INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
24th session
Agenda item 6

92FUND/EXC.24/8
27 February 2004
Original: ENGLISH

RECORD OF DECISIONS OF THE TWENTY FOURTH SESSION OF THE EXECUTIVE COMMITTEE

(held on 23, 24 and 27 February 2004)

Chairman: Mr J Rysanek (Canada)

Vice-Chairman: Mr V Schöfisch (Germany)

Opening of the session

1 Adoption of the Agenda

1.1 The Executive Committee adopted the Agenda as contained in document 92FUND/EXC.24/1.

1.2 In response to a question as to whether the Director should submit to each session of the Executive Committee a document summarising the activities of the 1992 Fund since the previous session, the Committee re-endorsed its previous decision that the agenda of the Executive Committee should focus on important incident-related issues requiring decisions and major developments and that general information on activities should be reported only at October sessions of the governing bodies.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

Australia	Greece	Netherlands
Cameroon	Grenada	Poland
Canada	India	Singapore
France	Japan	Sweden
Germany	Marshall Islands	United Arab Emirates

The Executive Committee took note of the information given by the Director that all the above-mentioned members of the Committee had submitted credentials which were in order.

2.2 The following Member States were represented as observers:

Algeria	Finland	Philippines
Antigua and Barbuda	Ghana	Portugal
Argentina	Ireland	Republic of Korea
Bahamas	Italy	Russian Federation
Belgium	Liberia	Spain
China (Hong Kong Special Administrative Region)	Malta	Tanzania
	Mexico	Trinidad and Tobago
Colombia	New Zealand	Tunisia
Congo	Nigeria	United Kingdom
Cyprus	Norway	Vanuatu
Denmark	Panama	Venezuela

2.3 The Executive Committee decided to grant observer status, on a provisional basis, to Pakistan, pending the decision by the Assembly at its next session.

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

Brazil	Iran, Islamic Republic of	Pakistan
Chile	Ecuador	Saudi Arabia

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

Intergovernmental organisations:

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

International non-governmental organisations:

BIMCO
Comité Maritime International (CMI)
Federation of European Tank Storage Associations (FETSA)
Friends of the Earth International (FOEI)
International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)
International Group of P&I Clubs
International Salvage Union (ISU)
International Tanker Owners Pollution Federation Ltd (ITOPF)
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 in respect of the *Erika* incident set out in document 92FUND/EXC.24/2.

Claims situation

3.1.2 The Committee noted that as at 23 January 2004, 6 892 daims totalling FFr1 354 million or €206million (£145 million) had been submitted to the Claims Handling Office in Lorient. It was noted that 6 482 claims totalling FFr1 179 million or €180 million (£127 million),

representing 94% of the total number of claims, had been assessed at a total of FFr653 million or €99 million (£70 million). It was also noted that 795 claims, totalling FFr154 million or €23 million (£16 million), had been rejected.

3.1.3 It was noted that payments for compensation had been made in respect of 5 436 claims for a total of FFr583 million or €88.9 million (£61.5 million), out of which the shipowner's P&I insurer, Steamship Mutual Underwriting Association (Bermuda) Limited (Steamship Mutual) had paid FFr84 million or €12.8 million (£8.9million) and the 1992 Fund FFr499 million or €76.1 million (£52.6 million).

3.1.4 It was recalled that the maximum amount available for compensation under the 1992 Civil Liability Convention and the 1992 Fund Convention was 135 million Special Drawing Rights (SDR) per incident, including the sum paid by the shipowner and his insurer (Article 4.4 of the 1992 Fund Convention), and that in respect of the *Erika* incident the conversion of that amount into French Francs had given the amount of FFr1 211 966 811 corresponding to €184 763 149 (£130 million).

3.1.5 It was recalled that the claims by the French Government and Total Fina Elf could be disregarded for the purpose of establishing the 1992 Fund's level of payments, since these claims would be pursued only if and to the extent that all other claims had been paid in full, provided however that the French Government's claim would take precedence over the claims of Total Fina Elf.

3.1.6 It was also recalled that the Director had on 25 April 2003 decided, as authorised by the Executive Committee, to increase the Fund's level of payments from 80% to 100% of the amount of the damage actually suffered by the respective claimants as assessed by the 1992 Fund and the Steamship Mutual or decided by the French Courts in final judgements.

3.1.7 It was recalled that at the Executive Committee's 22nd session held in October 2003, the Director had stated that although there remained considerable uncertainties as to the total amount of the established claims, this uncertainty had been reduced since April 2003 and that it might therefore be possible in the near future to make payments in respect of the French Government's claim. It was also recalled that the Committee had authorised the Director to make such payments to the extent that he considered 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). It was further noted that, after having reviewed his earlier assessment of the total level of admissible claims, the Director had decided that there was a sufficient margin to enable the 1992 Fund to commence payments to the French State. The Committee noted that on 29 December 2003, the 1992 Fund had paid €10 106 004 (£6 973 146) to the French State, corresponding to the French Government's subrogated claim in respect of the supplementary payments made by the Government to claimants in the tourism sector.

Recourse actions by the 1992 Fund

3.1.8 It was recalled that, pending the outcome of the ongoing investigations into the cause of the incident, the 1992 Fund had on 11 December 2002 taken recourse actions, as a protective measure, before the expiry of the three-year time period against the following parties:

Tevere Shipping Co Ltd (registered owner of the *Erika)*
Steamship Mutual (P & I insurer of the *Erika*)
Panship Management and Services Srl (manager of the *Erika)*
Selmont International Inc (time charterer of the *Erika*)
Total Fina Elf SA (previously Total Fina SA) (holding company)
Total Raffinage Distribution SA (shipper)
Total International Ltd (seller of cargo)

Total Transport Corporation (voyage charterer of the *Erika)*
RINA Spa (classification society)
Registro Italiano Navale (classification society)
Bureau Veritas (classification society)

3.1.9 The Committee recalled that criminal charges have been brought against, *inter alia*, the deputy manager of Centre Régional Opérationnel de Surveillance et Sauvetage (CROSS) and three officers of the French navy who were responsible for controlling the traffic off the cost of Brittany and that if they were found guilty there might be grounds for the Fund to take recourse action against the French State. It was also recalled that it was not possible for the 1992 Fund to decide whether there were grounds for such an action until the investigations into the cause of the incident had been completed.

3.1.10 It was recalled that under French law the general time bar period in commercial matters was ten years but that in matters involving the liability of public bodies, in order to prevent a claim for compensation becoming time-barred, such a claim should be notified to the French Administration by 31 December of the fourth year after the event giving rise to a claim, ie in the case of the *Erika* incident by 31 December 2003. It was also recalled that at its 22nd session in October 2003, the Executive Committee had instructed the Director to take the necessary steps to prevent possible future claims against the French State becoming time-barred (document 92FUND/EXC.22/15, paragraph 3.4.20). The Committee noted that the 1992 Fund had made a notification of its potential claim to the French Administration in December 2003 and that the French State had accepted that this notification had the effect of interrupting the time bar.

Claims in various courts

3.1.11 The Executive Committee took note of the court actions relating to some 500 claims set out in sections 10-13 of document 92FUND/EXC.24/2.

3.1.12 It was noted that by 23 January 2004, court actions taken by 499 claimants (including 212 salt producers) against the shipowner, Steamship Mutual and the 1992 Fund were pending and that the total amount claimed, excluding the claims by the French State and TotalFinaElf, was FFr553 million or €84.4 million (£59 million).

Court judgements in respect of claims against the 1992 Fund

3.1.13 The Committee noted that in December 2003, the Commercial Court in Lorient had rendered judgements in respect of four claims in the tourism and fisheries sectors relating to 'pure economic loss' which had been rejected by the shipowner, Steamship Mutual and the 1992 Fund, as reported in section 14 of document 92FUND/EXC.24/2. The Committee also noted that the 1992 Fund had appealed against the judgements to the Court of Appeal in Rennes.

