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COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
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Agenda item 5

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

(held on 27 February and 1 and 2 March 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.32/1.

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 10th extraordinary session the 1992 Fund Assembly had appointed the delegations of Algeria, Australia, Mexico, Russian Federation and Sweden to the Credentials Committee.

2.3 The following members of the Executive Committee were present:

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

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.32/2/1 that all of the above-mentioned members of the Executive Committee, except the delegation of Cameroon, had submitted credentials which were in order and that the credentials in respect of that

delegation were accepted provisionally pending correction of the deficiency set out in the report[<1>].

2.5 The following Member States were represented as observers:

Angola	Greece	Panama
Antigua and Barbuda	India	Papua New Guinea
Argentina	Ireland	Philippines
Australia	Japan	Poland
Bahamas	Kenya	Qatar
Belgium	Lithuania	Saint Vincent and the Grenadines
Brunei Darussalam	Malaysia	South Africa
Cambodia	Malta	Sri Lanka
Colombia	Marshall Islands	Sweden
Cyprus	Mexico	Tunisia
Denmark	Morocco	United Arab Emirates
Gabon	Netherlands	Venezuela
Germany	Nigeria	
Ghana	Norway	

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

Brazil	Ecuador	Saudi Arabia
Chile	Iran (Islamic Republic of)	
Côte d'Ivoire	Peru	

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

Intergovernmental organisations:

European Commission
International Maritime Organization (IMO)
International Oil Pollution Compensation Fund 1971 (1971 Fund)
International Oil Pollution Compensation Supplementary Fund 2003 (Supplementary Fund)

International non-governmental organisations:

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 *Erika*

3.1.1 The Executive Committee took note of the developments regarding the *Erika* incident as set out in document 92FUND/EXC.32/3.

[<1>] Note by Director: This deficiency had not been rectified when the final version of this Record of Decisions was issued.

Maximum amount available for compensation

3.1.2 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 (£127 million).

Undertakings by Total SA and the French Government

3.1.3 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.

3.1.4 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.

Payments to the French State

3.1.5 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).

3.1.6 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 noted 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 (see paragraphs 3.1.8 – 3.1.15 below).

Claims situation

3.1.7 The Committee noted that as at 31 January 2006, 6 985 claims for compensation had been submitted for a total of €208 million (£142 million), that 95% of the claims had been assessed and that some 800 claims, totalling €22.7 million (£15.5 million), had been rejected. It was also noted that payments of compensation had been made in respect of some 5 636 claims for a total of €117.4 million (£77.4 million), out of which the shipowner's insurer, Steamship Mutual Underwriting Association (Bermuda) Limited (Steamship Mutual) had paid €12.8 million (£8.8 million) and the 1992 Fund €104.6 million (£68.6 million).

French State's claim for clean up

3.1.8 The Committee noted that the total claim by the French State in respect of costs incurred by French authorities in the clean-up response was for €178.8 million (£122 million). The Committee noted that if the claim were to be assessed by the Fund's experts in the normal way,

it would take at least two years to complete the work. It was noted that the payments made to claimants (except the €15 million payment on account to the French State for clean-up costs) totalled €102.4 million (£67.1 million) and that the Director had estimated that the payments to be made to claimants (other than the French State) would total at least some €120 million (£82 million)[<2>]. It was also noted that since the amount available for compensation for this incident was €184.8 million (£127 million), the amount payable to the French State for clean-up operations would not exceed some €65 million (£45 million). The Committee noted that for these reasons the Director had sought a more pragmatic way of assessing the French State's claim up to that amount by carrying out a broad assessment of three major components of the claim in order to establish the lowest conceivable admissible amount.

3.1.9 It was noted that the largest component of the claim, for €128 million (£88 million), comprising shoreline clean-up costs incurred by the Prefectures of the five affected departments in support of the coastal communes had been assessed at €64 million (£44 million). It was also noted that another major component of the claim, for €23 million (£15.7 million), relating to costs of providing military personnel to assist with beach cleaning, had been assessed at €16 million (£11 million). It was noted that the third major component of the claim, for €18.4 million (£12.6 million), relating to the cost of at sea operations, including towing the casualty, monitoring the wreck, aerial surveillance of the oil and clean-up operations, had been assessed at €1.0 million (£680 000), although it was anticipated that a more detailed assessment would inevitably increase this amount to some €9 million (£6.2 million).

3.1.10 The Committee noted that on the basis of such a broad assessment of the three major components of the claim by the French State, the minimum total admissible amount was some €81 million (£55.5 million), well in excess of the maximum amount that was likely to be available (some €65 million) to the French State after all other claims arising from the incident (except that of Total SA) had been settled and paid. It was also noted that whilst a full assessment of the claim by the French State would inevitably result in the admissible amount increasing substantially, in the Director's view such a full assessment would not be justified given the enormous amount of time that would be required to complete the work and the limited amount of money that would be available to pay the claim.

3.1.11 The Executive Committee gave its unanimous support for the Director's approach to the assessment of the French State's claim for clean-up costs referred to in paragraph 3.1.8 and set out in paragraphs 7.2 - 7.4 of document 92FUND/EXC.32/3. The point was made that in view of the size of the claim in relation to the maximum amount of money likely to be available for payment, a full assessment of the claim could not be justified.

3.1.12 The French delegation stated that whilst it fully supported the Director's proposal it was important that such a broad assessment should not be regarded as final and that any payment made would have to be an interim one pending the final outcome of the outstanding legal actions.

3.1.13 One delegation expressed its surprise regarding the predicted time it would have taken to carry out a full assessment of the claim and asked whether it would have been possible to have recruited more experts so as to speed up the assessment. The Director stated that the Funds had created a database of experts, but that most countries had relatively few such experts. He pointed out that it was always necessary to strike a balance between the need to have a sufficient number of experts to expedite assessments and the need to ensure that claims were assessed in a consistent and uniform manor.

[<2>] That amount includes the payments made to the French State in December 2003 and October 2004 totalling €16.1 million (£13.0 million), which related to the Government's subrogated claims, but not the payment on account of €15 million (£10.3 million) made to the State in December 2005 (cf paragraph 3.1.6 above).

