INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
28th session
Agenda item 5

92FUND/EXC.28/8
22 March 2005
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RECORD OF DECISIONS OF THE TWENTY-EIGHTH SESSION OF THE EXECUTIVE COMMITTEE

(held on 14, 15 and 21 March 2005)

Chairman: Mrs Lolan Margaretha Eriksson (Finland)

Vice-Chairman: Mr Volker Schöfisch (Germany)

Opening of the session

In the absence of the Chairman, Mrs Lolan Margaretha Eriksson (Finland), the 28th session of the Executive Committee was opened by the Vice-Chairman, Mr Volker Schöfisch (Germany), who chaired the session except for the part dealing with the incident in Germany (paragraphs 3.1.1-3.1.30)

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 92FUND/EXC.28/1.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

Algeria	Germany	Republic of Korea
Australia	Italy	Russian Federation
China (Hong Kong Special Administrative Region)	Japan	United Arab Emirates
Finland	Netherlands	United Kingdom
	Portugal	Uruguay

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:

Antigua and Barbuda	Kenya	Panama
Argentina	Latvia	Philippines
Bahamas	Liberia	Poland
Belgium	Lithuania	Qatar
Cameroon	Malta	Sierra Leone
Canada	Marshall Islands	Singapore
Cyprus	Mexico	Spain
Denmark	Monaca	Sweden
France	Morocco	Trinidad and Tobago
Gabon	New Zealand	Tunisia
Ghana	Nigeria	Turkey
Greece	Norway	Vanuatu
Ireland	Oman	Venezuela

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

States which have deposited instruments of ratification, acceptance, approval or accession to the 1992 Fund Convention:

Malaysia

Other States

Benin	Democratic People's Republic of Korea	Peru
Brazil		Saudi Arabia
Chile	Ecuador	
Côte d'Ivoire	Iran (Islamic Republic of)	

2.4 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 (Supplementary Fund)

International non-governmental organisations:

BIMCO
Comité Maritime International (CMI)
Federation of European Tank Storage Associations (FETSA)
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 Incident in Germany

3.1.1 In view of the fact that this incident occurred in his country and had given rise to a claim by the Federal Republic of Germany, the Vice-Chairman proposed that he should not chair this part of the session. The Executive Committee appointed Mr John Wren (United Kingdom) to chair the deliberations concerning this incident.

3.1.2 The Committee took note of the information contained in document 92FUND/EXC.28/2.

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

3.1.4 It was recalled that investigations by the German authorities had revealed that the Russian tanker *Kuzbass* (88 692 GT) had discharged Libyan crude in the port of Wilhelmshaven on 11 June 1996 and that according to these authorities there remained on board some 46 m^3 of oil that could not be discharged by the ship's pumps.

3.1.5 The Committee recalled that the German authorities had approached the owner of the *Kuzbass* and requested that he should accept responsibility for the oil pollution, stating that failing this the authorities would take legal action against him. It was recalled that the shipowner and his P&I insurer, the West of England Ship Owners' Mutual Insurance Association (Luxembourg) (West of England Club), had denied any responsibility for the spill.

3.1.6 The Committee also recalled that the German authorities had informed the 1992 Fund that, if their attempts to recover the cost of the clean-up operations from the owner of the *Kuzbass* and his insurer were to be unsuccessful, they would claim against the 1992 Fund.

3.1.7 It was recalled that the limitation amount applicable to the *Kuzbass* under the 1992 Civil Liability Convention was estimated at approximately 38 million SDR (£30.7 million).

Legal actions

3.1.8 The Committee recalled that in July 1998 the Federal Republic of Germany had brought legal actions in the Court of first instance in Flensburg against the owner of the *Kuzbass* and the West of England Club, claiming compensation for the cost of the clean-up operations for an amount of DM2.6 million or €1.3 million (£900 000), subsequently increased to €1.4 million (£968 000) plus interest.

3.1.9 It was recalled that the 1992 Fund had been notified in November 1998 of the legal actions and that in August 1999 it had intervened in the proceedings in order to protect its interests.

3.1.10 The Committee recalled that in order to prevent their claims against the Fund becoming time barred at the expiry of the six-year period from the date of the incident, the German authorities had taken legal action against the 1992 Fund in June 2002 and that the 1992 Fund had applied to the Court to stay the proceedings in respect of this action, pending the outcome of the action by the German authorities against the ship owner and the West of England Club. It was recalled that the stay had been granted by the Court in November 2002.

3.1.11 It was recalled that the owner of the *Kuzbass* and the West of England Club had presented pleadings to the Court summarised below:

The chemical analyses provided by the German authorities have shown only that the oil carried in the *Kuzbass* and the oil found ashore both originated from Libya, without stating that the chemical composition of the oils was identical. The chemical analyses carried out on behalf of the shipowner and the Club, however, demonstrated that the oils were not identical. In particular, the latter analyses showed that, although both oils were of Libyan origin, the oil carried by the *Kuzbass* was Libyan Brega crude oil whereas the polluting oil was not Libyan Brega crude oil.

With respect to the question of whether the oil pollution might have been caused by the washing of the tanks of the *Kuzbass*, tank washing would normally be carried out only in exceptional cases, ie if a tank had to be repaired or if another cargo had to be taken on board that should not come into contact with the residues of the cargo carried on a previous voyage. In the case of the *Kuzbass*, the tanker was proceeding to the Mediterranean to load a cargo of crude oil and the conditions of the tanks were such that they did not require washing. In addition, it would not have been technically possible, nor would there have been sufficient time, to clean the tanks and to pump out the oil that remained on board.

In the period between 18:30 hours on 12 June 1996 and 19:00 hours on 13 June 1996 the *Kuzbass* was lying at anchor to carry out repairs on the ship's cooling system.

The route followed by the *Kuzbass* had been far from the areas where the oil that caused the pollution was alleged to have been discharged into the sea. The original Russian sea charts and the ship's logbook and a copy of the course recorder had been provided in support of this position.

As regards the data provided by Lloyd's Maritime Information Services showing that there were no other movements of tankers with Libyan crude oil on board in June 1996 in the area in question, the reports of Lloyd's Maritime Information Services covered only laden tankers, and did not give any information on the movements of unladen tankers which were most likely to carry out tank washing.

3.1.12 The Committee recalled that the shipowner and the West of England Club had also referred to the results of the investigation of the German police and of the Italian public prosecutor (a subsequent port of discharge of cargo was in Italy), both of which, according to the owner and the Club, had not found any valid evidence to support the accusation against the *Kuzbass*.

3.1.13 It was recalled that, in their reply to the Court, the German authorities had made the following points:

The *Kuzbass* had carried Libyan crude oil. The analysis of samples of the oil on the polluted beaches had established that this oil was also Libyan crude oil. The *Kuzbass* was the only oil tanker passing the North Sea en route to Helgoland Bay during June 1996. There was *prima facie* evidence that the pollution could only have been caused by the *Kuzbass*. The analysis carried out on behalf of the shipowner and the Club did not rebut this *prima facie* evidence. The assertion by the shipowner and the Club that the two oils were not identical was not sustainable, on the basis of current scientific standards. The *Kuzbass* had a leak between a slop tank and a cargo tank. It was no longer maintained that the oil pollution had been caused by a single tank washing, but the pollution was caused by the discharge of slops. It must be assumed, therefore, that on a previous laden voyage crude oil cargo had leaked into the slop tank, which had already contained slops originating from previous tank washings, resulting in a mixture of slops

highly enriched with crude oil. The *Kuzbass* had then discharged this mixture on the voyage from Cuxhaven to the Mediterranean.