3.1.14 The Committee recalled that the 1971 Fund Assembly had established in 1994 an intersessional Working Group to examine the general criteria for the admissibility of claims for compensation within the scope of the 1969 Civil Liability Convention, the 1971 Fund Convention and the 1992 Civil Liability and Fund Conventions, and to study, in particular, claims relating to 'pure economic loss'. It was also recalled that in its report to the Assembly (document FUND/A.17/23), the Working Group had emphasised that a uniform interpretation of the definition of 'pollution damage' was essential for the functioning of the regime of compensation established by these Conventions. It was further recalled that the conclusions of the Working Group set out in its report to the 1971 Fund Assembly (document FUND/A.17/23) had been endorsed by the Assembly at its 17th session held in October 1994 (document FUND/A.17/35, paragraph 26.8).

3.1.15 It was recalled that, as regards pure economic loss (ie loss of earnings sustained by persons whose property had not been polluted but who had nevertheless suffered economic loss as a result of an incident), the criteria for admissibility adopted by the Working Group and endorsed by the 1971 Fund Assembly could be summarised as follows:

> To qualify for compensation for pure economic loss, there must be a reasonable degree of proximity between the contamination and the loss or damage sustained by the claimant. A claim is not admissible for the *sole* reason that the loss or damage would not have occurred had the oil spill not happened. When considering whether the criterion of reasonable proximity is fulfilled, the following elements should be taken into account:
>
> - the geographic proximity between the claimant's activity and the contamination
> - the degree to which a claimant is economically dependent on an affected resource
> - the extent to which a claimant has alternative sources of supply
> - the extent to which a claimant's business forms an integral part of the economic activity within the area affected by the spill.
>
> Account should also be taken of the extent to which a claimant was able to mitigate his loss.

3.1.16 It was recalled that the 1971 Fund Executive Committee had decided at its 53rd session, held in April 1997, that, as regards the tourism sector, the Funds should make a distinction between (a) claimants who sold goods or services directly to tourists and whose businesses were directly affected by a reduction in visitors to the area affected by an oil spill, and (b) those who provided goods or services to other businesses in the tourist industry, but not directly to tourists. It was also recalled that it had been decided that in this second category there was generally not a sufficient degree of proximity between the contamination and the losses allegedly suffered by claimants and that claims of this type would therefore normally not be admissible in principle.

3.1.17 It was recalled that at its 1st session, held in June 1996, the 1992 Fund Assembly had adopted a Resolution on the admissibility of claims for compensation adopting the report of the Working Group of the 1971 Fund as basis of the policy of the 1992 Fund on the criteria for the admissibility of claims and decided that these criteria should be applied by the 1992 Fund in its consideration of the admissibility of claims (document 92FUND/A.1/34, Annex III).

3.1.18 The Committee took note of one of the judgements by the Commercial Court in Lorient relating to a claim in respect of loss of income allegedly suffered by a claimant whose property in the affected area was to be let to other businesses (and not directly to tourists) but which, according to the claimant, could not be let due to the negative effects of the *Erika* incident. It was noted that since this claim fell within the second category referred to in paragraph 3.1.16, the 1992 Fund had rejected the claim. It was further noted that in the Fund's view the claimant had not proven that he had suffered any loss as a result of the incident.

3.1.19 It was noted that in its judgement the Commercial Court had stated that its function was to establish whether there was damage and, if so, to assess it in accordance with the criteria of French law. The Committee noted that the Court had held that, under French law, a claim for compensation was admissible if the loss was direct and certain, provided there was a sufficient link of causation between the event and the damage, and that it was shown that the damage would not have occurred if the event had not taken place. It was noted that in the Court's view, the *Erika* incident was the sole cause of the pollution and its economic consequences, and that the pollution had caused a reduction in tourism, a decrease in sales of products related to the sea in the affected area and generally a reduction in turnover of all activities linked to the sea. It was also noted that the Court had stated that it was not bound by the criteria for admissibility laid down by the 1992 Fund. The Committee also noted that the Court had considered that a

letter from an estate agency had shown that a contract for the lease of the property had been cancelled due to the *Erika* incident. It was further 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 at €10 671 (£7 500).

3.1.20 The Committee took note of the three other judgements referred to in paragraphs 14.9-14.11 of 92FUND/EXC.24/2 relating to claims by a person selling and letting machines for the production of ice cream, by a hotel situated in Carnac and by an oyster grower in Morbihan. It was noted that these claims had been rejected by the 1992 Fund on the grounds that the claimants had not shown that there was a sufficient link of causation between the alleged loss and the contamination caused by the *Erika* oil spill. It was also noted that the Court, after having made the same statement in respect of the criteria to be applied as set out in paragraph 3.1.19 and stating that it was not bound by the Fund's criteria, had appointed an expert to investigate whether there was a link of causation between the alleged loss and the oil pollution.

3.1.21 The Committee noted that the issue of whether the Funds' criteria should be taken into account by national courts was the major issue in a large number of other court actions in relation to the *Erika* incident. It was recalled that the governing bodies of the 1992 and 1971 Funds had repeatedly emphasised the importance of a uniform application of the 1992 Conventions for the proper functioning of the international compensation regime. It was also recalled that the Funds' criteria had been developed and adopted by the 1971 and 1992 Funds' governing bodies in order to promote a uniform application of the Conventions.

3.1.22 It was recalled that this question had been addressed by the 1992 Fund Administrative Council at its 1st session in May 2003 when the Council had adopted a Resolution (1992 Fund Resolution N°8) in which it was recognised that under Article 31.3 of the 1969 Vienna Convention on the Law of Treaties, for the purpose of the interpretation of treaties there should be taken into account any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions and any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation. It was recalled that the Resolution had drawn attention to the fact that the governing bodies of the 1971 and 1992 Funds had taken a number of important decisions on the interpretation and application of the 1969, 1971 and 1992 Conventions for the purpose of ensuring equal treatment of all those who claimed compensation for oil pollution damage. It was also recalled that the Council had emphasised that it was vital that the decisions taken by the governing bodies of the 1971 Fund and the 1992 Fund were given due consideration when national courts in Member States took decisions on the interpretation and application of the 1992 Conventions and that it had considered that such decisions by the Fund's governing bodies should be taken into account by the courts. It was further noted that the application of uniform criteria for the admissibility of claims became especially important in respect of incidents causing pollution damage in several States, such as the *Prestige* incident, which had affected France, Spain, Portugal and the United Kingdom.

3.1.23 The Committee noted that the 1992 Fund's French lawyers had advised the Director that if the Fund wished to bring the issue of the importance of uniform application of the Conventions before the Court of Appeal, it should appeal against all four judgements.

3.1.24 A number of delegations stressed the importance of the uniform application of the Conventions stating that the Fund had no alternative but to challenge any court decision that did not take into account this fundamental tenet of the 1969 Vienna Convention on the Law of Treaties. Other delegations stated that it was also necessary to appeal against the Court's judgements on the grounds that the claims did not meet the Fund's criteria requiring a link of causation between the contamination and the loss suffered by the claimants. The point was made that although the Fund's criteria were not binding on the national courts, it was crucial that the courts took them into account.

3.1.25 Some delegations expressed concern that if final court decisions went against the Fund's policy regarding admissibility of claims, this would set a very bad precedent that could open the floodgates for such claims in the future. In those delegations' view it was therefore important that the Fund did its utmost to try to persuade the French courts to accept its criteria governing claims admissibility.

3.1.26 A number of delegations expressed concern that the Fund might often have to appeal against court judgements that went against its claims admissibility criteria and wondered how this problem could be overcome.

3.1.27 Considering the importance of this issue for the proper functioning of the compensation regime based on the 1992 Conventions, the Executive Committee decided that the 1992 Fund should pursue the appeals against all four judgements.