3.1.14 Another delegation expressed surprise at the volume of documentation that had been provided in support of the French claim and suggested that this was an issue the Audit Body could address in the context of its review of the efficiency of the claims handling procedures.

3.1.15 The Executive Committee decided that a broad assessment of the claim by the French State was an acceptable approach. It was noted that the assessment would be without prejudice to the French Government's position in any recourse action against third parties.

Cause of the incident

3.1.16 The Committee recalled that at the request of a number of parties, the Commercial Court (Tribunal de Commerce) in Dunkirk had appointed experts ('expertise judiciaire') to investigate the cause of the incident. It was noted that the experts, who had submitted their report in late November 2005, had concluded that the fate of the *Erika* was the inevitable consequence of the serious corrosion of the internal structures of the vessel's N°2 ballast tanks, which had resulted in their collapse as soon as the vessel had encountered sustained heavy seas. It was also noted that the experts had stated that the level of corrosion had been well beyond acceptable standards for a classification society and had contradicted the thickness measurements made of tank internals in 1997 and in particular in 1998, which had been carried out by the classification society Registro Italiano Navale (RINA). It was further noted that the experts had stated that once the longitudinal deck stiffeners and the upper parts of the transverse bulkheads in the N°2 ballast tanks had failed in the prevailing sea conditions, there was nothing anyone could have done to influence the fate of the vessel.

3.1.17 The Committee noted that the court experts had expressed the view that it would not have been possible to detect the level of corrosion when the ship had been vetted by Total SA, nor at the time of loading the vessel in Dunkirk prior to the final voyage, and that the vetting procedures of other major oil companies or a survey by a port state would also not have revealed the problem. It was noted that in contrast, the experts had stated that this had not been the case with Tevere Shipping (the registered owner), Panship (the management company), which had monitored the vessel's fifth special survey in Bijela (Croatia) in 1998, and RINA (the classification society), which had undertaken the surveys in Bijela and in Augusta in 1999.

3.1.18 The Committee endorsed the intention of the Director to study the report by the court experts with the assistance of the 1992 Fund's experts and to report to the Executive Committee at a later session in 2006.

Time bar

3.1.19 It was noted that a number of claimants had not taken legal action against the 1992 Fund before the expiry of the three-year time-bar period and had only submitted claims against the shipowner and Steamship Mutual in the limitation proceedings. It was recalled, however, that in order to prevent a claim from becoming time-barred against the Fund, these claimants had to take legal action against the Fund within six years of the date of the incident, ie by 12 December 2005. The Committee noted that in early December 2005 the Fund had written to all these claimants drawing their attention to the six-year time-bar period, and that as a result, an action had been filed by a fisherman for a claim of some €50 000 (£34 000) for loss of earnings in 2000.

Legal proceedings

3.1.20 It was recalled that claims totalling €497 million (£340 million) had been lodged against the shipowner's limitation fund constituted by Steamship Mutual, including 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 should therefore have been withdrawn against the limitation fund to the extent that they related to the same loss or damage.

3.1.21 It was noted that legal actions against the shipowner, Steamship Mutual and the 1992 Fund had been taken by 796 claimants and that by 31 January 2006 out-of-court settlements had been reached with 428 of these claimants. It was also noted that the courts had rendered judgements in respect of 57 claims and that actions by 311 claimants (including 145 salt producers) were pending. The Committee noted that the total amount claimed in the pending actions, excluding the claims by the French State and Total SA, was €63 million (£43 million).

3.1.22 It was noted that the 1992 Fund would continue the discussions with the claimants whose claims were not time-barred for the purpose of arriving at out-of-court settlements if appropriate.

Court judgements in respect of claims against the 1992 Fund

3.1.23 The Executive Committee took note of the information relating to judgements in respect of claims against the 1992 Fund set out in section 13 of document 92FUND/EXC.32/3.

Second-degree tourism claim

3.1.24 The Committee noted that the owner of a company letting commercial premises to a take-away business had submitted a claim for €6 329 (£4 340) for loss of income allegedly suffered in 2000, 2001 and 2002 due to the *Erika* incident and that the Fund had rejected the claim on the grounds that the claimant provided services to other businesses in the tourist industry but not directly to tourists, and that for this reason, there was not a sufficient link of causation between the contamination and the alleged loss.

3.1.25 It was noted that in its judgement, rendered in December 2005, the Civil Court in Saint-Nazaire had stated that it was not bound by the criteria for admissibility laid down by the 1992 Fund, which were internal to the Organisation and did not have a supranational character. It was noted that the Court had held that, under French law, a claim for compensation was admissible if the claimant could prove that there was a sufficient link of causation between the event and the damage. It was further noted that the Court had decided that, as far as the claim for loss of income in 2000, there had been a reduction in the letting of the premises and that this loss should be considered as directly related to the *Erika* incident. The Committee noted that the Court had ordered the shipowner, Steamship Mutual and the 1992 Fund to pay compensation to the claimant for loss of rental income in 2000 at €1 618 (£1 100) plus €1 300 (£880) for costs and had rejected the claim for losses in 2001 and 2002 on the grounds of a lack of a link of causation.

3.1.26 Since the judgement was at variance with the criteria for admissibility of claims adopted by the 1992 Fund governing bodies with regard to 'second degree' claims in the tourism sector, and bearing in mind that the 1992 Fund had rejected a number of other second degree claims arising from the *Erika* incident, and in order to respect the principle of equal treatment of claimants, the Committee endorsed the Director's decision to appeal against the judgement in spite of the very low amount involved.

Seasonal letting activities

3.1.27 The Committee recalled four judgements which had been rendered by the Commercial Court in La Roche sur Yon in September 2005 relating to claims by estate agencies in Vendée for losses suffered in their activity of seasonal lettings, which as regards three of the claims the 1992 Fund had assessed at amounts lower than those claimed, the fourth claim having been rejected by the Fund since, in the Fund's opinion, the claimant had not proven any losses.