3.1.14 The Committee recalled that the Court had appointed an expert to consider the evidence as to the origin of the oil, in particular whether the samples of oil and sand mixture contained residues of tank washing and/or residues of slops and whether the residues originated from Libyan El Brega crude oil. It was recalled that the expert had concluded that the samples in question contained residues of crude oil typical of those found in tank washings (slops) from oil tankers, that there was no trace of sludge in the samples and that the quantity of oil recovered (ie several hundred tonnes) ruled out that sludge oil had contributed to the pollution. It was also recalled that, on the basis of the examination carried out by the Federal Maritime and Hydrographic Agency, in the expert's view the oil in question was Libyan crude oil although it was not possible to relate this oil to a particular well. It was also recalled that in his view it was not possible to establish whether the pollution had been caused by the cargo carried by the *Kuzbass* without having access to samples taken from its slops tank.

3.1.15 The Committee recalled that the Director had concurred with the findings of the court expert but that, after studying the analytical data submitted by the Federal Maritime and Hydrographic Agency, in particular the mass spectrograms of the pollution samples, he had noted that there was a remarkable match with Libyan Es Sider crude as opposed to Libyan El Brega crude, the latter being the oil transported by the *Kuzbass* on the voyage immediately prior to the alleged pollution offence. It was recalled that, according to the schedule of Libyan crude exports produced by Lloyd's Maritime Information Services, prior to carrying the cargo of El Brega crude to Wilhelmshaven, the *Kuzbass* had carried two cargoes of Es Sider crude (loaded on 14 February and 28 March 1996). It was noted that if the *Kuzbass* had been the source of the pollution, and if this had resulted from the overboard discharge of slops accumulated over several voyages, this might, in the Director's view, explain why the mass spectrograms of the pollution samples most resembled mass spectrograms of Es Sider crude. The Committee recalled that, on the basis of the evidence presented by the German authorities, the Director had considered that the pollution had been caused by a discharge of crude oil closely resembling Es Sider crude from a tanker and that the *Kuzbass* was the most likely source of the contamination.

3.1.16 It was recalled that in December 2002 the first instance Court (Landgericht) had rendered a part-judgement holding that the owner of the *Kuzbass* and the West of England Club were jointly and severally liable for the pollution damage and that although the German authorities had failed to provide conclusive evidence that the *Kuzbass* was the vessel responsible the circumstantial evidence pointed overwhelmingly to that conclusion. It was also recalled that the Court had not dealt with the quantum of the losses suffered by the German authorities and had stated that this issue would be considered at the request of one of the parties, but not until the judgement on the liability issue had become final.

3.1.17 The Committee recalled that the shipowner and the West of England Club had appealed against the judgement arguing that the Court of first instance had followed incorrect and irregular procedures in that essential parts of the records of the hearing in December 2002 had not properly reflected the statements made at the hearing and that the Court had taken evidence from the public prosecutor's office in relation to the criminal investigation without a court order and without giving them the opportunity to comment on the evidence.

3.1.18 It was recalled that the main grounds for the appellants' appeal as regards substantive issues had been that the *Kuzbass* could not have reached the alleged dumping area in the time available, that the chemical analyses of the pollution samples did not provide conclusive proof that the oil originated from the *Kuzbass* and that there had been three other vessels in the southern North Sea at the relevant time that had previously carried cargoes of Libyan crude oil and which could therefore have caused the pollution.

3.1.19 The Committee recalled that the German authorities had submitted a statement of response to the appellants' grounds for appeal reiterating the circumstantial evidence that had led the Court

of first instance to conclude that the *Kuzbass* was the source of the pollution and addressing the points raised by the appellants in their appeal. It was recalled that in January 2004 the Fund had also submitted a statement of response, largely along the same lines as those of the German authorities.

3.1.20 The Executive Committee noted that, at a hearing in December 2004, the Schleswig-Holstein Appeal Court (Oberlandesgericht) had indicated that on the basis of the evidence submitted, it was far from convinced that the *Kuzbass* was the source of the pollution, drawing attention to other potential ship sources that the German authorities had failed to investigate. It was noted that the Court had raised doubts regarding the correctness of the circumstantial evidence and the Court of first instance's interpretation of that evidence and that it had stated that, on the basis of the documentation submitted, the prospects of the shipowner/West of England Club succeeding in the appeal were significantly better than those of the German Government. The Committee noted that the Court had strongly recommended that the parties reach an out-of-court settlement to the effect that the shipowner and the West of England Club would pay the German Government €120 000 (£85 000) and that the recoverable costs would be shared between the German Government and the shipowner/West of England Club on a 92%-8% basis, which would imply that the 1992 Fund should pay the balance of the admissible amount of the German Government's claim. It was however noted that the Court had granted the parties the possibility of submitting further briefs and presenting witnesses.

3.1.21 It was noted that the Appeal Court had fixed the date of the next hearing for 6 April 2005 and that it would call two witnesses who had attended the *Kuzbass* at the time of cargo discharge at Wilhelmshaven on 11 June 1996 on behalf of the receivers.

3.1.22 The Committee noted that in early February 2005 the Director had, in consultation with representatives of the German Government, held without prejudice discussions with the West of England Club with a view to reaching an out-of-court settlement.

3.1.23 The Executive Committee continued its deliberations in private, pursuant to Rule (iv) of the Rules of Procedure, in order to consider whether the 1992 Fund should reach an out-of-court settlement of the case. During the closed session, covered by paragraphs 3.1.24 – 3.1.30, only representatives of 1992 Fund Member States were present.

3.1.24 The Director proposed that, in the light of the evidence available and the indications by the Court of Appeal as regards the probable outcome of the legal proceedings, he should be authorised to reach an out-of-court settlement with the other parties.

3.1.25 The Committee noted that whilst there had been good grounds for suspecting that the *Kuzbass* was the source of the pollution, the evidence was largely circumstantial, and that in presenting their case the German authorities had sought to convince the Court of first instance that this evidence was sufficient to switch the burden on the shipowner to prove that the *Kuzbass* was not the source of the pollution.

3.1.26 The Committee noted that the shipowner and the West of England Club had made a proposal for a possible out-of court settlement involving all the parties whereby the shipowner and the West of England Club would pay 18% and the 1992 Fund 82% of any proven losses suffered by the Federal Republic of Germany as a result of the incident.

3.1.27 The Committee noted that the 1992 Fund had recently received documentation in support of the claim by the German Government and that the Fund's experts were currently examining the documentation for the purpose of carrying out an assessment. It was also noted that the Government would, under German law, be entitled to interest at the legal rate on any proven losses and that any settlement agreement would have to include the question of apportionment of the legal costs incurred by the respective parties.

