



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
29th session
Agenda item 5

92FUND/EXC.29/6
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RECORD OF DECISIONS OF THE TWENTY-NINTH SESSION OF THE EXECUTIVE COMMITTEE

(held on 27 and 28 June 2005)

Chairman: Mrs Lolan Margaretha Eriksson (Finland)

Vice-Chairman: Mr Volker Schöfisch (Germany)

Opening of the session

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 92FUND/EXC.29/1.

2 Examination of credentials

- 2.1 The Executive Committee recalled that the 1992 Fund Assembly had, at its March 2005 session, decided to establish, at each session, a Credentials Committee composed of five members elected by the Assembly on the proposal of the Chairman to examine the credentials of delegations of Member States and that the Credentials Committee established by it should also examine the credentials of the Executive Committee. The Committee also recalled that the Assembly had decided that, should the Executive Committee hold sessions that were not in conjunction with an Assembly session, as was the case at this session, the Committee should establish its own Credentials Committee composed of three members on the proposal of the Chairman. It was noted that the Assembly had inserted provisions to this effect in the respective Rules of Procedure.
- 2.2 In accordance with Rule (iv) of the Executive Committee's Rules of Procedure the delegations of Australia, Germany and the Republic of Korea were appointed to the Credentials Committee.
- 2.3 In response to a question as to whether members of the Credentials Committee would rotate at each session, the Director stated that it would be for the relevant governing body to decide.
- 2.4 One delegation made the point that when electing the members of the Credentials Committee, the Assembly or Executive Committee should endeavour to ensure a geographical distribution of the posts.

2.5 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 Kingdom
Finland	Netherlands	Uruguay
	Portugal	

2.6 After having examined the credentials of the delegations of the members of the Executive Committee, the Credentials Committee reported in document 92FUND/EXC.29/2/1 that all the above-mentioned members of the Executive Committee, except the delegations of the Netherlands and Uruguay, had submitted credentials which were in order and that the credentials in respect of these two delegations were accepted provisionally pending corrections of certain deficiencies set out in the report^{<1>}.

2.7 The Executive Committee drew attention to the importance of States complying with the guidelines on credentials approved by the Assembly at its March 2005 session as set out in circular 92FUND/Circ.49.

2.8 The following Member States were represented as observers:

Antigua and Barbuda	Greece	Norway
Argentina	Liberia	Panama
Bahamas	Malaysia	Poland
Belgium	Malta	Spain
Cameroon	Marshall Islands	Sweden
Canada	Mexico	Turkey
France	Monaco	Vanuatu
Ghana	Nigeria	Venezuela

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

Brazil	Iran (Islamic Republic of)	Saudi Arabia
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2.10 The following intergovernmental organisations and international non-governmental organisations were represented as observers:

Intergovernmental organisations:

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

International non-governmental organisations:

International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)
International Group of P&I Clubs
International Tanker Owners Pollution Federation Ltd (ITOPF)
Oil Companies International Marine Forum (OCIMF)

<1> Note by Director: These deficiencies were eliminated in respect of the credentials for both delegations shortly after the session.

3 Incidents involving the 1992 Fund

3.1 Erika

3.1.1 The Executive Committee took note of the developments regarding the *Erika* incident as set out in documents 92FUND/EXC.29/3 and 92FUND/EXC.29/3/Add.1.

Amount available for compensation

3.1.2 The Committee recalled that the Commercial Court in Nantes had determined the limitation amount applicable to the *Erika* at FFfr84 247 733 corresponding to €12 843 484 (£8.8 million).

3.1.3 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 FFfr1 211 966 811 corresponding to €84 763 149 (£127 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.

3.1.4 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.

3.1.5 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.

3.1.6 It was recalled that the Executive Committee had authorised the Director to make payments to the French State to the extent that he considered that there was a sufficient margin between the total amount of compensation available and the 1992 Fund's exposure in respect of other claims (document 92FUND/EXC.22/14, paragraph 3.4.11). It was also recalled that the 1992 Fund had made two payments to the French State totalling €16 070 342 (£11 118 000).

3.1.7 In response to a question by the French observer delegation the Director stated that he was continuing to review the claims situation in order to establish whether there was a sufficient margin to enable the 1992 Fund to make further payments to the French Government.

Claims situation

3.1.8 The Committee noted that as at 31 May 2005, 6 694 claims for compensation had been submitted for a total of €206 million (£142 million) and that 94.8% of the claims had been assessed.

3.1.9 It was noted that payments for compensation had been made in respect of 5 587 claims for a total of €99.3 million (£68.3 million), out of which the shipowner's insurer, Steamship Mutual Underwriting Association (Bermuda) Limited (Steamship Mutual) had paid €12.8 million (£8.8 million) and the 1992 Fund €86.5 million (£59.5 million). It was also noted that 815 claims, totalling €2.4 million (£15.4 million), had been rejected.

Legal proceedings

- 3.1.10 The Executive Committee recalled that a number of court actions for compensation had been brought in various jurisdictions in France.
- 3.1.11 The Committee noted that claims totalling €497 million (£342 million) had been lodged against the shipowner's limitation fund constituted by Steamship Mutual and that this amount included a claim by the French Government at €90.5 million (£131 million) and by TotalFinaElf at €70 million (£117 million). It was however noted that most of these claims, other than those of the French Government and TotalFinaElf, had been settled, and that therefore it appeared 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.
- 3.1.12 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 by 31 May 2005 out-of-court settlements had been reached with 412 of these claimants and that 51 salt producers had withdrawn their actions in favour of three local and regional authorities which had made provisional payments to these claimants. It was also noted that actions by 318 claimants (including 161 salt producers) were pending. It was further noted that the total amount claimed in the pending actions, excluding the claims by the French State and TotalFinaElf, was €65 million (£45 million).
- 3.1.13 The 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 judgements in respect of claims against the 1992 Fund