3.1.28 The Committee took note of a judgement dated 29 January 2004 rendered by the Civil Court (Tribunal de Grande Instance) in Nantes in respect of claims by the owners of two hotels in Nantes for pure economic loss as reported in document 92FUND/EXC.24/2/Add.2. It was noted that these claims had been rejected by the 1992 Fund since, in the Fund's view, they did not fulfil the criteria for admissibility laid down by the Fund's governing bodies in that there was not a reasonable degree of proximity between the alleged losses and the pollution. It was noted that the Court had rejected the claims in the light of the Fund's criteria, on the grounds that the claimants had not shown a link of causation between the alleged losses and the oil pollution caused by the *Erika* incident.

3.1.29 One delegation asked why the names of the claimants had not been given in document 92FUND/EXC.24/2/Add.2 and what the Fund's policy was regarding the naming of claimants. A number of delegations pointed out that since the Committee only considered claims from the point of view of questions of principle, it was generally not necessary to include the names of individual claimants, although there had been exceptions in the past.

3.1.30 The Director stated that the Fund's practice had been to name claimants in documents only when it was relevant for the matter under consideration to do so, although once litigation commenced, the names of claimants were then in the public domain. A number of delegations expressed support for maintaining the current practice.

3.1.31 One delegation stated that it was important that the Fund adopted a uniform approach as regards stating or withholding the names of claimants in documents and proposed that the Director should draw up criteria governing the Fund's policy on this issue.

3.1.32 The Committee instructed the Director to present a document on this issue for its consideration at a later session.

Claim in respect of reduction of airport taxes

3.1.33 The Committee took note of the information contained in document 92FUND/EXC.24/2/Add.1. It was recalled that in June 2001 the Morbihan Chamber of Commerce and Industry (CCI), which operated the airport of Lorient Lann Bihoué, had submitted a claim for FFr336 793 (£35 427) for reduction in the revenue from airport taxes during 2000. It was also recalled that the airport tax was levied at FFr42.06 per passenger, and that the claimant had maintained that there had been a reduction of 8 007 passengers during 2000 compared to 1999.

3.1.34 It was recalled that at its 14th session, held in October 2001, the Executive Committee had considered this claim in the light of the data provided by the claimant which showed that the number of passengers per flight using the airport varied by more than 5% from one year to another, compared with a decrease of 3% from 1999 to 2000. The Committee also recalled that Lorient was primarily a domestic airport for which tourist passengers were of only limited

importance. It was further recalled that the Committee had decided that the claim should be rejected since it had not been shown that the reduction in passengers from 1999 to 2000 and the ensuing reduction in airport tax revenue had been caused by the *Erika* incident (document 92FUND/EXC.14/12, paragraphs 3.4.67 and 3.4.68).

3.1.35 It was noted that in June 2002 the CCI had reduced its claim to FFr94 130 (£9 900) and that in December 2002 the CCI had taken legal action against the 1992 Fund claiming that amount.

3.1.36 The Committee noted that in December 2003 the CCI had submitted further data, including records of the numbers of flights and passengers using the airport in 2001 and 2002 and that in the light of the additional data provided by the claimant the Director had reconsidered the original assessment of the claim. It was noted that the first assessment made by the Fund's experts had focused on the number of passengers per flight as opposed to the overall number of passengers but that in the Director's view the occupancy per flight was not a good indicator of airport users because the number of flights varied considerably from year to year. It was also noted that the new data indicated that the number of passengers using the airport during the claim period (May to September) in 1999 had been exceptionally high in comparison with all other years between 1997 and 2002 and that for that reason the Fund's experts had considered that 1999 was not an appropriate reference year to use as a basis for determining any impact in 2000. It was further noted that in the Director's view 2001 appeared to represent a good reference year in that the number of passengers using the airport outside the claim period (October to April) in that year had been almost the same as in 2000 and that in contrast the number of passengers using the airport during the claim period (May to September) had been down in 2000 compared to 2001 by 4.92%, the difference in the number of passengers in the claim period between those two years likely to have been due to a reduction in tourists as a result of the incident. The Committee noted that the Director was of the view that after taking into account the new data provided by the claimant, and after reassessing the claim on the basis of the number of passengers using the airport as opposed to the occupancy of flights, the claim was admissible.

3.1.37 A number of delegations expressed their reservations about approving a claim, which was, in their view a borderline case. Most of those delegations accepted that the claim was admissible in principle, but considered that the evidence was insufficient in linking the alleged losses to a downturn in tourism caused by the *Erika* incident. Those delegations considered that more data and information was required before a final conclusion could be reached.

3.1.38 Other delegations, whilst recognising the borderline nature of the claim, supported the proposal by the Director on the grounds that it offered a pragmatic and realistic solution. Those delegations considered that whilst the drop in revenue by the airport was not of itself proof that this was due to a reduction in the number of tourists caused by the *Erika* incident, the claimants should be given the benefit of the doubt.

3.1.39 The Committee invited the Director to carry out a further study of the claim, if possible using additional data such as passenger records for the years 2002 and 2003, and to present his findings to the Committee at its May 2004 session so as to enable the Committee to reconsider the claim.

3.1.40 The Committee noted that until it had reconsidered the claim the Fund would have to oppose it in the court proceedings.

3.2 *Zeinab*

3.2.1 The Executive Committee took note of the information concerning the *Zeinab* incident, which involved both the 1992 and 1971 Funds, contained in document 92FUND/EXC.24/3 (cf 71FUND/AC.13/3).

3.2.2 The Committee recalled that the Georgian-registered vessel *Zeinab*, suspected of smuggling oil from Iraq, had sunk about 16 miles from the Dubai coastline (United Arab Emirates) in April 2001. It was recalled that the *Zeinab* had not been entered with any classification society or covered by any liability insurance.

3.2.3 It was noted that claims in relation to clean-up and pollution prevention measures had been settled at £1.0 million. It was also noted that no further claims had been submitted and that claims arising from this incident would be time-barred on or shortly after 14 April 2004.

3.2.4 The Committee recalled that the Funds had in 2002 and 2003 carried out an investigation into the identity and whereabouts of the owner of the *Zeinab*. It was recalled that available documents had confirmed that the registered shipowner was an Iraqi national and that there was evidence that he was a shareholder of two other companies in the UAE unrelated to shipping. The Committee recalled that the UAE immigration authorities had confirmed that the shipowner had left the UAE in March 2002, that there was no record of him returning to the UAE since and that there were indications that the shipowner was living in Baghdad (Iraq).

3.2.5 The Committee recalled that in the October 2003 sessions of the governing bodies, most delegations had shared the Director's view that, as long as the shipowner was not living in UAE but probably in Iraq, it would not be meaningful to take recourse action against him. The Committee also recalled, however, that some delegations had expressed the view that the fact that the shipowner was probably living in Iraq should not in itself prevent the Funds from taking recourse action against him outside the UAE provided that he had assets against which a favourable judgement could be enforced.

3.2.6 The Committee recalled that the governing bodies had decided that the matter should be reconsidered before the expiry of the three-year time bar period (14 April 2004). It was also recalled that it had been decided that the Director should investigate further the financial standing of the two companies in which the shipowner allegedly held shares, whether he still held the shares, and if so, what their value was (documents 92FUND/EXC.22/14, paragraph 3.5.19 and 71FUND/AC.12/22, paragraph 15.8.18).