3.1.28 A number of delegations expressed their disappointment in respect of recent developments in the legal proceedings, but acknowledged that evidence against the shipowner and the West of England Club was lacking in a number of key areas. Those delegations agreed with the Director's analysis of the situation and supported his recommendation that the 1992 Fund should seek an out-of-court settlement with the other parties.

3.1.29 Some delegations expressed their gratitude to the German authorities for their efforts in trying to identify the ship responsible for the pollution before seeking compensation from the 1992 Fund.

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

3.2 *Dolly*

3.2.1 The Executive Committee took note of the information contained in document 92FUND/EXC.28/3.

3.2.2 The Committee recalled that the *Dolly* had sunk in 20 metres depth in Robert Bay (Martinique), while carrying some 200 tonnes of bitumen and that so far no cargo had escaped. It was also recalled that there was a national park, a coral reef and mariculture near the grounding site, that artisanal fishing was carried out in the area and that there were fears that the fishery and mariculture would be affected if the bitumen were to escape.

3.2.3 It was recalled that the shipowner had been ordered by the authorities to remove the wreck but that he had not complied with the order, probably due to lack of financial resources. It was also recalled that the ship did not have any liability insurance.

3.2.4 The Committee recalled that, since the shipowner had not taken any measures to prevent pollution, the French authorities had arranged for the removal of 3.5 tonnes of bunker oil. It was recalled that in August 2004 the French authorities had informed the Fund that a contract had been awarded to a consortium comprising a French diving company and the managers of a yacht marina in Martinique. It was also recalled that the original intention had been to right the vessel on the seabed before removing the three cargo tanks containing the bitumen from the ship's hold, following which the tanks were to be towed to a dry dock in Fort de France for the bitumen to be removed. The Committee recalled that the total cost of the operation had been estimated at around €1 million (£780 000).

3.2.5 The Committee noted that operations had commenced in October 2004. It was noted that attempts to right the vessel on the seabed had been unsuccessful, and that the contractor had therefore decided to cut through the side and deck plating of the wreck in order to gain access to the three tanks containing the bitumen. It was also noted that, as a result of heavy sea conditions and a number of unforeseen practical problems, removal of the tanks had taken longer than planned and had proved more difficult than anticipated. It was further noted that by mid-December the contractors had removed the tanks from the hold with the aid of floatation bags and had laid them on the seabed near to the wreck, deciding to leave the tanks on the seabed until March 2005 when the weather would be more conducive to towing the tanks to the dry dock.

3.2.6 It was noted that the operations had been resumed in March 2005 as planned, the intention being to suspend each tank in turn from a cradle by means of webbing and raise the cradle to the sea surface by means of floatation bags before towing it and the tank to the dry dock. It was also noted that attempts to tow the first tank had been unsuccessful due to difficulties in maintaining air at the correct pressure in the floatation bags, which eventually had become

detached from their lashings. It was further noted that the tank had been towed into Robert Harbour and left on the seabed pending a decision on an alternative means of recovering the tanks to shore.

3.2.7 It was recalled that the French Government had taken legal action against the shipowner and the 1992 Fund, claiming provisionally FFr1.2 million or €232 000 (£164 000) in respect of the costs of removing the bunker oil from the *Dolly*, but that further costs would be claimed in respect of the removal of the cargo.

3.3 *Erika*

3.3.1 The Executive Committee took note of the developments regarding the *Erika* incident as set out in documents 92FUND/EXC.28/4 and 92FUND/EXC.28/4/Add.1.

Amount available for compensation

3.3.2 The Committee recalled that the Commercial Court in Nantes had determined the limitation amount applicable to the *Erika* at FFr84 247 733 corresponding to €12 843 484 (£9.1 million).

3.3.3 It was also 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 (£131 million), that the Executive Committee had endorsed this calculation at its April 2000 and October 2001 sessions and that in October 2000 and October 2001 the Assembly had endorsed the Committee's decision.

3.3.4 The Committee recalled that TotalFinaElf 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.

3.3.5 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 TotalFinaElf if funds were available after all other claims had been paid in full.

Payments by the French Government

3.3.6 The Committee recalled that the French Government had provided emergency payments for €4.2 million (£3.0 million) to claimants in the fishery sector and for €2.1 million (£1.5 million) to salt producers. It was recalled that the French Government had also introduced a scheme to provide supplementary payments to claimants in the tourism sector under which payments had been made totalling €10.1million (£7.1 million).

Claims situation

3.3.7 The Executive Committee noted that at 10 February 2005 6 959 claims for compensation had been submitted for a total of €206 million (£142 million), that 95% of the claims had been assessed and that 816 claims, totalling €22 million (£15 million), had been rejected. It was noted that payments for compensation had been made in respect of 5 579 claims for a total of €99.3 million (£68.3 million), out of which the shipowner's P&I insurer, Steamship Mutual

Underwriting Association (Bermuda) Limited (Steamship Mutual), had paid €12.8 million (£8.8 million) and the 1992 Fund €86.5 million (£59.5 million).

3.3.8 It was recalled that, at its session in October 2003, the Committee had authorised the Director to make payments in respect of the French Government's claim 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). The Committee recalled that, 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 and 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 to claimants in the tourism sector.

3.3.9 The Committee recalled that, having again reviewed the situation in the light of the developments during 2004, the Director had decided that there was sufficient margin to enable the 1992 Fund to make a further payment to the French State and that in October 2004 the French State had been paid an amount of €5 964 338 (£4 145 215) relating to the French Government's supplementary payments made under the scheme to provide emergency payments to claimants in the fishery, mariculture, oyster farming and salt producing sectors.

Legal proceedings

3.3.10 The Committee recalled that a number of court actions for compensation had been brought in various jurisdictions in France.

3.3.11 It was recalled that claims totalling €484 million (£343 million) had been lodged against the shipowner's limitation fund constituted by the Steamship Mutual and that this amount included a claim by the French Government at €190.5 million (£130 million) and by TotalFinaElf at €170 million (£116 million). It was however, noted that most of these claims, other than those of the French Government and TotalFinaElf, had been settled, and that it appeared therefore that these claims should be withdrawn against the limitation fund to the extent that they related to the same loss or damage. It was recalled that the 1992 Fund had received formal notification from the liquidator of the limitation fund of the claims lodged against that fund.

3.3.12 The Committee recalled that legal actions against the shipowner, Steamship Mutual and the 1992 Fund had been taken by 795 claimants. It was noted that out-of-court settlements had been reached with 409 of these claimants, that actions by the remaining 386 claimants (including 212 salt producers) were pending and that the total amount claimed in the pending actions, excluding the claims by the French State and TotalFinaElf, was €66 million (£47 million).

3.3.13 The Executive Committee noted that the 1992 Fund would continue the discussions with the claimants whose claims were not time-barred and were admissible in principle for the purpose of arriving at out-of-court settlements.