- 3.1.14 The Committee took note of the information contained in section 9 of document 92FUND/EXC.29/3 and section 1 of document 92FUND/EXC.29/3/Add.1 concerning judgements in various French Courts in respect of claims against the 1992 Fund, the shipowner and Steamship Mutual.
- 3.1.15 In summing up the situation with regard to legal proceedings, the Director stated that there had been a total of 30 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 requirement that there must be a link of causation between the event and the damage. He made reference to two judgements by the Court of Appeal in Rennes in which the Court had stated that the 1992 Fund's criteria for admissibility were not binding on the national courts, but could serve as a reference (une référence d'ordre indicatif) for the national judge. 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.
- 3.1.16 In the ensuing discussions reference was made to a judgement rendered by the Civil Court in Paris in which the Court had agreed with the 1992 Fund to reject a claim by an organisation for the protection of birds on the ground that, since the organisation had received significant amounts from the French Government, TotalFinaElf and private donors, the claimant had not proved it had suffered any loss which had not been compensated.

- 3.1.17 In response to a question about the 1992 Fund's policy with regard to claims by bodies that had received funds through private donations, the Director stated that where such funds had been received specifically in relation to an incident, for example in relation to the costs of providing resources to clean and rehabilitate oiled wildlife, the Fund deducted from admissible expenses any amount received in the form of such donations.
- 3.1.18 One delegation noted the success of the 1992 Fund with regard to the legal actions against it in France, but expressed concern about how major incidents would be managed in Member States that did not have the necessary infrastructure and what steps the 1992 Fund had taken to assist those States. The Director made the point that it was not just States lacking infrastructure, but also other States that had never experienced a major oil pollution incident that could benefit from the Fund's outreach programme. The Director referred to a number of initiatives by the Secretariat, including the production of the revised Claims Manual, the attendance at national and regional conferences and workshops focussing on pollution response and liability and compensation issues. He also referred to the model claims workshop that the Secretariat had recently developed, which was aimed at potential claimants in the pollution response, fisheries and tourism sectors. He mentioned that the Secretariat had run such workshops in India, Indonesia and most recently Malaysia.

3.2 Prestige

- 3.2.1 The Executive Committee took note of the information regarding the *Prestige* incident contained in document 92FUND/EXC.29/4.

CLAIMS FOR COMPENSATION

- 3.2.2 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

- 3.2.3 The Committee noted that as at 27 June 2005 the Claims Handling Office in La Coruña had received 730 claims totalling €31.5 million (£571 million), including a claim for €32 million (£91 million) from a group of 58 associations in Galicia, Asturias and Cantabria representing 13 600 fishermen and shellfish harvesters and five claims from the Spanish Government. It was noted that a fifth claim submitted by the Spanish Government for €7.7 million (£60 million) corresponded to compensation payments it had made to victims in the fishery and mariculture sectors. The Committee noted that this claim, together with subsequent amendments to the other claims, had brought the total of the amount claimed by the Spanish Government to €67 million (£458 million).
- 3.2.4 It was recalled that the claims submitted by the Spanish Government related to costs incurred in respect of at sea and onshore clean-up operations, removal of the oil from the wreck, compensation payments to fishermen and shellfish harvesters, tax relief for businesses affected by the spill, administration costs and costs relating to publicity campaigns.
- 3.2.5 It was 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 €6 050 000 (£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 €1 505 000 (£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 €7 555 000 (£39.9 million).

- 3.2.6 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 noted that cooperation with representatives of the Spanish Government was continuing, that progress was being made on the assessment of the claims submitted by the Government and that additional documents provided by the Spanish Government were being analysed.
- 3.2.7 The Committee noted that, of the 725 other claims submitted, 60% had been assessed and that further supporting documentation had been requested in respect of the remaining claims. It was noted that 348 of these other claims, for €6.2 million (£11 million), had been approved for €1.9 million (£1.3 million) and that interim payments totalling €8 065 (£40 000) had been made at 15% of the assessed amounts in respect of 60 of the approved claims. It was noted that compensation payments made by the Spanish Government to claimants had been deducted when calculating the interim payments. It was also noted that the remaining approved claims awaited a response from the claimants or were being re-examined following claimants' disagreement with the assessed amount. It was further noted that 104 claims for €4.1 million (£2.8 million) had been rejected, the majority because the claimant had not demonstrated that a loss had been suffered.
- 3.2.8 It was recalled that at the Executive Committee's May 2004 session the Spanish delegation had stated that 67 municipalities had requested compensation totalling €37.6 million (£25.8 million), that the four affected autonomous regions had estimated their damage at €50 million (£103 million) and that the claimed amounts were awaiting approval by the State before payments were made to these public authorities. The Committee noted that in May 2005 52 municipalities in Galicia had signed agreements with the Spanish Government, that a further three were expected to sign agreements in the near future and that another 20 municipalities in Asturias had accepted proposals made by the Spanish Government. It was noted that the 1992 Fund had not received any claims from the towns or autonomous regions and that the Spanish Government had not yet submitted subrogated claims relating to the compensation paid to the municipalities.