3.2.7 The Committee noted that subsequent investigations had revealed that the shipowner held 25% of the shares in relation to one of the two companies referred to in paragraph 3.2.4, which had an authorised share capital of AED300 000 (£50 000). It was noted that although UAE law required companies to file annual financial reports to the Ministry of Economy and Commerce, the Funds' lawyers had found that there were no public records available in relation to the financial status of that company. It was noted that the investigation had shown that a relative of the shipowner and a UAE national owned the second company but that the owner of the *Zeinab* had no financial interest in this company. The Committee noted that both companies had small offices manned by a small number of staff in Hamriyah port in Dubai. The Committee also noted that the Funds' lawyers had stated that the only assets in the UAE directly owned by the owner of the *Zeinab* appeared to be a three-year old motorcar whose registration had not been renewed since October 2002.

3.2.8 The Committee noted that the shipowner might be living illegally in the UAE under a new identity.

3.2.9 The Committee noted that as regards the question as to whether the Funds should take recourse action against the owner of the *Zeinab*, the Funds' lawyers had advised that under UAE law such actions could be taken by filing a claim with the UAE Courts prior to the expiry of the three-year time bar period. The Committee also noted that service upon the defendant (which would be undertaken by the Court) might be effected after the expiry of that period either directly (which in this case was likely to be difficult or if not impossible), or through publication of notices in the local press. It was noted that the Funds' lawyer had expressed the view that the Funds had a reasonable prospect of obtaining a favourable judgement against the

shipowner. It was noted, however, that they had stated that it would be extremely difficult to enforce any judgement against the shipowner since it had not been established that he was in the UAE and there was no evidence to suggest that he had any substantial assets there. It was also noted that the Funds' lawyers had further stated that it would take up to one year to obtain a judgement by the first instance court, that the defendant would have an unlimited right of appeal, firstly to the Dubai Court of Appeal and secondly to the Court of Cassation, and that these appeals could result in the proceedings lasting up to three years. It was further noted that it was possible that the shipowner would not appear in court even if he had been served and that a default judgement could then be obtained more quickly.

3.2.10 The Committee noted that the Funds' lawyers had indicated that the cost of the legal proceedings (exclusive of court fees) in the first instance court could reach US$45 000 (£24 000), that if the case were to proceed to the Court of Cassation, the costs could reach US$75 000 (£40 000) and that further costs would be incurred if execution proceedings were necessary. It was noted that the costs could be substantially higher if the shipowner raised complex arguments but would be substantially lower if the shipowner were not to contest the matter. It was noted that in the event of a favourable judgement being obtained, court fees would be recoverable but that lawyer fees and execution costs would only be recoverable for a nominal amount.

3.2.11 The Committee noted that as regards commencing recourse proceedings in Iraq against the owner of the *Zeinab*, the Funds' lawyers in the UAE had stated that the Civil Courts in Iraq were operational. It was noted that they had also advised that in order for the Iraqi Courts to effect service on the shipowner in Iraq, the Funds would have to provide the Court with a specific address at which the shipowner could be served, which might prove problematic as the relevant ministries were not operational, and that the Iraqi courts would not permit service to be effected by publication through Iraqi press unless a specific address for him in Iraq could be given. It was also noted, however, that the Funds' lawyers did not know if the shipowner was in Iraq, and if so, of his whereabouts or whether he had any assets there. It was further noted that the Funds' lawyers had also expressed the view that the Iraqi Courts might not assume jurisdiction over an action against the shipowner since the *Zeinab* was registered in Georgia and the incident had taken place in UAE territorial waters.

3.2.12 The Committee noted that since it was unlikely that the Funds would make any recovery from the shipowner as a result of a successful recourse action, the Director questioned whether it would be meaningful to pursue a recourse action in the UAE against him. It was noted that the Director had suggested that the governing bodies might wish to consider whether the IOPC Funds should nevertheless in the *Zeinab* case, as in the *Al Jaziah 1* case, take recourse action in the UAE in order to demonstrate their support for efforts to discourage the operation of substandard ships. The Committee also noted that the Director had considered that it would not be meaningful for the IOPC Funds to pursue a recourse action against the shipowner in Iraq.

3.2.13 Most delegations expressed the view that since the prospects of pursuing a successful recourse action were poor the Funds should not pursue recourse action against the owner of the *Zeinab*. Some delegations emphasised that the impracticability of making a recovery against the shipowner was the sole justification for deciding not to take recourse action.

3.2.14 Two delegations, whilst accepting the majority point of view for practical reasons, nevertheless indicated that they would have preferred that the Funds should take proceedings against the shipowner, even if there was little or no likelihood of success, since in their view it was important for the Funds to make a stand against substandard ships and shipping practices.

3.2.15 Emphasising that the IOPC Funds should in principle take recourse action in order to discourage the operation of substandard ships, the Executive Committee decided not to pursue a recourse action against the owner of the *Zeinab* on the sole ground that it would be extremely difficult to pursue such an action for legal and practical reasons.

3.3 *Duck Yang, Kyung Won and Jeong Yang* incidents

3.3.1 The Executive Committee took note of the information contained in document 92FUND/EXC.24/4 in respect of the *Duck Yang* and *Kyung Won* incidents, both of which occurred on 12 September 2003 and the *Jeong Yang* incident, which occurred on 23 December 2003, all in the Republic of Korea.

Duck Yang

3.3.2 The Committee recalled that the mooring ropes of the Korean tanker *Duck Yang* had parted whilst in the port of Busan (Republic of Korea) as a result of strong winds and heavy seas created by the typhoon 'Maemi', striking a barge and the quay wall of the port's central pier before turning on its side and sinking. It was recalled that an estimated 300 tonnes of heavy fuel oil had been lost from two cargo tanks whose manhole covers were open and another cargo tank whose shell plating had punctured. It was further recalled that the shipowner had engaged a local salvage company, which had successfully lifted the vessel out of the water by means of floating cranes and that the remaining oil on board had been transferred to another tanker.

3.3.3 It was recalled that the *Duck Yang* was insured for pollution liabilities with the Korea Shipping Association (KSA).

3.3.4 It was recalled that the oil had scattered throughout the port of Busan as a result of which the hulls of over 100 vessels were contaminated, that cleaning the hulls of some vessels had proved difficult due to restricted accessibility between vessels and quay walls and changes in vessels' freeboards as cargo was loaded or discharged. It was also recalled that a number of piers had been so heavily contaminated that vessels had been prevented from going alongside until they had been cleaned.

3.3.5 The Committee recalled that as a result of the confinement of the oil within the port areas, impact on fisheries had been minimal but that a number of raw seafood restaurants that abstracted seawater into their holding tanks had suffered business interruption due to the presence of oil.

3.3.6 It was recalled that the limit applicable to the *Duck Yang* under the 1992 Civil Liability Convention is 3 million SDR (£2.5 million). It was also recalled that at its 22nd session, held in October 2003, the Executive Committee had authorised the Director to settle claims arising from the incident to the extent that they did not give rise to issues of principle not previously considered by the Funds' governing bodies (document 92FUND/EXC.22/14, paragraph 3.11.10).

3.3.7 The Committee noted that claims in respect of the costs of preventive measures and clean-up, including the cleaning of the hulls of over 100 vessels, totalling Won 3 695 million (£1.7 million), had been assessed at Won 2 883 million (£1.4 million) and that claims totalling Won 46 million (£22 000) for property damage and economic losses resulting from disruption of vessel operations in the port of Busan had been assessed at Won 43 million. It was noted that further claims for property damage and consequential economic losses were expected and that it was therefore too early to predict whether the total claims arising from this incident would exceed the limitation amount applicable to the *Duck Yang*.

Kyung Won

3.3.8 The Executive Committee recalled that the Korean tank barge *Kyung Won* (144 GT), whilst moored near the port of Gwangyang, Namhae Island, Republic of Korea, had stranded on the breakwater of the village of Yu Po during the passing of the typhoon 'Maemi' resulting in a spill of approximately 100 tonnes of heavy fuel oil. It was recalled that approximately 14 km of

shoreline, along which 17 fishing villages were located, had been polluted by oil. It was also recalled that fishing and mariculture activities undertaken in the area included intertidal harvesting of marine products, inshore fishing with vessels, and set nets, shellfish culture farms and onshore hatcheries producing a range of marine products.