Court survey relating to the claims by salt producers

3.3.14 The Committee recalled that efforts had been made to minimise the impact of the spill on coastal salt production in marshes in Loire Atlantique and Vendée, and that a number of monitoring and analytical programmes had been implemented. It was recalled that salt production had resumed in Noirmoutier (Vendée) in mid-May 2000 as a result of an improvement in sea water quality and that bans which had been imposed to prevent the intake of sea water in Guérande (Loire Atlantique) had been lifted on 23 May 2000. It was also recalled that a group of independent producers in Guérande had tried to resume salt production but had been unable to take in sufficient sea water to produce salt. The Committee also recalled that members of a co-operative accounting for some 70% of the salt production in Guérande had

decided not to produce salt in 2000 on the grounds of protecting market confidence in the product.

3.3.15 The Committee recalled that claims for lost salt production due to delays to the start of the 2000 season caused by the imposed ban on water intake had been received from producers (both independent and members of the co-operative) in Guérande and Noirmoutier and that claims had also been presented for costs of restoration of salt ponds in Guérande in 2001. It was recalled that the experts engaged by the 1992 Fund and Steamship Mutual had considered that salt production had been possible in 2000, but that as a result of the interruption caused by the ban on water intake, the maximum yield would have been 20% of that expected for the year. It was further recalled that interim compensation payments had been made to the claimants on the basis of 20% lost production.

3.3.16 The Committee recalled that, at the request of the 1992 Fund and Steamship Mutual, a court expert had been appointed to examine whether it had been feasible to produce salt in 2000 in Guérande which met the criteria relating to quality and the protection of human health. It was noted that the court expert had presented his report in late December 2004, concluding that salt production would have been feasible in 2000, but that as a result of the bans that had been imposed, the maximum yield would have been between 4% and 11% of normal production.

3.3.17 The Committee noted that the 1992 Fund would attempt to reach settlements with claimants in light of the court expert's findings.

Judgements by various French courts

3.3.18 The Committee took note of the information contained in section 9 of document 92FUND/EXC.28/4 and section 1 of document 92FUND/EXC.28/4/Add.1 concerning judgements in various French Courts in respect of claims against the 1992 Fund, the shipowner and Steamship Mutual.

3.3.19 In summing up the situation with regard to legal proceedings, the Director stated that there had been a total of 21 judgements involving claims against the 1992 Fund in various courts, the majority of which had related to issues of admissibility. He stated that the judgements were in general very favourable for the Fund, since the Courts had in most cases where the Fund had rejected claims as not admissible concurred with the Fund's position. He mentioned that in some cases the Courts had applied the Fund's admissibility criteria, in other cases the Courts had not applied them but had taken them into account, and in some cases the Courts had stated that the Fund's criteria were not binding and that the admissibility should be decided by the application of French law but had reached the same results as the Fund on its rejection of the claims by applying the French requirement of a link of causation between the event and the damage. He further mentioned that a few judgements had related to issues of quantum, and that where the courts had not agreed with the Fund's assessments, the Fund had not appealed unless the amounts awarded by the Court were significantly different or appeared arbitrary.

Other court cases

3.3.20 The Committee noted that four judgements had been rendered during the week prior to the present session of the Executive Committee, and that although details were not yet available, it was understood that they were all favourable to the 1992 Fund. It was noted that a number of other cases had been heard during the period October 2004-February 2005 by various Courts of first instance but that the Courts had not yet rendered their judgements.

3.4 *Prestige*

3.4.1 The Executive Committee took note of the information regarding the *Prestige* incident contained in document 92FUND/EXC.28/5.

Claims for compensation

3.4.2 The Committee recalled that, in anticipation of a large number of claims and after consultation with the Spanish and French Authorities, the shipowner's 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).

Spain

3.4.3 The Committee noted that at 22 February 2005 the Claims Handling Office in La Coruña had received 716 claims totalling €698 million (£481 million) which included a claim for €132 million (£91 million) from a group of 58 associations from Galicia, Asturias and Cantabria representing 13 600 fishermen and shellfish harvesters and four claims from the Spanish Government. It was noted that the first claim from the Spanish Government submitted in October 2003 was for €383.7 million (£265 million), the second submitted in January 2004 for €44.6 million (£31 million), the third submitted in April 2004 for €85.5 million (£59 million), and the fourth claim submitted in December 2004 for €46.5 million (£32 million). It was noted that the claims submitted by the Spanish Government related to costs incurred until the end of April 2004 in respect of at sea and onshore 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. The Committee recalled that the first, second and third claims included items for the cost of clean-up operations in the Atlantic National Park amounting to €11.9 million (£8.2 million) in total and that these items had been withdrawn since funding for these operations had been obtained from another source. It was noted that this withdrawal, together with subsequent amendments, had reduced the total of the amount claimed by the Spanish Government to €534.7 million (£369 million).

3.4.4 The Committee recalled that the first claim received from the Spanish Government had been assessed by the Director on an interim basis 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 (£206 million) and that, as authorised by the Assembly, he had also made in December 2003 a further payment of €41 505 000 (£28.8 million) 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).

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

3.4.6 It was noted that of the 712 other claims submitted, 54% had been assessed, that many of the remaining claims lacked sufficient supporting documentation and that such documentation had been requested from the claimants. It was noted that 314 of these other claims for €20.1 million (£13.9 million) had been approved for €1.7 million (£1.2 million) and that interim payments totalling €25 586 (£17 650) had been made at 15% of the assessed amounts in respect of 45 of the approved claims. It was further noted that compensation payments made by the Spanish Government to claimants had been deducted when calculating interim payments. It was also noted that the remaining approved claims awaited a response from the claimants or were being reexamined following claimants' disagreement with the assessed amount. The Committee noted that 121 claims had been rejected, the majority because the claimant had not demonstrated that a loss had been suffered.

3.4.7 It was recalled that at the Executive Committee's May 2004 session the Spanish delegation had stated that 67 towns had requested compensation totalling €37.6 million (£26 million), that the four affected autonomous regions had estimated their damage at €150 million (£103 million)

and that the claimed amounts were awaiting approval by the State before payments would be made to these public authorities. The Committee noted that the 1992 Fund had not yet received claims from these towns and autonomous regions.

3.4.8 The Spanish delegation stated that it would be submitting further claims in the near future in respect of the costs of the operation to remove the oil from the wreck of the *Prestige* of some €100 million (£69 million) and also for the costs of treating the oily waste recovered during the clean-up operations. That delegation further stated that it would continue to co-operate with the Fund Secretariat and provide documentation so that the claims by the Spanish State could be assessed.

France

3.4.9 The Committee noted that at 22 February 2005 385 claims totalling €93.6 million (£65 million) had been received by the Claims Handling Office in Bordeaux, of which 65% 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. The Committee noted that 164 claims had been approved for €2.3 million (£1.6 million), that interim payments totalling €202 344 (£140 000) had been made at 15% of the assessed amounts in respect of 58 of these claims and that the remaining approved claims awaited a response from the claimants or were being reexamined following claimants' disagreement with the assessed amount. It was noted that 30 claims had been rejected, the majority because the claimant had not demonstrated that a loss had been suffered.

3.4.10 It was noted that 114 oyster farmers based in the Arcachon basin near Bordeaux had submitted claims totalling €1.2 million (£830 000) for losses allegedly suffered as a result of market resistance due to the pollution. The Committee noted that 90 of these claims totalling €652 000 (£450 000) had been assessed at €200 326 (£138 000), that payments totalling €12 250 (£8 500) had been made in respect of 18 of these claims at 15% of the assessed amounts and that the experts appointed by the London Club and 1992 Fund were examining the remaining 24 claims.