France

- 3.2.9 The Committee noted that by 31 May 2005, the Claims Handling Office in Bordeaux had received 396 claims totalling €5 million (£65 million), of which 66% had been assessed. It was noted that many of the remaining claims lacked sufficient supporting documentation and that such documentation had been requested from the claimants. It was noted that 219 claims had been approved for €4.5 million (£3.1 million) and that interim payments totalling €243 730 (£166 000) had been made at 15% of the assessed amounts in respect of 79 of the approved claims. The Committee noted that the remaining approved claims awaited a response from the claimants or were being re-examined following claimants' disagreement with the assessed amount. It was noted that 43 claims had been rejected, the majority because the claimants had not demonstrated that a loss had been suffered.
- 3.2.10 The Committee noted that the experts engaged by the London Club and the 1992 Fund had examined claims totalling €1.04 million (£715 000) from 117 oyster farmers based in the Arcachon basin near Bordeaux for losses allegedly suffered as a result of market resistance due to the pollution. It was noted that 94 of these claims totalling €701 934 (£483 000) had been assessed at €206 866 (£142 000), that payments totalling €15 170 (£10 400) had been made in respect of 26 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 23 claims.
- 3.2.11 It was noted that 93 of the 158 tourism-related claims totalling €17.3 million (£11.9 million) had been assessed at a total of €5 million (£3.4 million), that 78 claims had been approved for €3.5 million (£2.4 million) and that interim payments totalling €206 280 (£142 000) had been made at 15% of the assessed amounts in respect of 36 claims.

- 3.2.12 The Committee noted that experts appointed by the 1992 Fund and the London Club were assessing a claim submitted by the French Government in May 2004 for €67.5 million (£46.4 million) in relation to the costs incurred for clean-up and preventive measures. It was noted 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. It was also noted that a formal request for further information had been sent to the French Government.
- 3.2.13 The Committee noted that a further 32 claims, totalling €6.4 million (£4.4 million), had been submitted by local authorities for costs of clean-up operations, that thirteen of these claims had been assessed at €84 054 (£669 000), of which nine claims had been approved for €83 162 (£470 000), and that interim payments totalling € 516 (£5 800) had been made in respect of four claims at 15% of the assessed amounts.

Portugal

- 3.2.14 The Committee recalled that in December 2003 the Portuguese Government had submitted a claim for €3.3 million (£2.3 million) in respect of clean up and preventive measures. It was recalled that a meeting had been held in July 2004 between representatives of the 1992 Fund and representatives of the Government departments involved and that in February 2005 the Portuguese Government had provided the 1992 Fund with additional documentation in support of its claim. It was noted that the additional documentation included a supplementary claim for €1 million (£680 000) also in respect of clean-up and preventive measures. The Committee noted that the documentation provided was being examined by the experts engaged by the London Club and the 1992 Fund.

Payments and other financial assistance by the Spanish Authorities

- 3.2.15 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.
- 3.2.16 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.
- 3.2.17 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.
- 3.2.18 It was recalled that at the February 2004 session of the Executive Committee the Spanish delegation had informed the Committee that the Spanish Government had received almost 29 000 claims for compensation from victims of the *Prestige* incident who wished to use the payment mechanism set out in the first Royal Decree. It was also recalled 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 and that some 5 000 claims of other groups would be subject to individual assessments. The Committee noted that in May 2005 the Spanish Government had informed the 1992 Fund that agreements had been reached with some

19 500 workers in the fisheries sector and that payments totalling some €87.7 million (£60 million) had been made to them under the Royal Decrees.

- 3.2.19 The Committee recalled that the 1992 Fund had been informed by the Spanish Government in 2004 that claims which under the Decrees would be subject to individual assessment would be assessed by the Consorcio de Compensación de Seguros (the Consorcio), a state-owned insurance organisation set up to pay claims for damage not normally covered by commercial insurance policies. It was noted that as at 31 May 2005, 971 claims for a total of €229.9 million (£158 million) had been received by the Consorcio relating to some 3 700 persons.
- 3.2.20 It was noted that since the Royal Decrees provided that the assessment of claims would be made following the criteria used to apply the 1992 Civil Liability and Fund Conventions, meetings had been held between representatives of the Consorcio and of the 1992 Fund to discuss the criteria.
- 3.2.21 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 190 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. It was also noted that the experts of the Consorcio and the experts appointed by the London Club and the 1992 Fund had made joint assessments of 13 claims of which the 1992 Fund and the London Club had approved nine. The Committee noted that 66 claims with which the Consorcio had requested assistance had also been submitted directly to the Claims Office and had been approved by the London Club and the 1992 Fund. The Committee also noted that details of 65 of these assessments had been provided, with the approval of the claimants, to the Consorcio. It was noted that further assessments were in progress.
- 3.2.22 The Spanish observer delegation stated that a group of experts appointed by the Spanish Government were working closely with the 1992 Fund's experts providing the information required by the Fund on clean-up operations on shore and at sea and that the work was progressing. That delegation also stated that the latest claim submitted by the Spanish Government for €87.7 million (£60 million) corresponded to payments made to victims in the fishery and mariculture sectors who had subrogated their rights to the Government. The delegation informed the Committee that the Spanish Government would submit claims for the costs incurred by autonomous regions and municipalities that had been paid by the Government and for the costs incurred in the disposal of the oily residues. That delegation stated that it expected to submit these claims together with the claims assessed by the Consorcio by the end of 2005 or early in 2006.

Payments and other financial assistance by the French Authorities

- 3.2.23 The Committee recalled that the French Government had introduced a scheme to provide payments in excess of the amounts paid by the 1992 Fund to claimants in the fishery and shellfish harvesting sectors who had made a request to that effect by 13 December 2004 and that the Government would subrogate the rights of the claimants against the London Club and the 1992 Fund up to the amounts paid.
- 3.2.24 It was recalled 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 recalled 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.
- 3.2.25 It was noted that payments had been made to 175 claimants for a total of €1 153 621 (£793 000) in January 2005.

Amount available for compensation

- 3.2.26 The Committee recalled that the limitation amount applicable to the *Prestige* under the 1992 Civil Liability Convention was €2 777 986 (£15.7 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.
- 3.2.27 It was recalled that the maximum amount of compensation available under the 1992 Conventions in respect of this incident, 135 million SDR, corresponded to €71 520 703 (£118 million), including the amount actually paid by the shipowner and his insurer (Article 4.4 of the 1992 Fund Convention).