3.3.9 It was noted that the Marine Police, a private clean-up contractor and the Korean Marine Pollution Response Corporation (KMPRC) had deployed 31 response vessels to undertake clean-up operations at sea and that these operations had been terminated on 17 September, the remaining oil having stranded on shorelines. It was also noted that two private clean-up contractors, working under the direction of KMPRC, had organised shoreline clean-up operations, which had been undertaken by local labour drawn from the affected fishing communities and that these operations had been completed by mid-December 2003.

3.3.10 The Committee recalled that at the time of the incident the *Kyung Won* was not entered with any classification society and did not carry any liability insurance, that it appeared that its liability insurance had been terminated in May 2002 when the shipowner had become bankrupt, and that since then the former employees of the shipowner had continued to operate the vessel as a bunkering barge.

3.3.11 It was recalled that at its 22nd session, held in October 2003, the Executive Committee had authorised the Director to settle claims for compensation arising from *Kyung Won* incident to the extent that they did not give rise to issues of principle not previously considered by the Funds' governing bodies. It was also recalled that since the *Kyung Won* was not insured for pollution liabilities, and the shipowner was unlikely to have the financial resources to make any significant compensation payments, the Committee had decided that the 1992 Fund should pay settled claims even if the shipowner did not make any payments (document 92FUND/EXC.22/14, paragraphs 3.11.17 - 3.11.18).

3.3.12 The Committee noted that claims totalling Won 3 117 million (£1.5 million) in respect of the costs of clean-up and preventive measures had been settled and paid for Won 2 921 million (£1.3 million) and that no further claims were expected in these categories. It was also noted that the Fund's Korean experts were assessing claims totalling Won 3 268 million (£1.6 million) submitted by 18 village fishery associations (VFAs) in February 2004 in respect of losses in the fishing and mariculture sectors.

3.3.13 The Committee noted that in November 2003 the Director had considered whether the Fund should register the arrest of the *Kyung Won*, with a view to recovering the proceeds from public auction of the vessel in the event that the Fund were to obtain a judgement against the shipowner in respect of its subrogated claims. It was noted that in December 2003 the Fund's lawyers had advised the Director that the value of the *Kyung Won* was in the region of Won 70 – 80 million (£33 000 – £38 000) and that the owner had mortgaged the vessel for Won 50 million (£23 000). It was further noted that in view of the likely costs involved in pursuing a claim and the limited value of the *Kyung Won* in relation to the total claims exposure of the 1992 Fund, the Director had decided that there was no merit in the Fund attaching the vessel for potential subrogation claims.

Jeong Yang

3.3.14 The Executive Committee noted that shortly after departure from the L-G Caltex terminal near Yeosu (Republic of Korea) on 23 December 2003, the laden Korean tanker *Jeong Yang* (4 061 GT) had collided with the un-laden Korean tanker *Sung Hae* (5 914 GT) and that two of the *Jeong Yang*'s cargo tanks had been holed leading to the spillage of some 700 tonnes of heavy fuel oil. It was noted that, in its attempt to avoid the collision, the *Jeong Yang* had stranded on a muddy shore, but that it had been refloated with the aid of a tug. The Committee also noted that the cargo remaining on board the *Jeong Yang* had been offloaded on 24 December 2003.

3.3.15 It was noted that, due to the high pour point of the oil and the ambient sea temperature, the spilt oil had solidified into mats up to 10 centimetres thick and that the oil had drifted on the flood tide back towards the terminal from where the vessel had sailed, enabling the terminal personnel to contain most of the oil using a permanently deployed boom. It was also noted that tar balls up to 20 centimetres in diameter had stranded over four kilometres of shoreline on the island of Myodo to the north of the terminal and over 22 kilometres of coastline on Namhaedo to the east of the terminal.

3.3.16 The Committee noted that the *Jeong Yang* was entered with the Sveriges Ångfartygs Assurans Förening (Swedish Club) and the *Sung Hae* with the United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited (UK Club).

3.3.17 It was noted that some 60 vessels, including specialised pollution craft and fishing vessels, had been mobilised to combat the oil on the water. It was further noted that, due to the nature of the oil, mechanical collection methods had been employed using grab buckets and front-end loaders mounted on barges. The Committee noted that by 31 December 2003 all of the oil contained in the boom at the terminal and other floating oil had been recovered and the cleaning and demobilisation of equipment had commenced.

3.3.18 It was noted that booms had been deployed around the seawater intakes of three power stations and a steel plant to the north of the terminal and that manual cleaning of shorelines had been carried out rapidly and efficiently due to the solid nature of the oil, which had prevented spreading on surfaces and penetration into beach sediments.

3.3.19 The Committee noted that some 590 tonnes of liquid waste and 755 tonnes of solid waste had been collected as a result of clean-up operations, that under Korean law the reprocessing and recycling of oily waste is prohibited and that therefore all wastes had to be incinerated.

3.3.20 The Committee noted that, as a consequence of the successful containment of the bulk of the oil at the terminal, the impact of the spill on fisheries and mariculture had been limited. It was also noted that the booming of the seawater intakes had been successful and that it had therefore not been necessary to close any of the power plants and the steel plant.

3.3.21 It was noted that as at 5 February 2004 no claims for compensation had been submitted. The Committee noted that the Korean experts appointed by the Swedish Club and the 1992 Fund had estimated on a preliminary basis that the clean-up costs would be in the region of about Won 3 700 million (£1.7 million) and that some claims for property damage and economic losses could be expected.

3.3.22 It was noted that the limitation amount applicable to the *Jeong Yang* under the 1992 Civil Liability Convention was 4.5 million SDR (£3.8 million) and that it was too early to predict whether the total amount of claims would exceed this amount.

3.3.23 The Korean delegation stated that the Korean authorities had mounted a very successful response to the incident, which had greatly reduced the impact of the pollution. That delegation expressed the hope that the 1992 Fund would give every assistance towards settling claims arising from the incident.

3.3.24 The Executive Committee decided to authorise the Director to settle claims arising from the incident to the extent that they did not give rise to issues of principle not previously considered by the Funds' governing bodies.

3.4 *Prestige*

3.4.1 The Executive Committee took note of the information contained in documents 92FUND/EXC.24/5, 92FUND/EXC.24/5/Add.1 and 92FUND/EXC.24/5/Add.2 regarding the *Prestige* incident, which had occurred on 13 November 2002, in respect of the clean-up operations in Spain, France and Portugal and the impact of the spill in those countries. It was recalled that the oil had reached as far as the Dover Strait causing intermittent and light contamination of the French and English coasts of the English Channel.

3.4.2 It was noted that in December 2003, following trials in the Mediterranean and subsequently on the wreck site, the Spanish Government had decided that the cargo remaining in the wreck should be removed using aluminium shuttle containers filled by gravity through holes cut in the tanks. It was noted that these aluminium containers would, when filled, be raised to within some 40 metres of the sea surface and that from there the oil would be heated and pumped to a surface vessel. It was also noted that any oil remaining in the wreck after the removal operation would be subjected to bio-remediation.

3.4.3 It was recalled that in anticipation of a large number of claims, and after consultation with the Spanish and French Authorities, the shipowner's P&I insurer, the London Steamship Owners Mutual Insurance Association (London Club) and the 1992 Fund had established Claims Handling Offices in La Coruña (Spain) and Bordeaux (France).

Claims situation

3.4.4 The Committee noted that as at 23 January 2004 the Claims Handling Office in La Coruña had received 488 claims totalling €583.5 million (£411 million), including two claims from the Spanish Government, the first for €383.7 million (£270 million) submitted in October 2003 and the second for €44.6 million (£31 million) submitted in January 2004. It was noted that the claims by the Spanish Government related to costs incurred until the end of September 2003 in respect of at sea and on shore clean-up operations, compensation payments to fishermen and shellfish harvesters, tax relief for businesses affected by the spill, administration costs and costs relating to publicity campaigns. It was also noted that a third claim by the Spanish Government was expected in the next few weeks.