3.4.11 It was also noted that the Claims Handling Office had received 150 tourism-related claims totalling €16.3 million (£11.2 million). The Committee noted that 93 of these claims had been assessed at a total of €4.6 million (£3.2 million), that 60 claims had been approved for €2.0 million (£1.4 million) and that interim payments totalling €174 125 (£120 000) had been made at 15% of the assessed amounts in respect of 28 claims.

3.4.12 It was recalled that experts appointed by the 1992 Fund and the London Club were assessing a claim for €67.5 million (£46 million) submitted by the French Government in May 2004 relating to costs incurred for clean-up and preventive measures. It was also recalled that in October 2004, representatives of the Fund and the Fund's experts had met with representatives of the French Government to discuss the assessment process and what further information was required for the assessment to be completed. The Committee noted that a formal request for further information had been sent to the French Government.

3.4.13 It was noted that a further 32 claims, totalling €6.1 million (£4.2 million), had been submitted by local authorities for costs of clean-up operations. The Committee noted that 12 of these claims had been assessed at €194 805 (£134 000), that eight claims had been approved for €80 547 (£56 000) and that interim payments totalling €7 455 (£5 000) had been made at 15% of the assessed amounts in respect of four claims.

Portugal

3.4.14 It was recalled that the Portuguese Government had submitted a claim for €3.3 million (£2.3 million) in respect of clean-up and preventive measures and that a meeting had been held in July 2004 between representatives of the 1992 Fund and representatives of the Government departments involved. The Committee noted that in February 2005 the Portuguese Government

had provided the 1992 Fund with additional information in support of its claim and that this information was being examined by the experts engaged by the London Club and the 1992 Fund.

Payments and other financial assistance by the Spanish Authorities

3.4.15 It was recalled that the Spanish Government and regional authorities had made payments of €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 and 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.

3.4.16 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.

3.4.17 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 (£110 million) to compensate in full the victims of the pollution and 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. It was also recalled that in July 2004 another Royal Decree had increased the funds available for compensation to € 249.5 million (£172 million) and also the period in which persons in the fishing, shellfish harvesting and aquaculture sectors could claim for losses suffered directly as a result of the incident had been extended to include 2004.

3.4.18 The Committee recalled that at the February 2004 session of the Executive Committee the Spanish delegation had mentioned 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 and 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 a formula or a scale but that some 5000 claims of other groups would be subject to individual assessments.

3.4.19 It was recalled that according to information provided by the Spanish Government in August 2004, agreements had been reached with the great majority of the workers in the fishery sector and that payments totalling some €75 million (£52 million) had been made to them under the Royal Decrees.

3.4.20 The Committee recalled that the 1992 Fund had been informed by the Spanish Government in 2004 that claims under the Decrees which would be subject to individual assessment would be assessed by the Consorcio de Compensación de Seguros (the Consorcio), 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. It was noted that 844 claims had been received in 2004 by the Consorcio relating to 3 698 persons and that the Consorcio had informed the 1992 Fund in February 2005 that 160 more claims had been submitted. The Committee noted that the total amount claimed was €198 million (£137 million).

3.4.21 It was recalled that, since the Royal Decrees provided that the assessment of claims would be made following the criteria used to apply the 1992 Civil Liability and Fund Conventions, meetings had been held between representatives of the Consorcio and of the 1992 Fund to discuss the criteria. The Committee noted that the Consorcio had requested the assistance of the experts appointed by the London Club and the 1992 Fund in the assessment of 37 of these claims. It was noted that many 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. The Committee noted that the

experts of the Consorcio and the experts appointed by the London Club and the 1992 Fund had made a joint assessment of one claim, which had been approved by the 1992 Fund and the London Club. It was also noted that further assessments were in progress.

Payments and other financial assistance by the French Authorities

3.4.22 The Committee noted 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 the Government would subrogate the rights of the claimants against the London Club and the 1992 Fund up to the amounts paid.

3.4.23 It was noted that the Government had set up a Commission to administer the scheme and determine the amount to be paid to each claimant. It was also noted that the Commission had decided that as regards claims where an agreement as to the quantum had been reached between the claimant and the London Club and the 1992 Fund, the Commission would pay 85% of the agreed amount and that in cases where no agreement as to the quantum had been reached, the Commission would determine the losses and the amount to be paid.

3.4.24 It was noted that payments had been made to 175 claimants for a total of €1 153 621 (£0.8 million) in January 2005.

Amount available for compensation

3.4.25 The Committee recalled that the limitation amount applicable to the *Prestige* under the 1992 Civil Liability Convention was €22 777 986 (£16 million) and that on 28 May 2003 the shipowner had deposited that amount with the Criminal Court in Corcubión (Spain) for the purpose of constituting the limitation fund.

3.4.26 It was 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 (£121 million), including the amount actually paid by the shipowner and his insurer (Article 4.4 of the 1992 Fund Convention).

Level of payments

3.4.27 It was recalled that at its May 2003 session the Executive Committee had 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 Fund and the London Club. It was further recalled that at its October 2003, February 2004 and May 2004 sessions the Executive 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 and 92FUND/EXC.25/6, paragraph 3.2.26)

3.4.28 It was also recalled that at the October 2004 session of the Executive Committee the delegations of Spain and France had reported that they had held consultation meetings on the handling of the *Prestige* case in order to explore the possibilities of improving the settlement of claims. The Committee recalled that those delegations had expressed the view that the compensation level of 15% had left the victims in an unsatisfactory situation.

3.4.29 It was recalled that at that session the Director had stated that on the basis of the figures presented by the Governments of the three countries affected by the incident, the potential total claims exposure was some €1 038 million (£716 million) and that it was therefore, in his view, not possible to increase the level of payments beyond 15% at this stage and that, in accordance with the position taken by the IOPC Funds' governing bodies, the level of payments would have to be determined in the light of the potential exposure of the 1992 Fund and not on the basis of

the Fund's assessment of the claims. It was recalled that in view of the remaining uncertainties as to the level of admissible claims, the Executive Committee had decided, at its October 2004 session, to maintain the level of payments at 15% of the loss or damage suffered by the respective claimants (document 92FUND/EXC.26/11, paragraph 3.7.30).

3.4.30 The French delegation referred to informal meetings held between France, Portugal and Spain, the last of which had been attended by a representative of the 1992 Fund, to consider the claims situation in the three States. That delegation stated that in its view, on the basis of the exchanges of information at the last meeting, the actual losses suffered in the three States were much less than those originally predicted, such that it ought eventually to be possible to increase the level of payments from 15% to 30%. The French delegation requested the 1992 Fund to refine its assessment of the overall losses by June 2005 to enable the Executive Committee to take a decision on whether or not the level of payments could be increased.

3.4.31 The Director stated that whilst the 1992 Fund could carry out a refined assessment of the overall losses as requested by the French delegation, in his view, it was the Fund's claims exposure, currently in excess of €1 000 million, that determined the level of payments. He expressed the view that while this situation remained, the only way of increasing the level of payments would be to follow the same procedure as that in the United Kingdom following the *Sea Empress* incident and in France following the *Erika* incident, whereby the States had agreed to stand last in the queue with regard to their own claims.