*COURT ACTIONS**Spain*

- 3.2.28 The Committee noted that some 2 020 claims had been lodged in the legal proceedings before the Criminal Court in Corcubión (Spain), 208 of which involved persons who had submitted claims directly to the London Club and 1992 Fund through the Claims Office in La Coruña. It was noted that no details of the losses suffered had been provided to the Court. It was also noted that it was expected that claimants who had settled with the Spanish Government under the Royal Decrees would withdraw their claims from the court proceedings.
- 3.2.29 The Committee noted that on 22 June 2005 the Director had been informed by the 1992 Fund's Spanish lawyer of a decision in May 2005 in which the Criminal Court (in its role of investigating the cause of the incident and potential liabilities), following a request by the Public Prosecutor, had declared that the shipowner might be directly liable for the damage caused by the incident. It was noted that the Court, taking into account that the Spanish Government had paid compensation to victims as a result of the incident for €87 774 614.59 (£60.5 million), had ordered the shipowner to provide the Court security in that amount in addition to the limitation amount applicable to the *Prestige*, which the shipowner had deposited with the limitation court.
- 3.2.30 The Committee also noted that in its decision the Court had held that, under Spanish law, any person who had incurred criminal liability also had civil liability for the damage arising from the criminal action. The Committee further noted that in the Court's decision it was stated that the master of the *Prestige*, who had had the control and had commanded the ship, might have criminal liability arising from the event and that the shipowner might be directly liable for the damage caused. It was also noted that once the investigation had been concluded, the court file would be passed on to a Criminal Court judge who would render a judgement on the criminal and civil liabilities arising out of the incident.
- 3.2.31 The Director stated that the investigating Criminal Court had appeared to have based its decision on Spanish criminal law without taking into account the relevant provisions of the 1992 Civil Liability Convention, which formed part of Spanish law. He drew attention to the fact that Article III.4 of the 1992 Civil Liability Convention prohibited claims for compensation against the shipowner otherwise than in accordance with the Convention and also prohibited (other than in certain circumstances set out in the Convention) claims for compensation for pollution damage, under the Convention or otherwise, against the members of the crew or the charterer, manager and operator of the ship. The Director expressed the view that the decision by the Court did not respect these provisions. He stated that the Fund was not party to these proceedings and could not appeal against the decision.
- 3.2.32 The Spanish delegation agreed that the Spanish courts should respect the 1992 Civil Liability and Fund Conventions, since they were part of Spanish national law. It was stated that Spanish law allowed the parties to appeal against the Court's decision referred to in paragraph 3.2.29. The delegation also stated that the Spanish Government had the intention to submit pleadings

reminding the Appeal Court of the obligation to apply the international Conventions as part of Spanish law.

- 3.2.33 Several delegations expressed serious concern that by applying national criminal law the Court was, in fact, defeating one of the key elements of the regime established by the 1992 Civil Liability and Fund Conventions, namely to channel the civil liability for pollution damage to the shipowner. It was stated that it was important for the compensation regime that the courts in all Member States applied the 1992 Conventions in a uniform and correct manner.
- 3.2.34 One delegation asked whether the Secretariat could take action to ensure that national courts applied the 1992 Conventions and not national law. The Director stated that this was a difficult area because under the 1992 Conventions judgements by national courts were binding. He added that, although it could be argued that the 1992 Fund was not directly affected by decisions which contravened the 1992 Civil Liability Convention, the governing bodies had on several occasions endorsed the position taken by the Director that the 1992 Fund should endeavour to ensure the proper application of both the 1992 Civil Liability Convention and the 1992 Fund Convention.
- 3.2.35 The Committee recalled that at its October 2004 session, the 1992 Fund Assembly had instructed the Director to write to all Member States to enquire whether the 1992 Conventions had been fully implemented into their national law (document 92FUND/A.9/31, paragraph 33.3.2). The Director stated that although he had written to all Member States the response to date had been very poor. The Committee urged all States that had not responded to the Directors request to do so as soon as possible.

France

- 3.2.36 The Committee 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.

United States

- 3.2.37 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.
- 3.2.38 It was recalled that the New York Court had dismissed the counterclaim by ABS on the ground that the Spanish State was entitled to sovereign immunity but that ABS was seeking reconsideration by the Court or permission to appeal.
- 3.2.39 The Committee recalled that the Regional authorities of the Basque Region (Spain) had taken legal action against ABS in the Federal Court of first instance in Houston, Texas, claiming compensation for clean-up costs and payments made to individuals and businesses for US\$50 million (£28 million), 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

- 3.2.40 It was recalled that at its October 2004 session the Executive Committee had decided that the 1992 Fund should not take recourse action against ABS in the United States and had deferred 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 also recalled that the Committee had explicitly stated that this decision was without prejudice to the Fund's position vis-à-vis legal actions against other parties (document 92FUND/EXC.26/11, paragraphs 3.7.42 – 3.7.72).
- 3.2.41 It was also 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).
- 3.2.42 The Executive Committee renewed the instructions to the Director set out in paragraph 3.2.41.