3.1.28 It was recalled that in the four judgements the Court had stated that it was not bound by the 1992 Fund's criteria for admissibility and that it was for the Court to interpret the concept of 'pollution damage' in the 1992 Conventions and to apply it to an individual claim by determining whether there was a sufficient link of causation between the event that led to the

damage ('le fait générateur') and the losses suffered, and by assessing the extent of the damage suffered by the victims according to the criteria of French law. It was recalled that the Court had awarded the full claimed amounts to three of the four claimants and had decided that the judgements were immediately enforceable, whether or not appeals were lodged, and that in the case of the claimant whose claim had been rejected by the 1992 Fund, the Court had awarded the claimant an amount of €11 696 (£8 000), compared to the claimed amount of €25 383 (£17 400).

3.1.29 It was recalled that at its October 2005 session, the Executive Committee had endorsed the Director's intention to instruct the 1992 Fund's experts to examine the judgements and advise him as to the reasonableness of the amounts awarded by the Courts in order to enable him to decide whether the Fund should lodge appeals (document 92FUND/EXC.30/10, paragraph 3.4.44).

3.1.30 The Committee noted that, after having examined the judgements, the Fund's experts had expressed the view that the amounts awarded were unreasonable and that the Fund had therefore appealed against all four judgements.

3.2 *Prestige*

3.2.1 The Executive Committee took note of the information regarding the *Prestige* incident contained in documents presented by the Director (documents 92FUND/EXC.32/4 and 92FUND/EXC.32/4/Add.1) and by the Spanish delegation (document 92FUND/EXC.32/4/1).

CLAIMS FOR COMPENSATION

Spain

3.2.2 The Committee noted that as at 31 January 2006 the Claims Handling Office in La Coruña had received 836 claims totalling €838 million (£572 million), including seven claims from the Spanish Government totalling €653.5 million (£446 million), submitted during the period October 2003 – June 2005, relating 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 and costs relating to publicity campaigns. The Committee noted that on 6 February 2006 the Spanish Government had informed the Director that it had reduced its claim for the cost of removing the oil from the wreck by €84 million (£58 million), ie from €109.2 million (£75 million) to €24.2 million (£16.5 million).

3.2.3 It was recalled that the first claim received from the Spanish Government in October 2003 for €383.7 million (£262 million) had been assessed on an interim basis by the Director in December 2003 at €107 million (£73 million) and that a payment of €16 050 000 (£11.1 million), corresponding to 15% of the assessed amount, had been made in December 2003. It was also recalled that the Director had made a general assessment of the total of the admissible damage in Spain at €303 million (£207 million) and that, as authorised by the Assembly, a further payment of €41 505 000 (£28.8 million) had been made in December 2003 to the Spanish Government against a bank guarantee provided by a Spanish bank, bringing the total amount paid by the 1992 Fund to the Spanish Government to €57 555 000 (£39.9 million).

3.2.4 It was noted that, of the claims other than those submitted by the Spanish Government, 63% 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 noted that 447 of these other claims, totalling €27.2 million (£18.6 million), had been approved for €3.2 million (£2.2 million) and that interim payments totalling €100 868 (£69 000) had been made at 15% of

the assessed amounts in respect of 98 of the assessed claims[3]. It was noted that the remaining approved claims awaited a response from the claimants or were being reassessed following claimants' disagreements with the assessed amounts. The Committee noted that 115 claims totalling €12.6 million (£8.6 million) had been rejected, the majority because the claimant had not demonstrated that a loss had been suffered.

3.2.5 It was recalled that the Spanish delegation had informed the Executive Committee at its May 2004 session that 67 towns had requested compensation totalling €37.6 million (£25.7 million) and that the four affected autonomous regions had estimated their damage at €150 million (£102 million). The Committee noted that as at 31 January 2006, agreements had been reached between the Spanish Government and all the regions and almost all the towns affected by the spill but that there were four towns with which agreements had not been reached.

France

3.2.6 The Committee noted that by 31 January 2006 466 claims totalling €108 million (£74 million) had been received by the Claims Handling Office in Bordeaux of which 79% had been assessed. It was noted that many of the remaining claims lacked sufficient supporting documentation and that such documentation had been requested from the claimants. It was noted that 324 claims had been approved for €6.1 million (£4.2 million) and that interim payments totalling €1 054 102 (£719 000) had been made at 15% of the assessed amounts in respect of 157 of the approved claims. The Committee noted that the remaining approved claims awaited a response from the claimants or were being re-examined following claimants' disagreement with the assessed amount. It was noted that 44 claims had been rejected, the majority because the claimants had not demonstrated that a loss had been suffered.

3.2.7 It was recalled that 118 claims had been submitted by oyster farmers totalling €1.2 million (£819 000) for losses allegedly suffered as a result of market resistance due to the pollution. It was noted that 108 of these claims, totalling €1 055 704 (£720 000), had been assessed at €325 275 (£222 000), that payments totalling €18 779 (£12 800) had been made in respect of 28 of these claims at 15% of the assessed amounts and that the experts appointed by the shipowner's insurer, the London Shipowners' Mutual Insurance Association (London Club) and the 1992 Fund were examining the remaining ten claims.

3.2.8 The Committee noted that 193 tourism-related claims totalling €24.6 million (£17 million) had been received. It was noted that 154 of these claims had been assessed at a total of €8.1 million (£5.5 million), that 142 claims had been approved for €7.8 million (£5.3 million) and that interim payments totalling €854 000 (£583 000) had been made at 15% of the assessed amounts in respect of 80 claims.

3.2.9 It was recalled that in May 2004, the French Government had submitted a claim for €67.5 million (£46 million) in relation to the costs incurred for clean-up and preventive measures which had been provisionally assessed at €31.2 million (£21.3 million). It was also 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.

3.2.10 It was noted that a further 56 claims, totalling €10.6 million (£7.2 million), had been submitted by local authorities for costs of clean-up operations. It was noted that 24 of these claims had been assessed at €3.5 million (£2.4 million), that 18 claims had been approved for €983 607 (£671 000) and that interim payments totalling €145 444 (£99 000) had been made in respect of 16 claims at 15% of the assessed amounts.

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[3] Compensation payments made by the Spanish Government to claimants have been deducted when calculating the interim payments.