3.4.32 One delegation, whilst stating that it was important to complete the claims assessment before the third anniversary of the incident when the time bar provisions would apply, expressed concern about the reference to claims being assessed using a formulaic approach (cf paragraph 3.4.18 above), bearing in mind the importance of equal treatment of all claims. The Director stated that although the Consorcio had decided to assess some claims according to a formula or scale, the Fund would continue to assess claims individually or in groups of similar claims on their merits, including subrogated claims.

3.4.33 A number of delegations considered that, whilst regrettable, it was necessary to maintain the level of payments at 15% of proven losses for the time being, recognising that such a level would be unacceptable in the long term.

3.4.34 In view of 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.

Court actions

Spain

3.4.35 The Committee noted that some 2 000 claimants had joined the legal proceedings before the Criminal Court in Corcubión (Spain) but that no details of the losses suffered had been provided to the Court. It was further noted that 208 of these claimants had submitted claims to the Claims Handling Office in La Coruña and 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.

France

3.4.36 It was recalled 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.

3.4.37 It was also recalled that in July 2003 five oyster farmers had commenced summary proceedings against the shipowner, the London Club and the 1992 Fund before the Commercial Court of

Marennes d'Oleron requesting provisional payments of amounts totalling approximately €400 000 (£272 000). The Committee recalled that in July 2004, the Court had rendered a summary judgement rejecting the request on the grounds that the claimants had not provided sufficient evidence to justify summary proceedings and had invited the claimants to submit their claims to the Claims Handling Office in Bordeaux.

United States

3.4.38 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 to exceed US$700 million (£390 million). It was 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 that it had been negligent in granting classification. It was also recalled 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 recalled 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.

3.4.39 The Committee noted that the New York Court had dismissed the counterclaim by ABS on the grounds that the Spanish State was entitled to sovereign immunity but that ABS was seeking reconsideration by the Court or permission to appeal.

3.4.40 The Committee recalled that 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), 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 recalled that this legal action had been transferred to the Federal Court of first instance in New York which was dealing with the claim by the Spanish State referred to above.

Recourse action by the 1992 Fund against ABS

3.4.41 It was recalled that at its October 2004 session the Executive Committee had considered whether the 1992 Fund should take recourse action against ABS in the United States, where the defendant was incorporated, or in Spain where the major part of the pollution damage had occurred (document 92FUND/EXC.26/11, paragraphs 3.7.42 – 3.7.72).

3.4.42 It was also recalled that the Executive Committee had decided that the 1992 Fund should not take recourse action against ABS in the United States and to defer any decision on recourse action against ABS in Spain until further details surrounding the cause of the *Prestige* incident had come to light. It was further recalled that the Director had been instructed to follow the ongoing litigation in the United States, monitor the ongoing investigations into the cause of the incident and take any steps necessary to protect the 1992 Fund's interests in any relevant jurisdiction (document 92FUND/EXC.26/11, paragraph 3.7.71).

3.4.43 The Executive Committee recalled that it had explicitly stated that this decision was without prejudice to the Fund's position vis-à-vis legal actions against other parties.

Investigations into the cause of the incident

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

Bahamas Maritime Authority

3.4.45 The Committee noted that the Bahamas Maritime Authority (ie the authority of the flag State) had carried out an investigation into the cause of the incident. It was noted that, as regards the cause of the incident, the report of the investigation, which was published in November 2004, concluded, *inter alia*, that it was likely that the initial failure had been in the side structure of 3 starboard wing tank, followed by a failure in 2 starboard after wing tank, probably in the bulkhead between the two tanks.

3.4.46 It was noted that according to the report, there was a lack of firm evidence to assist in finally deciding the cause of the initial failure of the hull, but that the probable cause of the initial breach of the hull had been a large wave revealing a weakness in 3 starboard wing tank. It was also noted that according to the report the weakness was probably one of, or more likely a combination of two or more of the following factors: ship-to-ship transfer damage sustained in St. Petersburg; fatigue; stresses due to large quantities of new metal being attached to old steelwork; and/or corrosion and that there may possibly have been some damage to one of the cargo tanks adjoining 3 Starboard wing tank.

3.4.47 The Committee noted that, according to the report, videos taken during the towage of the ship showed that waves had continually pounded into the tank for prolonged periods and that roll and pitch motions had caused water to flow rapidly in and out of the tank resulting in unusually high fluctuating pressure loading and that tank structures were not designed to withstand such forces.

3.4.48 It was noted that Classification Society rules required that vessels be subjected to an extensive survey every five years (Special Surveys). It was also noted that the report of the Bahamas Maritime Authority stated that the vessel's 5th Special Survey had been carried out in China in 2001, 18 months before the incident, apparently to the highest current industry standards.

3.4.49 The Committee noted that according to the report the Annual Survey, carried out in Dubai in 2002, six months before the incident, had been checked by the Bahamas Maritime Authority. It was noted that the report mentioned that an internal inspection of 2 Starboard after wing tank should have been carried out but that this had not been done. It was however noted that the report concluded that since the structure of 2 Starboard after wing tank appeared to have survived all of the additional stresses that the incident had imposed upon it except for the bulkhead between the two tanks, it was probable that an inspection in Dubai would not have revealed any significant problems.

3.4.50 It was also noted that, according to the report, the Port State Control, SIRE (Ship Inspection Report Program) and other inspections carried out before the incident had given no cause for concern about the general condition of the ship and no reason to believe that special internal inspection of any tank was necessary.

3.4.51 The Committee noted that as regards actions taken after the damage to the hull had occurred, the Bahamas Maritime Authority had concluded, *inter alia*, that:

- It was certain that the ship could have survived being taken to a place of refuge and that once at such a position, a proper assessment could have been made of the condition of the ship and the best way to ensure that any risk of further pollution was minimised.

- The provision of a place of refuge could well have resulted in a much more favourable outcome and prevented the subsequent large-scale pollution of a long stretch of coastline.

- Looking at the charge of causing pollution, it was difficult to blame the Master for the initial damage to his ship. The Master would have had no way of anticipating or

acting to prevent the event. He had acted in a proper seamanlike manner during the severe weather prior to the incident, slowing to an appropriate speed.

3.4.52 The Spanish delegation stated that it would soon submit to the working group established by the Maritime Safety Committee of IMO on investigation of maritime accidents an additional report of the Spanish authorities' own investigation into the cause of the incident, which would highlight a number of errors in the report by the Bahamas Maritime Authority. That delegation further stated that the IMO working group had decided that no report on the investigation of the *Prestige* incident should be reviewed until the Spanish Government had submitted its final report. The Spanish delegation questioned whether it was therefore appropriate for the Director to bring to the attention of the Executive Committee the findings of a single investigation into the cause of an incident when it was known that other investigations were continuing.

3.4.53 In response to a question from one delegation regarding the implications for the 1992 Fund of any decision by the IMO working group, the Chairman stated that the 1992 Fund was an independent organisation and that any decision by an outside body was not binding on the Fund or its bodies.