LEVEL OF PAYMENTS

- 3.2.43 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 1992 Fund and the London Club. It was also recalled that at its October 2003, February 2004, May 2004, October 2004 and March 2005 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, 92FUND/EXC.25/6, paragraph 3.2.26, 92FUND/EXC.26/11, paragraph 3.7.30 and 92FUND/EXC.28/8, paragraph 3.4.34).
- 3.2.44 It was also recalled that, at the March 2005 session, the French delegation had requested the Director to refine the assessment of the overall losses arising from the *Prestige* incident by June 2005 to enable the Committee to take a decision on whether or not the level of payments could be increased.
- 3.2.45 The Director stated that although over two and half years had passed since the incident took place, it was nevertheless very difficult to estimate the overall impact of the pollution. He also stated that the assessment of the claims representing the majority of the damage was still at an early stage due to the voluminous documentation involved and that further documentation was required in respect of a large number of claims. He mentioned that, additionally, there were some 2 020 claims presented in the proceedings before the Criminal Court in Corcubi3n (Spain) which had not been presented to the 1992 Fund, although it was expected that most of these would be withdrawn as a result of the compensation paid to the claimants by the Spanish Government. He added that further claims might also be presented before the three-year time bar period expired.
- 3.2.46 Notwithstanding these factors, which made any estimates very uncertain, the Director considered that the best estimate that could be made at this stage of the total amount of admissible claims for pollution damage in the three States concerned was as follows:

State	Minimum	Maximum
Spain	€25 million	€50 million
France	€0 million	€5 million
Portugal	€2.6 million	€3.5 million
Total	€77.6 million	€738.5 million

- 3.2.47 The Committee noted that in the case of Spain, the cost of the removal of the oil from the wreck was not included in the minimum estimate of the total amount of admissible claims but was included in the maximum estimate.
- 3.2.48 The Committee noted, however, that on the basis of the figures presented by the Governments of the three States affected by the incident, the potential total claims might be as high as some € 050 million (£720 million).
- 3.2.49 It was recalled that the IOPC Funds' governing bodies had taken the position that the level of payments should be determined in the light of the potential claims against the 1992 Fund and not on the basis of the Fund's assessment of the claims.
- 3.2.50 The Committee decided, on the basis of the figures presented by the three Governments concerned and in view of the remaining uncertainties as to the level of admissible claims, to maintain the level of payments at the current level of 15% of the loss or damage suffered by the respective claimants.
- 3.2.51 The French observer delegation stated that the slow pace in which claims were being assessed was unacceptable. In that delegation's view the Fund should have recruited more experts to speed up the assessment. That delegation stated that the delay in assessment had prevented an increase in the level of payments since there were no credible figures of the admissible claims on the basis of which a decision to increase the level could be taken.
- 3.2.52 The Director stated that he recognised that the assessment of claims appeared to be very slow. He made the point, however, that in a case with an enormous volume of documentation it was inevitable that the assessment would take a considerable time. He mentioned that many claims were not sufficiently documented and that therefore claimants had to be requested to submit additional documentation. He also stated that there was only a limited number of experienced experts available and that using too many experts would in any event make it very difficult to ensure uniformity in the assessments.

SEARCH FOR AN INCREASE IN THE LEVEL OF PAYMENTS

- 3.2.53 It was noted that, as a result of the complexity of the case and the volume of the claims documentation, the assessment of the claims would take several years and that the pending court actions might make it even more difficult to establish with any degree of certainty the total of the admissible claims. It was generally recognised that a payment level of 15% was manifestly unsatisfactory for claimants. It was noted that there was a considerable risk that, if no action was taken to remedy the situation, the payment level would have to be maintained at 15% for several years. The Executive Committee noted the Director's view that for this reason attempts should be made to find an innovative approach which would make it possible to increase the level of payments, provided that any solution would have to respect the provisions of the 1992 Conventions and, in particular, the principle of equal treatment of claimants.

- 3.2.54 The Committee noted that, in order to explore whether it would be possible to make progress towards an increase in the level of payments, the Director had invited the French, Portuguese and Spanish delegations to a meeting in London, which had been held on 1 June 2005.
- 3.2.55 The Committee took note of the following points considered at the meeting:
- According to the Director's estimate, the total amount of admissible claims for pollution damage arising from the *Prestige* incident may be more than four times the amount available for compensation (cf paragraph 3.2.46).
 - The Spanish Government represented the great majority of claimants in Spain since it had undertaken to compensate all victims in Spain.
 - The French Government's claim for the costs of clean-up operations represented approximately 70% of the estimated total damage suffered in France.
 - The Portuguese Government was the sole claimant as regards damage in Portugal.
 - These three delegations represented either directly or by subrogation the great majority of the victims of the pollution.
- 3.2.56 It was noted that, having considered the estimate made by the Director of the total amount of admissible claims, the three delegations had found that, irrespective of whether the maximum or minimum provisionally estimated amounts were considered as regards each affected State, the proportions of the damage between the three States remained substantially the same.
- 3.2.57 The Director informed the Executive Committee that, during the discussions at the meeting, he had suggested that it would be preferable if a solution could be found which was inspired by previous decisions of the governing bodies of the 1971 and 1992 Funds. In this context the Committee noted that reference had been made to a decision by the 1971 Fund Executive Committee in the *Haven* case and a decision by the 1992 Fund Assembly in the *Prestige* case.
- 3.2.58 It was recalled that in the *Haven* case, the French Government's claim had been agreed at FFfr12 580 724 and that the accepted claims by 33 other public claimants had totalled FFfr10 659 469. It was further recalled that the agreed amount of the French Government's claim had been higher than the accepted amount of the other French public claimants' claims and that the French Government had offered to provide its approved claim as a security to enable the 1971 Fund to pay all other French claimants in full and had given the following undertaking:
- Should the full and immediate payment of compensation due to the 31 municipalities of the Var and Alpes Maritimes, to the Department of the Var (Direction départementale d'incendie et de secours) and to the Parc national de Port-Cros eventually result in an overpayment by the IOPC Fund, then the State would agree to a reduction of the compensation to which the State would be entitled up to the amounts overpaid to the other French victims.
- 3.2.59 It was also recalled that the 1971 Fund Executive Committee had instructed the Director to pay the claims presented by the 33 other public claimants in full on the basis of the French Government's undertaking (document FUND/EXC.47/14, paragraphs 3.1.10 - 3.1.13).
- 3.2.60 It was noted that at the meeting on 1 June 2005 it had been considered that, in respect of the French claims, an approach similar to the one adopted in the *Haven* case could be applied.
- 3.2.61 It was also noted that at the meeting it had been considered that in the *Prestige* case a precedent could be found in the decision of the 1992 Fund Assembly, taken at its 8th session held in October 2003. It was recalled that, in that decision, the Assembly had authorised the Director to make a payment of a significant amount to the Spanish Government (€7 555 000), subject to

the Government 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 (documents 92FUND/A.8/30, paragraph 20.29 and 92FUND/EXC.29/4, paragraph 10.2).