3.4.5 The Committee noted that the first claim received from the Spanish Government had been assessed by the Director on an interim basis at €107 million (£75 million) and that 170 other claims, totalling €8 423 343 (£5.9 million), had been assessed at €1 372 385 (£966 000). It was noted that many of the remaining claims lacked sufficient supporting documentation and that such documentation had been requested from the claimants. The Committee noted that interim payments totalling €1 457 (£1 030) had been made at 15% of the assessed amounts in respect of nine of the assessed claims. It was noted that of the 161 assessed claims that had not been paid, 72 had been rejected, the majority because the claimant had not demonstrated that a loss had been suffered, 52 claims awaited a response from the claimant to the offer of payment, one claim had been withdrawn and 36 claims were being examined by the London Club and the Fund.

3.4.6 The Committee noted that by 23 January 2004, 170 claims totalling €7.4million (£5.2 million) had been received by the Claims Handling Office in Bordeaux, that 24 claims for €528 515 (£372 000) had been assessed at €360 824 (£254 000), that 146 claims were being assessed by the experts appointed by the London Club and the 1992 Fund and that five claims had been rejected. It was noted that one payment of €10 470 (£7 370) had been made at 15% of the assessed amount and that the Club and the Fund were examining the remaining claims.

3.4.7 The Committee also noted that claims were expected in respect of clean-up and preventive measures in Portugal and that the Portuguese authorities had not submitted any claims but had

indicated that the clean-up costs amounted to some €3.0 million (£1.2 million) and that fishery losses were around €0.25 million (£100 000).

Payments and other financial assistance by the Spanish Authorities

3.4.8 The Committee recalled that the Spanish Government and regional authorities had made payments of some €40 (£28) 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 noted 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, and that it was expected that further subrogated claims would be presented in the near future.

3.4.9 It was noted that the Spanish Government had also provided aid to other individuals and businesses affected by the oil spill in the form of tax relief and waivers of social security payments.

3.4.10 The Committee recalled that the Spanish Government had made available to victims of the pollution credit facilities totalling €100 million (£70 million). It was also recalled that as the damage covered by these loans would eventually form the basis of claims against the Fund either directly or in subrogation, the Fund, at the Spanish Government's request, had agreed to assist in carrying out such evaluations. It was noted that as at 23 January 2004, the Claims Handling Office in La Coruña had received requests to assess the losses suffered by 41 loan applicants totalling €250 351 (£178 000), that 36 applications had been assessed on the basis of the documentation provided at a total of €82 937 (£59 000), that three applications had been returned at the request of the Spanish Government and that two could not be assessed due to lack of information.

3.4.11 The Committee recalled that in June 2003 the Spanish Government had adopted legislation in the form of a Royal Decree (Real Decreto-Ley) making available €160 million (£112 million) to compensate in full the victims of the pollution and that under this Decree the Spanish Government would acquire by subrogation the rights of those victims who decided to claim under this legislation. It was recalled that to receive compensation the claimants had to submit their claims by 31 December 2003, renounce the right to claim compensation in any other way in relation to the *Prestige* incident and transfer their rights of compensation to the Spanish Government. It was noted that the Decree provided that the assessment of claims would be made following the criteria used to apply the 1992 Civil Liability and Fund Conventions but that the procedure for the assessment of the claims submitted under this Royal Decree had not yet been decided.

Investigations into the cause of the incident

3.4.12 The Committee noted that the Court in Corcubión (Spain) was carrying out an investigation into the cause of the incident in the context of criminal proceedings. It was noted that the Court was investigating the role of the master of the *Prestige* and of one civil servant who had been involved in the decision not to allow the ship into a port of refuge in Spain. It was also noted that the Permanent Commission of Investigation of Maritime Incidents, under the authority of the Spanish Ministry of Infrastructure and Public Works, was gathering the necessary information to be able to issue a report on the *Prestige* accident but that given the scale of the incident, it would take some time for the investigation to be completed.

3.4.13 As regards France, the Committee noted that an examining magistrate in Brest was carrying out a criminal investigation into the cause of the incident.

3.4.14 It was noted that the 1992 Fund was following these investigations through its Spanish and French lawyers.

Court actions in Spain

3.4.15 The Committee noted that 1 848 claimants who allegedly had suffered losses as a result of the incident had joined the legal proceedings before the Court in Corcubión (Spain), that no details of the losses had been provided to the Court and that some of these claimants had submitted claims to the Claims Handling Office in La Coruña.

Court actions in France

3.4.16 The Committee noted that, at the request of a number of communes, the Administrative Court in Bordeaux had appointed experts to establish the extent of the pollution at various locations in the affected area and that the court experts have held a number of meetings. It was noted that in July 2003 five oyster farmers had commenced summary proceedings against the shipowner, the London Club and the 1992 Fund before the Court of Commerce in Marennes requesting provisional payments of amounts totalling approximately €400 000 (£282 040) and that a hearing was scheduled for March 2004.

Court actions in United States

3.4.17 The Committee noted 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 to exceed US$700 million (£390 million). It was noted 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 that it had been negligent in granting classification. It was also noted that ABS had denied the allegation made by the Spanish State and that it had in its turn taken action against the State, arguing that if the State had suffered damage this had been caused in whole or in part by its own negligence. It was further noted that ABS had made a counterclaim requesting 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.

3.4.18 The Committee also noted that regional authorities of the País Vasco 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), arguing *inter alia* that ABS had breached its duty to inspect the *Prestige* adequately and that it had classified the vessel as seaworthy when it was not. It was also noted that the Court in Houston had decided that the action should be transferred to the Federal Court of first instance in New York.

Maximum amount available under the 1992 Conventions

3.4.19 The Committee 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 (£16 million) and that in 28 May 2003 the shipowner had deposited €22 777 986 with the Criminal Court in Corcubión (Spain) for the purpose of constituting the limitation fund.

3.4.20 It was recalled that applying the principles laid down in the *Nakhodka* case, the Executive Committee had decided in February 2003 that in the *Prestige* case the conversion of the maximum amount available for compensation under the 1992 Fund, 135 million SDR, into euro should be made on the basis of the value of the euro vis-à-vis the SDR on the date of the adoption of the Committee's Record of Decisions of that session, ie 7 February 2003, and that as

a result the maximum amount available for compensation corresponded to €171 520 703 (£121 million).

Payments to the Spanish Government

3.4.21 It was recalled that at the Executive Committee's October 2003 session the Spanish delegation had proposed that the 1992 Fund should, subject to certain safeguards, make advance payments on account to the Spanish Government and the Governments of other affected States which wished to receive such advance payments. It was also recalled that under the proposal the payments should be made based on an estimate of the damages by the Director and that if it transpired from the final settlement that a particular State had been advanced more than it was entitled to, the State should return the corresponding overpayment. It was further recalled that according to the proposal a State receiving advances should provide the necessary guarantees in that respect and that the Fund should retain a sufficient percentage to enable it to make payments to those affected parties who made direct claims to it. The Committee also recalled the statement by the Spanish delegation that measures had been adopted by the Spanish Government which would enable all claimants to receive 100% of their proven losses as assessed by the 1992 Fund in accordance with the Fund's criteria. It was recalled that in view of the importance of the issue and the ramifications involved, the Executive Committee had decided to refer the decision as to this proposal to the Assembly.

3.4.22 It was recalled that the Director had informed the Assembly that he would make an interim assessment of any claim submitted by the Government of Spain and that he would make a payment of 15% of the assessed amount, as authorised by the Executive Committee (document 92FUND/A.8/30, paragraph 20.28).