Portugal

3.2.11 The Committee recalled that in December 2003 the Portuguese Government had submitted a claim for €3.3 million (£2.3 million) in respect of clean-up and preventive measures. It was recalled that a meeting had been held in July 2004 between representatives of the 1992 Fund and representatives of the Government departments involved. It was also recalled that in February 2005, the Portuguese Government had provided the 1992 Fund with additional documentation in support of its claim, which included a supplementary claim for €1.0 million (£680 000), also in respect of clean-up and preventive measures. It was noted that the claims had been provisionally assessed at €1.86 million (£1.3 million) and that further information had been requested from the Portuguese Government.

PAYMENTS AND OTHER FINANCIAL ASSISTANCE BY THE SPANISH AUTHORITIES

3.2.12 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 dependence on the closed fisheries, such as fish vendors, fishing net repairers and employees of fishing co-operatives, fish markets and ice factories. It was 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.

3.2.13 The Committee 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 (£170 million) to compensate in full certain categories of victims of the pollution. It was recalled 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 had to transfer their rights of compensation to the Spanish Government. It was also recalled that the Decrees provided that the assessment of claims would be made following the criteria used to apply the 1992 Civil Liability and Fund Conventions.

3.2.14 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 ('estimación objetiva') or a scale and that some 5 000 claims of other groups would be subject to individual assessments.

3.2.15 The Committee 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 million) had been made to them under the Royal Decrees. The Committee noted that it was expected that the claims lodged in the legal proceedings before the Criminal Court in Corcubión (Spain) on behalf of these workers would be withdrawn following their settlement with the Spanish Government under the Royal Decrees (cf paragraph 3.2.34).

3.2.16 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 de Compensación de Seguros (Consorcio)[<4>] and that as at 31 January 2006, 971 claims totalling €229.9 million (£157 million) had been received by the Consorcio relating to some 3 700 persons. The Committee recalled that since the Royal Decrees provided that the

<4> 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.

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.

3.2.17 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 (£32.6 million). It was noted 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 also noted that the experts of the Consorcio and the experts appointed by the London Club and the 1992 Fund had made joint assessments of 192 claims, 179 of which, for €13.7 million (£9.3 million), had been approved by the 1992 Fund and the London Club for €1.98 million (£1.4 million). The Committee noted that 134 claims included in the 241 claims with which the Consorcio had requested assistance had also been submitted directly to the Claims Office and that details of 83 of the assessments had been provided, with the approval of the claimants, to the Consorcio. It was noted that further assessments were being carried out.

PAYMENTS AND OTHER FINANCIAL ASSISTANCE BY THE FRENCH AUTHORITIES

3.2.18 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 (£785 000).

3.2.19 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.

AMOUNT AVAILABLE FOR COMPENSATION

3.2.20 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 (£15.5 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.

3.2.21 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 (£117 million), including the amount actually paid by the shipowner and his insurer (Article 4.4 of the 1992 Fund Convention).

LEVEL OF PAYMENTS

Previous considerations by the Executive Committee

3.2.22 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 for the time being 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 and that at its October 2003, February 2004, May 2004, October 2004 and March 2005 sessions the Committee had decided that, in view of the remaining uncertainties as to the level of admissible claims, the level of payments should be maintained at 15% (documents 92FUND/EXC.22/14, paragraph 3.7.24, 92FUND/EXC.24/8, paragraph 3.4.43, 92FUND/EXC.25/6, paragraph 3.2.26, 92FUND/EXC.26/11, paragraph 3.7.30 and 92FUND/EXC.28/8, paragraph 3.4.34).

3.2.23 It was recalled that in June 2005 the Executive Committee had considered an approach put forward by the Director after discussions with the delegations of France, Portugal and Spain, which was based on an increase in the level of payments, an apportionment between the three States of the amount available for compensation and certain undertakings and guarantees to be provided by these States against overpayment. It was recalled that the Committee had instructed the Director to make a detailed proposal on the basis of his proposed approach, after consultations with the three delegations concerned and taking into account the points raised during the discussion, covering the legal and technical aspects, to be considered by the Committee at its October 2005 session (document 92FUND/EXC.29/6, paragraph 3.2.78).

3.2.24 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[5]
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 (£505 000), 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

[5] 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.

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

3.2.25 The Committee noted that the Portuguese Government had informed the 1992 Fund in December 2005 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.

3.2.26 It was noted that in January 2006 the French Government had given the required undertaking in respect of its own claim.

3.2.27 It was noted that meetings had been held in London with the representatives of the Spanish Government in November 2005 and January 2006 to consider the wording of the required undertaking and bank guarantee to be provided by the Government.

3.2.28 The Committee noted that once the Spanish Government had provided the required undertaking and guarantee the Director would implement the Executive Committee's decision, ie increase the level of payments to 30% and make the payment of €57 365 000 (£39 million) to the Spanish State.

3.2.29 The Spanish delegation indicated that the Spanish State had made considerable progress in fulfilling its obligations and that it hoped to be able to implement the Executive Committee's decision in the very near future. That delegation further indicated that the Spanish State had paid compensation to 90% of all individual claimants as well as to the Autonomous and Municipal Administrations that had been affected. The Spanish delegation stated that it was working on the submission of the claim relating to the payments to the Autonomous and Municipal Administrations in order to avoid duplication of claims already submitted.

INVESTIGATIONS INTO THE CAUSE OF THE INCIDENT

3.2.30 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).

3.2.31 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 a manager of the ship's management company.

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

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

COURT ACTIONS

Spain

3.2.34 It was noted that some 2 020 claims had been lodged in the legal proceedings before the Criminal Court in Corcubión (Spain), 213 of which involved persons who had submitted claims directly to the London Club and 1992 Fund through the Claims Office in La Coruña. It was noted that no details of the losses suffered had been provided to the Court. The Committee noted that it was expected that claimants who had settled with the Spanish Government under the Royal Decrees would withdraw their claims from the court proceedings.

3.2.35 It was also noted 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. It was further noted that a number of other claimants had also taken legal action in that Court and that the Court was examining whether these claimants were entitled to join the proceedings.

France

3.2.36 The Committee noted that the French Government and 217 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 €110 million (£75 million), including €67.7 million (£46 million) claimed by the Government.

Portugal

3.2.37 It was noted that the Portuguese Government 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 (£3.0 million).

United States

3.2.38 The Committee recalled that the Spanish State had taken legal action against the American Bureau of Shipping (ABS), the classification society of the *Prestige*, 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 (£393 million) and estimated later to exceed US$1 000 million (£561 million). It was also recalled 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.