- 3.2.62 The Executive Committee noted that, as regards Spain and Portugal, in order to meet the concerns previously expressed by some delegations, it was considered at the meeting on 1 June that, in addition to the provision of bank guarantees, payments should only be made on the basis of an assessment, provisional or final, of claims.

DIRECTOR'S PROPOSAL

- 3.2.63 It was noted that, in order to enable the 1992 Fund to increase the level of payments and to speed up payments of compensation to victims, the Director, after discussions with the delegations of France, Portugal and Spain, proposed that the Executive Committee should examine an approach outlined in document 92FUND/EXC.29/4/Add.1, which was based on an increase in the level of payments and a guarantee by each State against overpayment.
- 3.2.64 It was noted that the maximum amount payable by the 1992 Fund was 135 million SDR minus the limitation amount applicable to the *Prestige*, ie approximately €148.7 million (£102 million).

Provisional apportionment between the three States of the maximum amount payable by the 1992 Fund

- 3.2.65 The Director proposed that he should be instructed to make a refined provisional estimate of the total amount of the admissible claims arising from the incident for pollution damage in each of the three States concerned. He further proposed that, on that basis, he should assess provisionally the proportion of the admissible claims for damage in respect of each of these States in relation to the estimated total amount of admissible claims in respect of all three States and submit a proposal to the Executive Committee on a provisional apportionment between those three States of the maximum amount payable by the 1992 Fund. He also proposed that the Committee should then take a decision on such an apportionment.

Level of payments and guarantees provided by the States

- 3.2.66 The Director further proposed that, on the basis of the more refined provisional assessment to be carried out by him of the total amount of the admissible claims in respect of the damage in each of the three States concerned, the Executive Committee would decide whether the level of payments could be increased and, if so, what the new level of payments should be, subject to guarantees against overpayment as set out below. The Director also suggested that, should the Committee decide to increase the level of payments, progress could be made as set out in subparagraphs (i) – (xi) below.

Spain

- (i) The Spanish Government would undertake to compensate all claimants who had suffered pollution damage in Spain for amounts no less than those that would be arrived at by applying the level of payments established by the Executive Committee, if the Government had not already done so.
- (ii) The 1992 Fund would pay to the Spanish Government an amount corresponding to the proportion established by the Executive Committee for provisional distribution for damage in Spain of the maximum amount payable by the Fund.
- (iii) In order to protect the 1992 Fund against overpayment, the Spanish Government would undertake to repay to the Fund any amount due by it to the Fund if the Executive

Committee were to decide to reduce the proportion payable by the Fund for damage in Spain or to reduce the level of payments.

- (iv) The Spanish Government would provide the 1992 Fund with a bank guarantee to protect the Fund against overpayment.

Portugal

- (v) The 1992 Fund would pay to the Portuguese Government an amount corresponding to the proportion established by the Executive Committee for provisional distribution for damage in Portugal of the maximum amount payable by the Fund.
- (vi) In order to protect the 1992 Fund against overpayment, the Portuguese Government would undertake to repay to the 1992 Fund any amount due by it to the Fund if the Executive Committee were to decide to reduce the proportion payable by the Fund for damage in Portugal or to reduce the level of payments.
- (vii) The Portuguese Government would provide the 1992 Fund with a bank guarantee to protect the Fund against overpayment.

France

- (viii) The 1992 Fund would pay to each claimant who has suffered pollution damage in France, except the French Government, an amount arrived at by applying the level of payments established by the Executive Committee to the loss or damage as assessed by the 1992 Fund or as decided by a final judgement rendered by a competent court. However, the total amount payable by the 1992 Fund in respect of pollution damage in France would not exceed the proportion of the total amount payable by the Fund as regards damage in France.
- (ix) In order to protect the 1992 Fund against overpayment, the French Government would undertake to accept a reduction in the compensation to which it would be entitled for its claim if the Executive Committee were to decide to reduce the proportion payable by the Fund for damage in France or to reduce the level of payments.

Bank guarantees

- (x) The bank guarantees to be provided by the Spanish and Portuguese Governments should be given not by the State, but by a financial institution which would have the financial standing laid down in the 1992 Fund's Internal Investment Guidelines.

Final apportionment between the three States of the maximum amount payable by the 1992 Fund

- (xi) Once all claims arising from the incident had been settled, whether as a result of agreements with the claimants or as a result of final judgements by a competent court, the Director would inform the Executive Committee of the total amount of admissible claims in the three States concerned. The Committee would then decide, taking into account the distribution of the shipowner's limitation fund deposited with the Criminal Court in Corcubión (Spain) as decided by the courts, on any reapportionment between the three States concerned of the total amount payable by the 1992 Fund. The Committee would then make the necessary adjustments so that the correct proportion of the total amount of compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention was received in respect of each of the three States; if required the Committee would invoke the guarantees provided by these States.