3.4.23 It was recalled that, taking into account the exceptional circumstances of the *Prestige* incident, the Assembly had decided as follows (document 92FUND/A.8/30, paragraph 20.29):

(a) The Assembly authorised the Director, subject to a general assessment by the Director of the total of the admissible damage in Spain arising from the *Prestige* incident, to make a payment of the balance between 15% of the assessed amount of the claim submitted on 2 October 2003 and 15% of that claim as submitted (15% of €383.7 million = €57 555 000) and also subject to the Government of Spain providing a guarantee from a financial institution, not from the Spanish State, which would have the financial standing laid down in the 1992 Fund's Internal Investment Guidelines so as to protect the 1992 Fund against an overpayment situation.

(b) The Assembly decided that such a guarantee should cover the difference between 15% of the assessed amount of the claim submitted on 2 October 2003 and 15% of that claim as submitted (15% of €383.7 million = €57 555 000). Further, it was decided that the terms and conditions of the guarantee should be to the satisfaction of the Director.

(c) The Assembly instructed the Director to provide full information on assessments and payments under paragraph (a) and to provide explanations when required by any Member State.

(d) The Assembly also decided that the Executive Committee should review, at its next session, the payments made. It was also decided that if the Committee reduced the payment amount, the difference should be repaid.

(e) It was further decided that if any other State having suffered losses relating to the *Prestige* incident were to seek the same solution for payments on the same terms, such a request should be submitted to the Executive Committee.

3.4.24 The Executive Committee took note of the information contained in Annex II of document 92FUND/EXC.24/5 regarding the provisional assessment of the Spanish Government's claim and the general assessment of the total of the admissible damage in Spain.

3.4.25 The Director expressed the 1992 Fund's appreciation of the excellent cooperation between the Spanish authorities and the Fund since the October 2003 sessions. He mentioned that the Spanish Government had appointed a contact person in each Ministry and that a number of useful meetings had taken place between the representatives of the Spanish authorities and the Fund's experts which had greatly facilitated the assessments.

3.4.26 It was noted that, with the assistance of a number of experts, the Director had made an interim assessment of the Spanish Government's claim, that on the basis of the documentation provided he had arrived at a preliminary assessment of €107 million (£75 million) and that on that basis the 1992 Fund had made a payment to the Spanish State of €16 050 000 (£11.1 million), corresponding to 15% of the interim assessment.

3.4.27 It was also noted that the Director, with the assistance of a number of experts, had carried out a general assessment of the total of the admissible damage in Spain, concluding that the admissible damage would be at least €303 million (£213.4 million). The Committee noted that on that basis, and as authorised by the Assembly, the Director had made an additional payment to the Spanish State of €41 505 000 (£28.8 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 noted that this payment had been made against a bank guarantee covering the above mentioned difference (ie €41 505 000) by 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 or amounts decided by the Executive Committee or the Assembly up to €41 505 000. It was also noted that under the terms of the guarantee, the bank would, up to the amount of the guarantee, pay to the 1992 Fund the amount or amounts requested by the Director without him having to show the Fund's right to repayment.

3.4.28 The Executive Committee noted that the payment to the Spanish State totalling €57 555 000 (£39 914 906) had been made on 17 December 2003.

3.4.29 The Executive Committee noted a statement by the Director that the assessments made with respect to the Spanish Government's claim and the total of the admissible losses in Spain provided very conservative estimates. It was noted that the original claim by the Spanish Government examined by the Fund's experts covered only the period to 31 July 2003, that many of the items included in that claim had not been addressed as a result of lack of information, that a similar situation applied in respect of the expenditure incurred by the regional governments of the affected areas, that fisheries losses had been assessed on the basis of general statistical data and not on actual data relating to specific claimants and that therefore it was likely that the estimates would rise substantially as more information and documentation became available.

3.4.30 Having reviewed the assessments made by the Director, the Executive Committee thanked the Director for the clear and transparent explanation of his assessment of the claim by the Spanish Government and his general assessment of the overall losses in Spain.

Estimates of the cost of the incident

3.4.31 The Executive Committee took note of the information contained in document 92FUND/EXC.24/5/Add.1 as regards the estimates of the cost of the incident and the issue of the level of payments as well as the information given by the Spanish and French delegations in documents 92FUND/EXC.24/5/1 and 92FUND/EXC.24/5/2.

3.4.32 In introducing document 92FUND/EXC.24/5/1 the Spanish delegation expressed its gratitude to the Director, the staff of the Secretariat and the experts engaged by the Fund for all their efforts

in carrying out an interim assessment of the claim by the Spanish Government and an overall assessment of the losses in Spain, which had facilitated the rapid payment of compensation to claimants.

3.4.33 The Committee noted that all but five beaches in Spain were now totally cleaned, that more than 1.2 million man-days had been expended in shoreline clean-up and restoration operations and that some 90 000 tonnes of oily waste had been generated. It was also noted that the contract to remove the remaining oil from the *Prestige* had been signed between the Spanish Government and Repsol YPF and that the work, which was due to take place between May and October 2004, was expected to be completed for a total cost of €99.3 million.

3.4.34 It was noted that the Spanish Government had estimated the total damage in Spain to be €834.8 million. It was also noted that approximately 24 000 persons in the fisheries sector had been affected by the pollution from the *Prestige*, of which some 23 000 had submitted claims to the Spanish Government under the Royal Decree and that, in addition, some 5 000 claims had been received under the Royal Decree from individuals and businesses in the mariculture, tourism and other sectors. The Committee noted that some €75 million was available for payment of compensation in accordance with the Royal Decree, €57.5 million of which had been received from the 1992 Fund and €17.5 million from other sources.

3.4.35 The Committee noted that the Spanish Government had received almost 29 000 claims for compensation from victims of the *Prestige* incident who wished to use the advanced payment mechanism set out in the Royal Decree of June 2003. It was also noted that of those claims, some 22 800 related to groups of workers in the fisheries sector which would be assessed by means of a system using either objective estimates or a scale. It was further noted that some 5 000 claims of other groups would be subject to an individual assessment. The Committee took note that, following checks that the claims fulfilled the requirements set out in the Royal Decree, to date agreements on advance compensation had been signed by 11 700 of those affected in Galicia and Asturias. It was further noted that during the week of the present session, an agreement would be signed by some 1 000 victims in Cantabria, which would mean that an agreement would have been reached with 60 per cent of the victims for a total of €52 million (£42 million). The Spanish delegation informed the Committee that during the coming weeks it hoped to pay the compensation to the rest of the victims who had presented claims, as soon as the files had been processed.

3.4.36 In introducing document 92FUND/EXC.24/5/2 the French delegation confirmed that the pollution had extended northwards between Vendée and the Seine Estuary, although pollution levels were much lower than along the Aquitaine coast.

3.4.37 It was noted that surveys carried out of the impact of the pollution between the department of Vendée and the department of Seine-Maritime had indicated no damage to the fish and shellfish industries and that the tourist season in the Vendée had, on the whole, been satisfactory.

3.4.38 It was noted that the overall losses in France had been estimated by the French Government to be in the range of €145.2 to 202.3 million (£102 – 142 million), although the maximum losses were expected to be around €176 million (£124 million). It was also noted that it was the intention of the French Government to supplement the Fund's payments to individual claimants.

3.4.39 The Portuguese delegation stated that the total amount of the damage in Portugal was some €3.25 million (£2.3 million).

3.4.40 A number of delegations expressed their appreciation to the delegations of Spain and France for providing detailed information on the likely level of claims.

Level of payments

3.4.41 The Executive Committee noted that, based on the figures given by the Spanish, French and Portuguese Governments, the total costs of the incident could be estimated in the region of some €1 020 to 1 100 million (£718 and £774 million).

