delegations supported the proposal by the Director that a claim for the cost of removing oil from the *Solar 1* was admissible in principle. The point was made by many delegations that given the likelihood that a significant quantity of oil remained in the wreck, and in view of the seismic activity in the vicinity of the wreck and its close proximity to sensitive economic and environmental resources, the indicative costs of removing the oil were not disproportionate to risks of pollution damage resulting from further releases of oil.

3.9.45 The Executive Committee decided that the claim for the cost of removing the oil from the *Solar 1* was admissible in principle.

3.9.46 The Spanish delegation stated that it considered the decision by the Committee was very important and congratulated it for the new proactive approach that that decision represented with respect to the anticipated admissibility of claims still not formulated, underlining the positive and innovating aspects that this new approach would bring in similar future situations.

3.9.47 The Director stated that the Spanish delegation was incorrect in its assertion that the admissibility of a claim could not be approved in principle since the governing bodies had made such decisions in the past, for example in connection with the *Osung Nº3* incident in the Republic of Korea.

3.9.48 The Philippines delegation thanked the Committee for its support for the claim in principle and thanked the Spanish delegation for its generous offer of assistance, which it offered to reciprocate in the hope that it might be of benefit to Spain.

Concerns raised by the Shipowners' Club

3.9.49 The Committee noted that on 18 October 2006 the Shipowners' Club had informed the Director that on the basis of its investigations into the background of the incident, and in particular the issues of causation, it had serious concerns over the shipowner's operation of the vessel, which would warrant the Shipowners' Club revoking insurance cover against the shipowner. It was noted, however, that the Club had decided not to attempt to avoid any liability arising under the 1992 Civil Liability Convention and STOPIA 2006 under Article VII, paragraph 8 of the Civil Liability Convention, which provided, *inter alia*, that the insurer could have availed himself of the defence that the pollution damage resulted from the wilful misconduct of the shipowner.

3.9.50 It was noted, however, that the Shipowners' Club had informed the Director that it had decided to reserve its right under Article III, paragraph 3 of the Civil Liability Convention, to oppose claims from claimants whose negligence may have caused or contributed to the pollution damage, and that it did not intend to pay claims made by third parties where it saw evidence of contributory negligence.

3.9.51 In response to a question by one delegation, the representative of the Shipowners' Club stated that it did not expect to reserve its right against all third parties involved in preventive measures, although a substantial portion of the amount claimed for such measures could involve parties whose negligence may have contributed to the pollution damage.

3.9.52 The Committee recalled that Article III, paragraph 3 stated:

> 'If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or form the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person'.

3.9.53 It was noted that claims by third parties which the Shipowners' Club did not intend to pay were only likely to be in respect of preventive measures.

3.9.54 The Committee recalled Article 4, paragraph 3 of the 1992 Fund Convention, which stated:

> 'If the Fund that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or form the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person. The Fund shall in any event be exonerated to the extent that the shipowner may have been exonerated under Article III, paragraph 3, of the 1992 Civil Liability Convention. However, there shall be no such exoneration of the Fund with regard to preventive measures.'

3.9.55 It was noted that the Director had concluded that on the basis of the above Article 4, paragraph 3, the 1992 Fund would be liable to pay any claims for reasonable costs of preventive measures made by third parties even where the negligence of such parties may have caused or contributed to the pollution damage. It was further noted that the Director was of the view that if the Fund were to pay such claims, it would not, or at least not for the time being, be reimbursed by the Shipowners' Club under the terms of STOPIA 2006 (cf paragraphs 3.9.6 and 3.9.7 above).

3.9.56 The Committee noted that the Director was not yet in a position to comment on the allegations by the Shipowners' Club of contributory negligence on the part of parties, but that he intended to examine all the evidence available to establish whether there was contributory negligence on the part of any claimant and to report his findings to the Committee. It was noted that if no agreement was reached between the Club and the Fund in that regard it would be for the Philippine Courts to decide this issue.

Settlement and payment of claims

3.9.57 The Executive Committee granted the Director the authority to settle all claims arising from this incident to the extent that they did not give rise to issues of principle not previously considered by the Funds' governing bodies.

3.9.58 The Committee also granted the Director authority to make payments on behalf of the 1992 Fund in respect of all admissible claims arising from this incident to the extent that the Shipowners' Club refused to make payments.

4 Future sessions

4.1 The Executive Committee noted that, at its 11th session, the 1992 Fund Assembly had decided to hold its next regular session during the week of 15 -19 October 2007.

4.2 The Excutive Committee decided to hold its next session during the week of 12 March 2007 to take place at the Inmarsat building.

4.3 The Committee noted that the Assembly had agreed at its 11th session to accept the invitation by the Government of Canada to hold sessions of the IOPC Funds' governing bodies at the

Headquarters of the International Civil Aviation Organization (ICAO) in Montreal during the week of 11-15 June 2007.

5 Any other business

On the occasion of the last sessions of the governing bodies before his successor took up office, at a special joint session of the 1992 Fund Assembly, the 1992 Fund Executive Committee, the 1971 Fund Administrative Council and the Supplementary Fund Assembly, the outgoing Director, Mr Måns Jacobsson of Sweden, who had held the post of Director of the IOPC Funds for nearly 22 years, made a final address. The Director Elect also chose to mark the special occasion by addressing the governing bodies prior to taking over responsibility for the IOPC Funds on 1 November 2006. The Director Elect, the Ambassadors of Sweden and the Netherlands, on behalf of the Swedish and Netherlands delegations, and a number of other delegations, as well as the Chairpersons of the above-mentioned governing bodies also took the opportunity to pay tribute to Mr Jacobsson's outstanding career and invaluable contribution to the international compensation regime. In respect of the joint session, reference is made to the Record of Decisions of the 11th session of the 1992 Fund Assembly (document 92FUND/A.11/35, paragraph 37).

6 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.34/WP.1, was adopted, subject to certain amendments.