EXECUTIVE COMMITTEE'S CONSIDERATIONS

- 3.2.67 Many delegations welcomed the Director's innovative approach since otherwise the current level of payments of 15% was likely to remain unchanged for several years. Some delegations expressed concerns, however, regarding the precedent that the adoption of such an approach would set for future incidents. A number of delegations urged caution since it was important to ensure that the principles of the 1992 Fund Convention were respected and that any solution should be transparent and ensure that:
- The payment of compensation was made on the basis of assessment of individual claims in accordance with the criteria for admissibility established by the governing bodies
 - The principle of equal treatment between victims was upheld
 - The 1992 Fund was protected against overpayment
 - There was a real benefit to claimants
- 3.2.68 It was noted that the Fund would in any event pay the full amount of compensation payable by it under the Conventions.
- 3.2.69 The point was made that although the 1992 Fund would have to respect the principle of equal treatment of claimants as regards payments under the 1992 Conventions, States were free to use taxpayers' money to make additional payments to victims as they considered appropriate.
- 3.2.70 One delegation considered that the proposal represented a deviation from the Fund's previous practice, since in the past the level of payments had been established on the basis of the total amount claimed, whereas the Director's proposal was that the level of payments should be established on the basis of provisional assessments. That delegation recognised, however, that establishing the level of payments on the basis of the amount claimed had disadvantages since genuine claimants could be prejudiced by unfounded or inflated claims.
- 3.2.71 Several delegations expressed the view that the 1992 Fund should take great care in making changes to the current policy of establishing the level of payments in the light of the potential claims against the Fund.
- 3.2.72 The delegation of Spain supported the Director's approach in principle.
- 3.2.73 The delegation of France also supported the approach proposed by the Director, but stated that this approach was only of interest if it led to a significant increase in the level of payments.
- 3.2.74 The delegation of Portugal expressed the view that the Director's approach offered a practical solution to a difficult situation and that it would therefore agree to instruct the Director to present a refined proposal in October 2005, taking into account the comments and suggestions made during the discussion.
- 3.2.75 In response to a question the Director stated that in making any payments under the proposed approach deductions would have to be made for any amount already paid in compensation.
- 3.2.76 In response to a question as to how the apportionment of the amount payable by the 1992 Fund to the Spanish Government would be affected by individual payments made by the Fund to claimants in Spain, the Director stated that the amounts of such payments would have to be deducted from the Spanish Government's share.
- 3.2.77 In her summary the Chairperson noted that there was broad support for the approach proposed by the Director in his search for a solution which would enable the Fund to increase the level of payments. The Chairperson noted that some delegations had emphasised that their support was

without prejudice to their position as regards any detailed proposal to be developed by the Director. The Chairperson further noted that many delegations had emphasised the importance of ensuring that the principles of the Conventions were followed, particularly with regard to equal treatment of victims, and of safeguarding the Fund against overpayment.

- 3.2.78 The Executive Committee decided to instruct the Director to make a detailed proposal on the basis of the approach set out in paragraphs 3.2.66, after consultations with the three delegations concerned and taking into account the points raised during the discussion, covering the legal and technical aspects, to be considered by the Committee at its October 2005 session.

INVESTIGATIONS INTO THE CAUSE OF THE ACCIDENT

The Bahamas Maritime Authority

- 3.2.79 The Committee recalled that the Bahamas Maritime Authority (ie the authority of the flag State) had carried out an investigation into the cause of the incident (cf document 92FUND/EXC.28/5, section 13.1 and document 92FUND/EXC.28/8, paragraphs 3.4.52 – 3.4.60).

The Spanish Ministry of Public Works

- 3.2.80 The Committee noted that the Spanish Ministry of Public Works (Ministerio de Fomento) had carried out an investigation into the cause of the incident through the Permanent Commission on the Investigation of Maritime Casualties (the Commission) that had the task of determining the technical causes of maritime accidents and that this report had been made available to the 1992 Fund in April 2005.

- 3.2.81 It was noted that the report stated, *inter alia*, that the Commission had calculated the shear forces and bending moments^{<2>} experienced by the vessel on three occasions, namely: just prior to the damage occurring; after the starboard ballast tanks had flooded and; after the port side ballast tanks had been filled to correct the list brought about by the flooding of the starboard tanks. It was also noted that the report stated, *inter alia*, that:

- The maximum bending moment just prior to the damage occurring was within the calm water maximum allowed by the vessel's classification society, the American Bureau of Shipping (ABS).
- After the starboard tanks had flooded the maximum bending moment exceeded the calm water maximum by 28.4%.
- Once the port side tanks had been filled the maximum bending moment exceeded the calm water maximum by 70.4%.
- The maximum shear force on all three occasions was within that admissible according to ABS.

- 3.2.82 It was noted that the Commission had reached the conclusion that the cause of the casualty was a structural failure in the area of No. 2 starboard-aft and No. 3 starboard wing tanks as a result of a local loss of strength due to deformation, detachment or fracture of the longitudinal shipside frames, which had caused a loss of rigidity in the shell plates and their consequent deformation, which could have caused a large breach and even a detachment of those plates. The Committee noted that the Commission had based its conclusions on the following factors:

- Video film taken by the submarine *Nautile* showed that the shell plating of the *Prestige* had become detached on the starboard side at the weld line six metres below the main deck.

<2>

Internal forces that are induced in the structure depending on the way the vessel is loaded.

- Part of the structure of the affected tanks had been replaced at Guangzhou (China) ^{<3>} because the thickness was found to be below the minimum permissible under classification society rules.
- The area affected by the damage, and which had been partially repaired, had over the years been subject to thermal and mechanical fatigue; thermal because fuel oil is a cargo that is transported at high temperatures (up to 90°C) and mechanical because of the age of the ship.
- Replacement of longitudinal frames had been carried out with profiles produced and welded manually since prefabricated frames were not available on the local market. Although it is accepted in the report that this technique is valid, the mechanical characteristics of the sections made this way are said to be of inferior quality.
- The thickness of replacement plates was in some cases less than the originals and, although within the reduction permitted by ABS, could provoke an excessive stress concentration in the areas of joint.
- The ship had been modified to allow cargo tanks to be used for clean ballast, including those tanks that were affected by damage. This, added to the fact that the adjacent cargo tanks carried cargo at temperatures up to 90°C, meant that those tanks were subject to a higher degree of corrosion.
- The bad weather prevailing in the area.
- The deficient state of maintenance of the ship.
- The repeated berthing of ships alongside *Prestige* during the four-month stay at St Petersburg ^{<4>}, requiring the use of special fenders, could have weakened the area of her side.