3.4.42 It was noted that, in his assessment of the total of the admissible damage suffered in Spain as a result of the *Prestige* incident (document 92FUND/EXC.24/5, paragraph 13.7), the Director had estimated the total amount of the losses in Spain to be at least €303 million (£213 million) but that the Director had considered that his provisional estimate was very conservative and that the evaluated amount of the admissible losses would rise substantially as more information and documentation became available.

3.4.43 In view of the figures provided by the Governments of the three States concerned and the remaining uncertainties as to the level of admissible claims, the Executive Committee decided to maintain the current level of payments at 15% of the loss or damage suffered by the respective claimants.

3.5 *Slops*

3.5.1 The Executive Committee took note of the information contained in document 92FUND/EXC.24/6 concerning the *Slops* incident.

3.5.2 It was recalled that at its July 2000 session the Executive Committee had decided that the 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.

3.5.3 It was recalled that two companies that had carried out clean-up operations had taken legal action against the 1992 Fund and that at its July 2002 session the Executive Committee had decided that the companies had not provided any information which would modify its position that the *Slops* should not be considered a 'ship' and instructed the Director to oppose the action.

3.5.4 It was also recalled that the Court of first instance had rendered its judgement on 13 December 2002, holding that the *Slops* fell within the definition of 'ship' and that the 1992 Fund had appealed against the judgement.

3.5.5 The Committee took note of a judgement rendered on 16 February 2004 whereby the Court of Appeal had overturned the judgement of the Court of first instance and held that the *Slops* did not meet the criteria required by the Conventions and therefore could not be considered a 'ship'. It was noted that as a result of this judgement the claims against the Fund had been rejected.

3.5.6 In response to a question by one delegation regarding the recovery of legal costs incurred by the 1992 Fund, the Director stated that the decision by the Court regarding the issue of costs would not be known until the written judgement had been issued. The Director further stated that in the event that the Court decided not to award the Fund costs it would, in his view, not be appropriate for the Fund to appeal on this point and that, since an appeal to the Supreme Court could only relate to points of law, it would in any event probably not be possible to appeal on the costs issue.

3.6 *Dolly*

3.6.1 The Committee recalled that the *Dolly* (289 GT), registered in Dominica, had sank at 20 metres depth in Martinique, carrying some 200 tonnes of bitumen but that so far no cargo had escaped.

3.6.2 It was recalled that in July 2001 the Executive 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. It was also recalled that the Director had been instructed to examine with the Fund's experts and the French authorities the proposed measures to remove the bitumen.

3.6.3 It was also recalled that the French Government had indicated that as a result of the delays necessitated by the tendering process, during which divers had made regular checks on the condition of the wreck, the operations had been expected to commence towards the end of 2002 after the hurricane season.

3.6.4 In response to a question by the observer delegation from the Friends of the Earth International as regards any developments with respect to the proposed cargo removal operation, the Director stated that these operations had still not been undertaken, but 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 (£165 000) in respect of the costs of removing the bunker oil from the *Dolly*, stating in the writ that further costs in excess of €2 million (£1.1 million) would be claimed in respect of the removal of the wreck and cargo.

3.7 Lessons to be learned from the *Nakhodka* incident

3.7.1 The Executive Committee took note of the information contained in document 92FUND/EXC.24/7 (cf document 71FUND/AC.13/6) submitted by the Japanese delegation concerning the lessons learned from the *Nakhodka* incident.

3.7.2 The Committee took note in particular of the Japanese delegation's proposal to unify the format of the claims documents other than the assessment reports and to modify the format in the Claims Manual to facilitate the understanding of the documents and the prompt claims handling. The Committee also took note of the proposal to supplement the Claims Manual with examples of actual assessments to ensure uniformity in the assessments and assist victims in the presentation of their claims.

3.7.3 The Deputy Director stated that the document presented by the Japanese delegation had raised some interesting suggestions based on the lessons learned. He further stated that the settlement of all claims arising from an incident within three years of the date of the incident was a worthy goal, which the Fund had got close to achieving in respect of claims arising from the *Erika* incident, largely as a result of increasing the number of experts employed to assess claims. The Deputy Director also welcomed the suggestion to include examples of claims assessments in a future edition of the Claims Manual.

3.7.4 A number of delegations expressed their support for the concrete proposals made by the Japanese delegation on the basis of an objective review of the lessons learned. Those delegations also welcomed the positive response from the Secretariat on the suggestions put forward by the Japanese delegation, which could only be of benefit to claimants in the long run.

3.7.5 The Director was invited to submit a document to a future session of the Executive Committee with detailed proposals on how the Funds could implement the recommendations made by the Japanese delegation, for example through improvements in their internal procedures and changes to the next edition of the Claims Manual.

4 Future sessions

4.1 The Executive Committee decided to hold its 25th session on 24 May 2004.

4.2 It was noted that the Committee would hold its normal autumn session during the week of 18 October 2004.

5 Any other business

Preparations for entry into force of the Supplementary Fund Protocol

5.1 The Committee recalled that the International Conference which adopted the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, also adopted a Resolution on the Establishment of the International Oil Pollution Compensation Supplementary Fund requesting *inter alia* the 1992 Fund Assembly to authorise and instruct the Director to provide all necessary assistance for the setting up of the Supplementary Fund and to make the necessary preparations for the first session of the Assembly of the Supplementary Fund.

5.2 The Director stated that to enable him to fulfil these tasks it was important that the Fund Secretariat was kept up to date with the States' timetable for ratification of the Supplementary Fund Protocol in order that it could undertake the necessary preparatory work needed before the Protocol's entry into force, bearing in mind that the first Assembly of the Supplementary Fund would have to be held within 30 days of the entry into force of the Protocol.

5.3 The delegations of Denmark and Norway indicated that preparations in their States were very advanced and that they expected to ratify the Protocol very shortly (that same day in the case of Denmark). The delegations of Finland, Spain and France indicated that their States expected to ratify during the spring of 2004 whilst the delegations of Germany, Ireland, Japan and the United Kingdom expected their States to ratify during the summer. The delegations of Sweden and Greece indicated that their States expected to ratify later in 2004. The delegations of Canada, the Netherlands and Italy stated that they were preparing for consultations on ratification but did not give an estimated date. The delegation of Liberia stated that no preparations were being made for ratification in his State.

5.4 It was recalled that the Protocol would enter into force three months after it had been ratified by at least eight States which had received a combined total of 450 million tonnes of contributing oil in a calendar year.

5.5 The Director stated that in view of the indications given by some States as regards the timetable for ratification, he suggested that an extraordinary session of the 1992 Fund Assembly should be held during the week of 24 May 2004 to consider documents relating to the setting up of the Supplementary Fund.

HNS Convention

5.6 The observer delegation of OCIMF informed the Committee of a meeting on the HNS Convention that was due to take place in Barcelona, Spain on 19 May 2004, which was aimed at bringing together representatives of the shipping, oil and chemical industries as well as governments. The Committee noted that OCIMF had initiated the meeting as a means of promoting a greater awareness of the Convention and to acquaint stakeholders with the various tools that had been developed to facilitate the functioning of the Convention when it finally enters into force sometime in 2006.

5.7 A number of delegations expressed support for the initiative, which should provide the opportunity to fully engage the industry in the ratification and implementation process.

5.8 It was noted that further information about the meeting would be available via the IOPC Funds' website.

Topics for discussion under any other business

5.9 A number of delegations expressed the view that the agenda item any other business provided a good opportunity to raise any issues not covered elsewhere during meetings. It was recognised that because of the flexible and open-ended nature of this agenda item, issues raised were not usually accompanied by written documents. However, the Committee decided that if issues raised were of sufficient importance, and if they were known about sufficiently well in advance of forthcoming sessions of the Committee, it would be helpful if documents were submitted.

6 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.24/WP.1, was adopted, subject to certain amendments.