3.4.54 The Director stated that he had always understood that he had a right and a duty to bring to the attention of the Committee any report of an investigation into the cause of an incident involving the IOPC Funds as soon as it was published. He further stated that this had always been the Funds' policy, although the Secretariat had always refrained from giving any opinions on the findings of investigations until all such investigations had been completed.

3.4.55 The Bahamas delegation stated that it had no intention of criticising any State or any report of investigation into the cause of the *Prestige* incident, but that in carrying out its own investigation, the Bahamas Maritime Authority had been hampered by the lack of support and co-operation from the Spanish Government.

3.4.56 The Spanish delegation stated that it had co-operated with the Bahamas Maritime Authority by providing photographs and videos of the casualty. That delegation reiterated its position that no report regarding the cause of the *Prestige* incident should be reviewed by the Executive Committee or reported in the Committee's Record of Decisions until the Spanish Government had submitted its additional report in May 2005, nor should any discussions on this issue during the session be reflected in that Record.

3.4.57 A number of delegations stated that the Director had a duty to inform the Executive Committee of the findings of investigations into the causes of incidents affecting the IOPC Funds as soon as they were made available. Those delegations further stated that the conclusions of such investigations were also facts that could not be overlooked, although it was important that the Director presented them to the Funds' governing bodies in a neutral way. Those delegations recognised that any debate on the cause of an incident should not take place until information on all investigations was available, but considered that it was entirely appropriate for the Record of Decisions to contain a summary of the results of any investigations at the session at which they were brought to the Committee's attention as well as a summary of any discussions that took place.

3.4.58 The Spanish delegation agreed that it was appropriate for the IOPC Funds to provide information on the facts surrounding the *Prestige* incident, but not appropriate to report opinions, which were not facts, partial or incomplete information.

3.4.59 In reply to the intervention by the Spanish delegation the Director stated that it would not have been practical to publish in an Executive Committee document the entire report by the Bahamas Maritime Authority due to its length, that it had therefore been necessary to make a summary of the report, that any summary by necessity had to be based on a selection of information, and that the 'selection' made in the Director's note was, as in all cases, objective and impartial.

3.4.60 The point was made by several delegations that conclusions contained in the report by the Bahamas Maritime Authority were of themselves facts, which should be made known to the Assembly albeit without any view being expressed on the validity of those conclusions.

Spanish Ministry of Transport and Public Works

3.4.61 The Committee noted that the Spanish Permanent Commission of Investigation into Maritime Accidents (Comisión Permanente de Siniestros Marítimos), under the Authority of the Spanish Ministry of Transport and Public Works (Ministerio de Fomento), was carrying out an investigation into the cause of the incident.

Criminal Court in Corcubión

3.4.62 It was noted 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 further noted that the Court was investigating the role of the master of the *Prestige*, of a civil servant who had been involved in the decision not to allow the ship into a port of refuge in Spain and of a manager of the ship's management company.

3.4.63 The Committee noted that on 3 February 2005 the Court had informed the parties to the criminal proceedings that it had received a report by the Spanish Permanent Commission of Investigation into Maritime Accidents and that a copy of the report had been requested by the 1992 Fund.

3.4.64 In response to a question regarding the fate of the master of the *Prestige* the Spanish delegation stated that the Spanish court had granted the master leave of residence in Greece provided he presented himself to the Greek authorities on a regular basis and complied with other bail requirements. That delegation further stated that although the leave of residence had initially been granted for a period of three months, the Spanish court had recently agreed with the master's request for this to be extended indefinitely.

France

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

3.5 Incident in Bahrain

3.5.1 The Executive Committee took note of the information contained in document 92FUND/EXC.28/6 in respect of an oil spill in Bahrain.

3.5.2 The Committee recalled that on 15 March 2003 the Air Wing of the Bahrain Ministry of Interior had reported an oil slick 20 miles off the north coast of Bahrain. It was recalled that a few days later some 18 kilometres of shoreline had been polluted with an estimated 100 tonnes of oil and that some oil had reportedly affected the coastline of the Kingdom of Saudi Arabia in the vicinity of the causeway linking Bahrain with the mainland.

3.5.3 It was recalled that in light of the evidence presented by the Bahrain authorities and the Marine Emergency Mutual Aid Centre (MEMAC) the Director had been satisfied that the source of the pollution had been a ship carrying oil in bulk as cargo engaged either in the transport of Iraq crude oil under the United Nations 'Oil for Food' programme or illegal oil smuggling operations. The Committee also recalled that the Director had therefore considered that claims for pollution damage arising from this incident were covered by the 1992 Conventions, and that in the absence of the identity of a specific vessel as the source, the 1992 Fund was liable to pay compensation.

3.5.4 It was recalled that at its 25th session in May 2004 the Executive Committee had decided that the claims arising from the incident were covered by the 1992 Fund Convention and that the claims by the Bahrain authorities were admissible in principle (document 92FUND/EXC.25/6, paragraph 3.3.16).

3.5.5 It was recalled that the Bahrain Coast Guard had assisted the Public Commission for the Protection of Marine Resources, Environment and Wildlife in clean-up operations at sea between 15 and 24 March 2003. It was also recalled that on 22 March the Presidency of Meteorology and Environment of Saudi Arabia had provided the Bahrain authorities with some 2 000 metres of oil containment boom and a skimming vessel and that this equipment had been returned to Saudi Arabia on 28 March.

3.5.6 It was recalled that the Ministry of Electricity and Water had deployed booms in the vicinity of the intakes of the Sitra and Hidd power/desalination plants and the Addur desalination plant and that it had also organised shoreline clean-up operations to prevent the oil contaminating the cooling systems and desalination feedstock of these facilities.

3.5.7 It was also recalled that from 19 March to 18 April 2003 the Ministry of Municipalities and Agriculture and the Bahrain Petroleum Company (BAPCO) had undertaken extensive shoreline clean-up operations and disposed of the oily waste.

3.5.8 The Committee noted that claims totalling US$1.1 million (£573 000) had been submitted by five government agencies, MEMAC and BAPCO, for the costs of preventive measures and clean-up operations and that these claims had been settled for a total of US$689 000 (£383 000). It was also noted that claims totalling US$1.6 million (£830 000) had been submitted by the Directorate of Marine Resources on behalf of 434 fishermen who had suffered property damage and economic losses and that these claims had been settled at US$542 000 (£284 000).

3.5.9 It was noted that all claims arising from this incident had been settled within eight months of having been submitted to the 1992 Fund.

4 Any other business

4.1 Incident in the Russian Federation

4.1.1 The Committee took note of the information contained in document 92FUND/EXC.28/7 submitted by the International Group of P&I Clubs which related to an incident in the Russian Federation in September 2003 involving the *Nefterudovoz-57M*.

4.1.2 The Committee noted that, although the scale of the incident was such that the 1992 Fund would not be required to pay compensation, in view of the importance placed by the 1992 Fund's Member States on the uniform application of the international compensation regime, the International Group had brought the 1992 Fund Executive Committee's attention to the circumstances of the incident and the position taken by the Russian courts as regards the applicability of the 1992 Civil Liability Convention and the scope of compensation for impairment of the environment.