3.2.39 It was recalled that ABS had denied the allegation made by the Spanish State and in its turn had 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 and requested that the State should be ordered to indemnify ABS for any amount that ABS may be obliged to pay pursuant to any judgement against it in relation to the *Prestige* incident. It was further recalled that the New York Court had dismissed the counterclaim by ABS on the grounds that the Spanish State was entitled to sovereign immunity and that ABS was seeking reconsideration by the Court or permission to appeal.

3.2.40 The Committee recalled that as part of the discovery procedure in the New York litigation, ABS had requested the 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 recalled that, in a decision rendered in August 2005, the judge

supervising the discovery procedure had denied the Spanish State's assertion of privilege and ordered the production of the documents.

3.2.41 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 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.

3.2.42 It was also recalled that in August 2005 ABS had submitted a request to the New York Court for a summary judgement dismissing the Spanish State's complaint. It was noted that the Court had not yet taken a decision on the request.

3.2.43 It was recalled that the 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 (£28 million). It was noted that since the Spanish Government had compensated the Basque Region, this action had been withdrawn.

3.2.44 The Committee noted that ABS had filed another motion for a summary judgement 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 was further noted 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.

CLAIM FOR COSTS OF REMOVING OIL FROM THE WRECK

3.2.45 The Committee recalled that the Spanish Government had originally submitted a claim for €109.2 million (£75 million) for the cost of the operation to remove the oil from the wreck of the *Prestige*, including the costs of preparatory work and the feasibility trials conducted in the Mediterranean and at the wreck site. It was noted that in February 2006 the Spanish Government had reduced its claim to €24.2 million (£16.5 million).

Consideration by the 1992 Fund Executive Committee at its October 2005 session

3.2.46 It was recalled that at its October 2005 session the Executive Committee had considered the question as to whether the Spanish Government's claim for the costs of the operation to remove the oil from the *Prestige* was admissible in accordance with the 1992 Fund's criteria as set out in the 1992 Fund Claims Manual, in particular whether the operation was technically reasonable.

3.2.47 It was recalled that the Director had requested the International Tanker Owners Pollution Federation Limited (ITOPF) to provide the 1992 Fund with an opinion on the technical reasonableness of the operation, ie on the basis of the particular circumstances of the incident, the facts available at the time of the decision to undertake the operation and whether the costs incurred and the relationship between those costs and the benefits derived or expected were reasonable (document 92FUND/EXC.30/9/2).

3.2.48 It was also recalled that the Spanish Government had requested an opinion from Dr Michel Girin, Director of the Centre de documentation de recherche et d'expérimentations sur les pollutions accidentelles des eaux (CEDRE), (France), Professor Lucien Laubier, Director of the Institut Océanographique de Paris (IOP), (France) and Dr Ezio Amato, Director at the Istituto Centrale per la Ricerca Scientifica e Tecnologica Applicata al Mare (ICRAM), (Italy) on

the ecological and social necessity to deal with the wreck of the *Prestige* (document 92FUND/EXC.30/9/3).

3.2.49 It was recalled that one of the main differences between the opinions of the two groups of experts was that the experts appointed by the Spanish Government had taken into account the possible social impact of leaving the oil in the wreck, whereas ITOPF had focused solely on the 1992 Fund's admissibility criteria, which did not take social, non-economic effects into account. It was recalled that in his consideration of the admissibility issue the Director had also not taken such effects into account.

3.2.50 The Committee recalled that the Director had shared the views of ITOPF and the experts appointed by the Spanish Government that a catastrophic release of the oil was unlikely and that any escape of oil from the wreck would likely have been in the form of a slow leak of small quantities of oil and that although there was a perceptible risk of oil released from the wreck reaching seafood cultivation areas in Galicia and tourist beaches of the Atlantic islands, a substantially greater release of oil would have been required to cause significant damage to these resources.

3.2.51 It was recalled that in light of the considerations set out above the Director had expressed the view that the oil remaining in the sunken sections of the *Prestige* did not pose a significant pollution threat and that the costs of the operation to remove the oil had been disproportionate to any potential economic and environmental consequences of leaving the oil in the wreck. It was also recalled that for this reason, the Director had considered that the Spanish Government's claim did not fulfil the criteria for admissibility laid down by the IOPC Funds' governing bodies, namely that the operation should be reasonable from an objective, technical point of view.

3.2.52 It was recalled that some delegations had disagreed with the Director's conclusions and had argued that since it was not possible to predict with any certainty what the outcome of leaving the oil in the wreck would have been, it would have been difficult for any government to resist the pressure from the public or for it not to comply with various United Nations Conventions on protecting the environment.

3.2.53 The Committee recalled that other delegations had agreed with the Director that the claim did not fulfil the Funds' admissibility criteria and had made the point that if the decision to remove the oil from the wreck had been made on the basis of potential social, non-economic effects, these could not be taken into account when assessing the admissibility of the claim. It was recalled that some of those delegations had, however, made the point that some of the costs of studies and surveys might have been reasonable up to the point when the actual cost of the oil removal operation had been known. It was also recalled that those delegations had therefore recommended carrying out assessments of the different elements of the claim to see if some were admissible.

3.2.54 It was recalled that the Committee had decided to defer any decision on the admissibility of the claim, but had instructed the Director to collaborate with the Spanish Government to examine all the elements of the claim with a view to identifying possible admissible items and to assess the admissible quantum of those items for consideration by the Committee at a future session (document 92FUND/EXC.30/10, paragraph 3.7.101).

Funding by the European Commission

3.2.55 The Committee noted that on 4 December 2003 the Commission of the European Communities (European Commission) had decided to make a concession of aid to the Spanish Government in connection with the preparatory technical work for the application of solutions for dealing with the oil in the wreck of the *Prestige*. It was also noted that on 31 March 2005 the European Commission had decided to make a concession of aid to the Spanish Government for the costs of removing the oil from the wreck of the *Prestige.*

3.2.56 The Committee noted that in February 2006 the Spanish Government had confirmed the amounts awarded by the European Commission and had informed the Director that it had so far received a total of €50.9 million (£34.7 million) and that further payments totalling €33.1 million (£22.6 million) were pending as set out in the table below.