4.1.3 It was noted that in September 2003 the Russian oil-ore carrier *Nefterudovoz-57M* (2 605 GT), laden with a cargo of heavy fuel oil, had struck the Cyprus tanker *Zoja I* (18 625 GT) in the outer roads of Onega, White Sea (Russian Federation).

4.1.4 It was noted that the surveyor attending the incident on behalf of the shipowner had initially estimated that 0.2 tonnes of cargo was spilled but that the Russian authorities had later calculated that 53.893 tonnes had been spilled, of which 8.893 tonnes had been recovered by skimming.

4.1.5 The Committee noted that the *Nefterudovoz-57M* was insured by the North of England P&I Club and carried a certificate issued by the Harbour Master of Astrakhan on behalf of the Government of the Russian Federation attesting that the ship was insured in accordance with the provisions of the 1992 Civil Liability Convention. It was also noted that the Russian Maritime Register of Shipping had classed the vessel for river and sea navigation with certain restrictions as regards navigation at sea and that the vessel had in recent years sailed in the North Sea and the Baltic Sea.

4.1.6 It was noted that a claim for Roubles 14 847 521 (£242 000) for pollution damage had been submitted by the Arkhangelsk Specialised Maritime Inspectorate of the Ministry of Natural Resources of the Russian Federation, calculated on the basis of the 'Methodika', a method developed in 1967 for quantifying environmental damages. The Committee noted that the method used a theoretical formula to determine the scale of damages based on the volume of oil spilled, the sensitivity of the area in which a spill occurred and the rate at which the oil was cleaned up. It was also noted that the claimants had referred the claim to the Arkhangel Arbitration Court.

4.1.7 It was noted that in the proceedings before the Arbitration Court the shipowner had argued that claims for compensation in respect of the incident should be governed by the 1992 Civil Liability Convention, which excluded claims for impairment of the environment based on abstract quantification calculated in accordance with theoretical models.

4.1.8 The Committee noted that the Arbitration Court had dismissed the shipowner's argument that compensation for pollution damage should be governed by the 1992 Civil Liability Convention. It was noted that in the Court's view the provisions of the 1992 Civil Liability Convention applied to vessels carrying oil and oil products which called at a foreign port and which were on the high seas or on inland waters of a foreign State, that the *Nefterudovoz-57M,* which was a river-sea vessel, was at the material time undertaking deliveries of oil products in internal waters of the Russian Federation under the regulations for service of the ships of the River Fleet Ministry and that therefore the calculation of the amount of the losses should be carried out under the rules of the Russian Federation, but not under the rules of international law or the provisions of international treaties.

4.1.9 The Committee noted that in a judgement in April 2004 the Arbitration Court had found against the shipowner in the amount of Roubles 12 397 500 (£202 000) calculated in accordance with the 'Methodika' and that it had ordered that the compensation should be allocated to the revenue of the Municipal Authority of Gorod Onega Onezhskiy. It was noted that the shipowner had appealed against the decision by the Arbitration Court of the Arkhangel Region to the Appeal Court of Arkhangel and then to the Court of Cassation in St Petersburg, maintaining that the claim should be subject to the 1992 Civil Liability Convention but that both these Courts had upheld the ruling of the first instance Arbitration Court.

4.1.10 It was noted that in January 2005 the Arctic Regional Border Department of the Federal Security Service had filed a claim for Roubles 19 604 529 (£368 000) on behalf of fishery interests, calculated also on the basis of the 'Methodika'. It was also noted that this claimant had taken legal action in the Arkhangel Arbitration Court against the shipowner.

4.1.11 The Committee noted that the International Group of P&I Clubs had brought this incident to the attention of the Executive Committee for the following reasons:

(i) The Arbitration Court had stated that the provisions of the 1992 Civil Liability Convention applied to vessels carrying oil and oil products which called at a foreign port and which were on the high seas or on inland waters of a foreign State. However, Article II (a)(i) of the 1992 Civil Liability Convention stated that the Convention applied to pollution damage in the territory, including the territorial sea of a Contracting State.

(ii) In the case of a similar incident, namely the *Victoriya* (Russian Federation, 30 August 2003) - a Russian tanker that suffered a fire and explosion at a terminal on the Volga river, 1 300 kilometres inland from the Caspian Sea and the Sea of Azov - the 1992 Fund Executive Committee had decided at its October 2003 session that the 1992 Conventions applied, since the *Victoriya* was a sea-going vessel and the pollution damage had been caused in the territory of a Contracting State.

(iii) As the International Group was firmly convinced that claims for pollution damage arising from the *Nefterudovoz-57M* incident should be governed by the 1992 Civil Liability Convention, the claims calculated on the basis of the 'Methodika' should be inadmissible in accordance with the policy of the 1992 Fund, whereby claims would not be entertained for environmental damage based on an abstract quantification in accordance with theoretical models (cf 1992 Fund Claims Manual, November 2002 edition, page 30).

4.1.12 The delegation of the Russian Federation expressed its gratitude to the observer delegation of the International Group of P&I Clubs for drawing the Committee's attention to the *Nefterudovoz-57M* incident. That delegation agreed that the 1992 Civil Liability Convention should have applied to the incident, and that while the Russian courts could be criticised for their decisions, there was nothing that could be done to change the situation. That delegation further stated that it appeared that the courts might have decided, since the 'Methodika' was not applicable under the 1992 Civil Liability Convention, and in order to protect victims to the maximum possible extent, to apply national legislation that did permit its use.

4.1.13 A number of delegations also agreed that the 1992 Civil Liability Convention should have been applied to this incident and that the decision of the Russian courts could be an item for consideration by the intersessional Working Group in the context of the importance of the uniform application of the Conventions.

4.1.14 The Committee recalled that the 'Methodika' had been applied to the first incident involving the 1971 Fund and that this had led to the 1971 Fund Assembly passing a Resolution in 1980 to the effect that the assessment of compensation should not be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models.

4.1.15 The Director drew attention to the fact that, since the total amount of the claims in this case fell well below the limitation amount applicable to the *Nefterudovoz-57M* under the 1992 Civil Liability Convention, the 1992 Fund had not been able to intervene in the court proceedings.

4.1.16 One delegation pointed out that the non-uniform application of the Conventions might, on this occasion, have benefited the 1992 Fund, had the total admissible claims exceeded the limitation of liability applicable to the *Nefterudovoz-57M*. However, that delegation was of the view that the 1992 Fund should have reimbursed the shipowner's insurer if and to the extent that shipowner's limit had been exceeded in respect of admissible claims.

4.1.17 Another delegation drew attention to a positive aspect in that although the 1992 Civil Liability Convention should have applied to the incident, the courts had recognised that the application of the 'Methodika' was not compatible with the 1992 Conventions.

4.1.18 The Executive Committee considered that the 1992 Civil Liability Convention should have applied to the *Nefterudovoz-57M* incident and that had the Convention been applied, claims based on the 'Methodika' would not have been admissible.

4.2 Future sessions

The Executive Committee decided that the next session should be held during the week of 27 June 2005, starting on Monday 27 June.

5 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.28/WP.1, was adopted, subject to certain amendments.