Claim item	Claimed amounts €	Amounts awarded by the Commission €	Amounts paid to date €	Amounts pending €
Preparatory studies	31 900 000	27 115 000	5 423 000	21 692 000
Extraction of the oil	66 828 000	56 803 800	45 443 040	11 360 760
TOTAL	98 728 000	83 918 800	50 866 040	33 052 760

3.2.57 It was noted that as a result of the amounts awarded by the European Commission, the Spanish Government had reduced its claim to €24 168 265 (£16.5 million), of which €4 785 000 (£3.3 million) related to the costs incurred in 2003 and €19 383 265 (£13.2 million) related to the costs incurred in 2004.

3.2.58 One delegation noted with dissatisfaction that neither the Executive Committee nor the IOPC Funds had been informed of the amounts previously awarded by the European Commission to Spain when the claim for the removal operation was discussed at the October 2005 session.

Director's assessment in accordance with the Executive Committee's instruction

3.2.59 It was noted that, as instructed by the Executive Committee, the Director had carried out a detailed examination of all the elements of the claim by the Spanish Government with the aim of identifying items which might be admissible in accordance with the Funds' criteria.

3.2.60 It was noted that the costs of the operation to remove the oil from the vessel could be divided into two main parts, namely costs incurred in 2003 totalling €33.1 million (£22.6 million) and costs incurred in 2004 totalling €76.1 million (£51.9 million). It was also noted that the costs in 2003 had related to operations to seal further oil leaks emanating from the wreck and various studies, including investigations into the feasibility of different methods of extracting the oil from the wreck. It was further noted that the costs incurred in 2004 had related to the actual oil removal operation and the introduction of nutrients into the tanks of the fore section of the wreck after the bulk of the oil had been removed in order to promote the biodegradation of the remaining oil residues.

3.2.61 It was noted that since the Executive Committee's October 2005 session three meetings had been held between the IOPC Funds' Secretariat and representatives of the Spanish Government to discuss the various elements of the claim and exchange views regarding their admissibility.

3.2.62 The Committee noted that during the discussions the Spanish Government had drawn attention to the costs of previous oil removal operations from sunken wrecks that the IOPC Funds had accepted compared with the costs of the operation to remove the oil from the *Prestige*, and in particular the costs per tonne of oil removed from those wrecks as set out in paragraph 4.5 of document 92FUND/EXC.32/4/Add.1. It was noted that the Spanish Government had pointed out that the cost per tonne of oil recovered from the wreck of the *Prestige* was very similar to the costs per tonne of oil recovered in the case of the *Tanio* and *Yuil N°1* incidents all of which had been considerably lower than the cost per tonne of oil removed from the *Osung N°3*.

3.2.63 It was also noted that the Spanish Government had maintained that the 1992 Fund should consider the question of the proportionality of the costs of the operation on the basis of the revised claim and had pointed out that the cost per tonne of oil removed from the wreck would then be reduced well below the costs per tonne arising from previous incidents.

3.2.64 It was noted, however, that in the Director's view the cost per tonne of oil recovered, although a useful parameter in assessing the cost effectiveness of an operation, was not the overriding consideration when considering the reasonableness of a decision to remove oil from a wreck against the Funds' admissibility criteria, but rather the overall cost of the operation in relation to the economic and environmental consequences of leaving the oil in the wreck. It was also noted that, in the Director's view, when assessing the technical reasonableness of the operations, account should be taken of the location of the wreck and any sensitive resources in the vicinity. It was further noted that in the cases of the *Tanio*, *Yuil Nº1* and *Osung Nº3* the vessels had sunk close to sensitive resources and that therefore the oil remaining in both wrecks had the potential to cause serious economic damage.

3.2.65 It was noted that the Director remained of the view that the costs of the actual operation to remove the oil from the wreck of the *Prestige* were disproportionate to any potential economic and environmental consequences of leaving the oil in the wreck and that, for this reason, the claim by the Spanish Government did not fulfil the IOPC Funds' admissibility criteria, namely that the operation should be reasonable from an objective, technical point of view.

3.2.66 It was noted that in early 2003 a Scientific Commission had proposed that the oil should be recovered from the wreck and that in February 2003 the Spanish Government had requested Repsol YPF to lead the oil removal project. It was also noted that Repsol YFP had subsequently initiated a number of studies culminating in a presentation in Madrid on 30 April 2003 of the options for the recovery of the oil together with estimates of the costs. The Committee noted that the Director had considered that from that date the very high costs of the oil removal operation in relation to the potential economic and environmental effects of leaving the oil in the wreck had been apparent and that costs incurred subsequent to that date would therefore be for the most part inadmissible. It was noted, however, that, on the basis of the information contained in the supporting documentation submitted with the claim, the Director considered that there were a number of items of expenditure incurred in early 2003 that were admissible in principle, as well as the costs of the work undertaken in July and August 2003 to complete the sealing of the wreck.

3.2.67 The Committee noted the Director's view that the costs of the secondary sealing of oil leaks from the wreck were proportionate and therefore admissible in principle. It was noted that the Director had also considered that the costs of a number of studies and surveys carried out were, to the extent that the studies and surveys assisted in the assessment of the pollution threat posed by the wreck, admissible in principle (cf document 92FUND/EXC.32/4/Add.1 paragraphs 4.15-4.23). It was noted that the total cost of these potentially admissible items was some €11.3 million (£7.7 million), although, in the Director's view, a further, more detailed analysis of these claim items would be required in order to identify the extent to which they had a bearing on the risk posed by the oil in the wreck and to assess the admissible quantum. It was, however, noted that since, as a result of the European Commission aid payments, the claim for costs incurred in 2003 had been reduced to €4 785 000 (£3.3 million), this reduced claimed amount would have to be taken into account for the purpose of determining the total amount of compensation due to the Spanish Government under the 1992 Conventions.

3.2.68 The Committee also noted that the Director had considered that the other costs incurred in 2003, totalling €21.8 million (£14.9 million), relating to basic engineering studies of the two proposed alternative methods of extracting the oil and pilot-scale and field-scale tests of the shuttle containers, were not admissible, since they were incurred after the very high costs of the operation in relation to the potential economic and environmental effects of leaving the oil in the wreck had been known.

3.2.69 It was also noted that, in the Director's view, the costs incurred in 2004, totalling €76.1 million (£51.9 million), relating to the actual oil removal operations and the application of nutrients to the tanks in the forepart of the wreck after the bulk oil had been removed, were inadmissible in principle, since these costs were disproportionate to any potential economic and environmental consequences of leaving the oil in the wreck. It was noted that although, as a result of the European Commission aid payments, the claim for the costs of the operations in 2004 had been reduced to €19 383 265 (£13.2 million), the Director was of the view that in considering the admissibility of the claim, the technical reasonableness of the operation and the proportionality between the costs of the operation and the potential economic and environmental consequences, the total costs of the oil removal operation, as opposed to the balance of the costs after deducting the amount granted by the European Commission, should be taken into account and that therefore in his view the claim for costs incurred in 2004, even for the reduced amount, was inadmissible.

Spanish delegation's position

3.2.70 The Spanish delegation introduced document 92FUND/EXC.32/4/1, in which it had confirmed that the Spanish Government had reduced its claim from €109.2 million to €24.2 million. That delegation reiterated its view that the Funds' admissibility criteria and the concept of proportionality should be applied to the revised, and not the original, claimed amount.

3.2.71 The Spanish delegation also drew attention to the fact that on the basis of the revised claimed amount the cost per tonne of oil removed from the *Prestige* of €1 751 was significantly lower than in previous cases accepted by the Funds and that it could not therefore be argued that the cost was disproportionate or that the claim was inadmissible.

Consideration by the Executive Committee

3.2.72 In response to a question, the Spanish delegation stated that whilst the European Commission had not based its decision to award the Spanish State 85% of the costs of the oil removal operation using the same criteria as the 1992 Fund, it was clear the Member States of the European Union had considered that the action by the Spanish Government was reasonable.

3.2.73 The Spanish delegation stated that it did not anticipate any further financial aid beyond that already awarded, but that it did not know when the pending amounts awarded by the European Commission would be paid. The delegations of France and Portugal stated that their Governments had not received any aid payments from the European Commission in respect of the *Prestige* incident.

3.2.74 Some delegations stated that they did not share the Director's view that the cost of the oil removal operation was disproportionate on the grounds that had the oil not been removed from the wreck pollution would have continued year on year. The point was made that it had not been possible to predict with any certainty what the outcome of leaving the oil in the wreck would have been and that it would therefore be difficult for any government to resist pressure from the public to ensure that the risk was eliminated. The point was also made that there was a very clear link between the costs incurred in 2003 and 2004 in that the operation could not have proceeded in 2004 without the necessary studies and preparatory work in 2003.

3.2.75 Some delegations considered that the admissibility of the claim should be assessed on the basis of the revised claim amount and not on the actual cost of the operation to remove the oil. Other delegations disagreed and expressed the view that admissibility should not be assessed on the basis of the reduced claim, since this would encourage the manipulation of claims in the future.

3.2.76 A number of delegations agreed with the Director's analysis that certain elements of the claim for costs incurred in 2003 were admissible in principle but that the claim for the cost of removing the oil from the wreck did not fulfil the Funds' objective technical criteria. Those delegations considered that for the claim to be admissible the Fund would need to change its

existing policy so as to allow assessments to be made on the basis of a broader analysis including a social dimension.

3.2.77 At the suggestion of the Chairman, the Committee postponed further discussion of the question of the admissibility of the claim for the costs for the actual removal operation until later in the week to allow delegations to reflect on the views expressed and give further time for consideration of the issues involved.

3.2.78 At the resumption of the discussion most delegations that intervened expressed the view that, on the basis of the Funds' existing admissibility criteria, and in the interest of applying those criteria in a uniform way, the claim for the costs incurred by the Spanish Government in 2004 for the removal of the oil from the wreck was inadmissible. However, some delegations considered that it was important that the Funds were prepared to deal with similar claims in the future in a more flexible manner. To that end, those delegations expressed the view that the Director should be instructed to examine the existing admissibility criteria in respect of preventive measures and to submit to the Assembly detailed proposals for clarifying the criteria within the framework of the existing Conventions.

3.2.79 The Spanish delegation expressed its gratitude to the Director and members of the Executive Committee for its efforts in trying to understand the position of the Spanish Government and the problems that it had faced. That delegation stressed that the Spanish State, although it considered that its claim was reasonable and admissible, had no economic interest in the outcome of the decision and that one of the reasons why it had pursued the claim was to address an important question of principle in the light of technological developments. The Spanish delegation also expressed the view that the Funds' criteria should allow greater flexibility as regards the admissibility of such claims.

3.2.80 The Executive Committee decided, as proposed by the Director in paragraphs 4.26 and 4.27 of document 92FUND/EXC.32/4/Add.1, that some of the costs incurred in 2003 in respect of sealing the oil leaking from the wreck and various surveys and studies were admissible in principle, but that the claim for costs incurred in 2004 relating to the removal of oil from the wreck was inadmissible.

3.2.81 The Executive Committee instructed the Director to carry out an examination of the admissibility criteria relating to claims for costs of preventive measures, in particular for the extraction of oil from sunken vessels, with a view to enabling the 1992 Fund Assembly at it October 2006 session to discuss possible alternatives for the existing criteria for admissibility within the framework of the 1992 Conventions.

3.3 *N°7 Kwang Min*

3.3.1 The Executive Committee took note of the information regarding the *N°7 Kwang Min* incident as set out in document 92FUND/EXC.32/5.

The incident

3.3.2 It was noted that on 24 November 2005 the Korean tanker *N°7 Kwang Min* (161 GT) had collided with the Korean fishing boat *Chil Yang N°1* (139 GT) in the port of Busan, Republic of Korea, and that a total of 64 tonnes of heavy fuel oil had escaped into the sea from a damaged cargo tank. It was also noted that the remaining oil onboard the *N°7 Kwang Min* had been transferred to a number of other vessels and that the *N°7 Kwang Min* had subsequently been taken to a shipyard in Busan.

3.3.3 The Committee noted that the 1992 Fund had appointed a team of Korean surveyors to monitor the clean-up operations and investigate the potential impact of the pollution on fisheries and mariculture.

Clean-up operations

3.3.4 It was noted that the Korean Coastguard, the Korea Marine Pollution Response Corporation and seven private clean-up contractors had promptly mobilised 36 pollution response vessels and that defensive booms had been deployed to protect port installations such as shipyards and fish markets as well as the hulls of a number of ships berthed in the port. The Committee noted that, as a result of this rapid response, serious property damage and consequential economic losses had been prevented. It was noted that most of the on-water clean-up resources had been withdrawn on 27 November 2005.

3.3.5 The Committee noted that the remaining spilled oil, as well as considerable quantities of oiled debris, had stranded on the shorelines to the west and south of the island of Yeongdo and that approximately 5 km of shoreline composed of rocks, boulders and pebbles had been polluted to varying degrees. It was noted that four private clean-up contractors had been appointed by the shipowner to undertake shoreline clean-up operations using predominantly manual methods to remove bulk oil, followed by high pressure water washing to remove oil stains. It was also noted that some oiled sections of shoreline were fronted by cliffs, making access difficult both from the land and from the sea, and that a landing craft had eventually been able to land an earth excavator on the island in order to construct a temporary road and causeway to facilitate the removal of collected oil by barge. The Committee noted that shoreline clean-up operations had been completed on 18 January 2006.

Impact of the spill

3.3.6 The Committee noted that drifting oil at sea had contaminated the hulls of a number of vessels, including those engaged in the clean-up operations. It was noted that some of the affected shorelines supported village fishing grounds and that the activities of some 80 women divers engaged in the gathering of sub-tidal species of plants and animals had been interrupted. It was also noted that the oil had also affected a number of seaweed (sea mustard and kelp) cultivation farms as it passed through the supporting structures, contaminating buoys and ropes, but that, as a result of oiled equipment having been cleaned or replaced quickly, there had been no serious damage to the seaweed products. It was further noted that six seafood restaurants had reported alleged mortalities of fish as a result of oil entering the sub-surface intakes supplying seawater to the aquaria in which they were being kept.

Applicability of the 1992 Fund Convention

3.3.7 The Committee noted that the limitation amount applicable to the *N°7 Kwang Min* under the 1992 Civil Liability Convention was 4.51 million SDR (£3.8 million).

3.3.8 It was noted that in December 2005 the Korean Ministry of Maritime Affairs and Fisheries had informed the 1992 Fund that the *N°7 Kwang Min* was not insured for pollution liabilities, that the shipowner had very few assets and that the value of the *N°7 Kwang Min*, which was built in 1977, was such that the proceeds from its sale would be insufficient to cover the claims for compensation for pollution damage arising from the incident. The Committee noted that the 1992 Fund was nevertheless investigating the financial situation of the shipowner.

3.3.9 The Committee noted that in view of the lack of liability insurance in respect of the vessel and the limited assets of the shipowner it was unlikely that he would be financially capable of meeting his obligations under the 1992 Civil Liability Convention to pay compensation in full to persons suffering pollution damage arising out of the incident. It was noted that, although the total amount of the admissible claims would fall below the limitation amount applicable to the *N°7 Kwang Min,* the 1992 Fund, in the Director's view, would be liable in accordance with Article 4.1 (b) of the 1992 Fund Convention to pay compensation.

3.3.10 It was recalled that Regulation 7.4 of the 1992 Fund's Internal Regulations provided that where the Director was satisfied that the 1992 Fund was liable under the 1992 Fund Convention to pay

compensation for pollution damage, he may, without the prior approval of the Assembly, make final settlement of any claim, if he estimated that the total cost to the 1992 Fund of satisfying all claims arising out of the relevant incident was not likely to exceed 2.5 million SDRs. It was also recalled that the Director may in any case make final settlement of claims from individuals and small businesses up to an aggregate amount of 1 million SDRs in respect of any one incident and that the relevant date for conversion should be the date of the incident in question.

3.3.11 The Committee noted that on the basis of the SDR/Won exchange rate on 24 November 2005, the date of the incident, the Director's financial limit under Regulation 7.4 was Won 3 700 million. It was also noted that the Fund's experts had indicated that in their view, the total claims arising from the incident would not exceed this amount.

3.3.12 The Committee endorsed the position taken by the Director as regards his authority to settle claims under Internal Regulation 7.4 and also authorised him to make final settlement of all further claims arising out of the incident.

Claims for compensation

3.3.13 The Committee noted that as at 27 February 2006 12 claims totalling Won 2 665 million (£1.6 million) in respect of the costs of clean-up and preventive measures had been received by the 1992 Fund, four of which, totalling Won 239 million (£139 000), had been settled at Won 237 million (£138 000).

3.3.14 It was noted that six live seafood restaurants located on the polluted coast 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 and for losses as a result of cancellations of bookings, one month's lost earnings and for other, unspecified damages. The Committee noted that in order to establish whether oil had entered the restaurants' aquaria the Fund's experts had appointed a diver to inspect their seawater intakes, which was located in depths of between two and 0.8 metres of water, that the divers had reported no evidence of any exposure to oil and that the Fund had therefore rejected the claim for alleged mortalities of fish. It was also noted that the claimants had been unable to demonstrate any booking cancellations but had provided sales records for several weeks prior to, and following, the incident which indicated that no significant loss had occurred during the weeks following the incident. As regards the unspecified losses, the Committee noted that the owners and staff of the restaurants had voluntarily undertaken clean-up of the shoreline fronting their restaurants, which had lasted over two days, that the Director had considered that these activities had been prudent preventive measures and that the Fund had therefore approved costs totalling Won 3.1 million (£1 800) in respect of clean-up operations.

3.3.15 It was also noted that fishery and mariculture claims totalling Won 618 million (£360 000) had been received by the Fund and that these claims were being assessed.

3.3.16 The Korean delegation expressed its gratitude to the 1992 Fund for its prompt assistance in dealing with claims arising form the incident. That delegation confirmed that the shipowner did not have any liability insurance and that an investigation by the Korean Coast Guard had shown that the shipowner did not have sufficient assets to pay compensation claims.

4 Any other business

No items were raised under this agenda item.

5 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.32/WP.1, was adopted, subject to certain amendments.