3.2.83 The Committee noted that on 27 May 2005, the Spanish Ministry of Public Works had provided the 1992 Fund with a copy of the conclusions in an addendum to the report referred to above. It was noted that in the addendum it was concluded that, in the opinion of the Spanish Maritime Administration, the chain of errors, omissions and negligence in the inspections of the *Prestige* was the cause of the ship's critical condition and consequently of the final outcome. It was also noted that the addendum stated that the Bahamas Maritime Authority seemed to have deliberately ignored this, creating the impression that the master or the salvage team had complete freedom to choose between various options and that, meanwhile, the Spanish coast was seriously threatened and the authorities were taking measures to protect it without reliable information concerning the real condition of the ship (cf Annex to document 92FUND/EXC.29/4).

3.2.84 The Bahamas observer delegation stated that it was unfortunate that the Spanish authorities had not provided the Bahamas authorities with drafts of their report and its addendum before publishing them, since they contained a number of errors. The Bahamas delegation also referred to a number of strong criticisms set out in the Spanish report of the report by the Bahamas Maritime Authority on its investigation into the cause of the incident and expressed its regret that the Spanish authorities had ignored the provisions of the International Maritime Organization (IMO) accident investigation guidelines on co-operation with the flag State. The

^{<3>} The vessel underwent repairs, and special survey, at Guangzhou in May 2001.

^{<4>} The ship acted as a storage ship for 131 days, from 22 June to 30 October 2002, while moored at St Petersburg (Russian Federation) prior to the final voyage. During that time barges delivered oil to the ship and tankers came alongside to load. The ship would have been at risk of contact damage by vessels coming alongside to discharge or load cargo.

Bahamas delegation drew attention to a number of specific errors in the Spanish authorities' report and its addendum.

- 3.2.85 The Spanish delegation drew attention to the findings in the report by the Spanish Commission as regards the cause of the incident and those of the French Ministry of Transport and the Sea, (cf paragraphs 3.2.87 – 3.2.94 below) which were in agreement on a number of points. That delegation also stated that it had submitted comments on the draft report by the Bahamas Maritime Authority pointing out a number of errors and omissions but that these comments had not been taken into account. The Spanish delegation stated that it had complied fully with the requirements of IMO Resolution 849, even to the extent of providing further information at the request of IMO.

The Criminal Court in Corcubi3n

- 3.2.86 The Committee recalled that the Criminal Court in Corcubi3n in Spain was carrying out an investigation into the cause of the incident in the context of criminal proceedings. It was recalled that the Court was investigating the role of the master of the *Prestige*, of a civil servant who had been involved in the decision not to allow the ship into a port of refuge in Spain and a manager of the ship's management company.

The French Ministry of Transport and the Sea

- 3.2.87 The Committee noted that the French Ministry of Transport and the Sea (Secr3tariat D'Etat aux Transports et 3 La Mer) had carried out a preliminary investigation into the cause of the incident through the General Inspectorate of Maritime Affairs – Bureau of investigations – accidents/sea (Inspection General des Services des Affaires Maritimes – Bureau enqu3tes – accidents / mer (BEAmer)) to establish the circumstances and causes of the incident and to learn those lessons which might prevent further accidents of a similar type. It was noted that the purpose of the investigation was not to establish criminal fault or individual or collective civil liability.
- 3.2.88 It was noted that, as regards the cause of the incident, the report stated that since the investigators only had access to the documents provided by the classification society and the flag state, they could not base their conclusions on tangible evidence.
- 3.2.89 It was noted that the report concluded that, on the basis of the information available, the loss of the *Prestige* appeared to be due to a series of successive factors, namely:
- Factors linked to conditions of the market for maritime transport of heavy fuels, leading to carriage of a substantial part of such heavily polluting products in old and pre-MARPOL ships
 - Factors concerning the design of these ships at their date of construction and problems with aging resultant on the ships being brought into compliance with the provisions of MARPOL
 - Possible factors causing the initial damage: impact by a floating object (thought unlikely); violent wave impact; failure of the hull or; a combination of these factors
 - Successive repairs, which could indicate structural weakness in the bulkhead between wing tanks 2 and 3 which, in pre-MARPOL vessels, are more susceptible to corrosion, weakening of the internal structure of wing tanks Nos 2 and 3 due to use of the vessel for transshipment operations at St Petersburg and insufficient repairs, notably while at Guangzhou in 2001
 - Enlargement of the initial damage because of: forces on the structure produced by the sea before the damage was reported, additional forces on the damaged structure generated by filling the port ballast tanks and towage operations and maintaining the ship at sea in a

delicate condition after the initial damage, linked to difficulties in reception (configuration of the coast, limited means of towage).

- 3.2.90 It was also noted that the report considered that the action of the master in flooding the port side ballast tanks had aggravated the situation^{<5>} and made towage over a long distance perilous but that the master probably had not had available the relevant information for making his decision because the stability calculator had been out of action since the initial sudden list had occurred^{<6>}.
- 3.2.91 Concerning the actions of the shipowner, it was noted that the report mentioned that liaison with the maritime authorities of the coastal state seemed to have been through a ships' agent nominated by the shipowner and who had made contact with the authorities three hours after the alarm had been raised and this information had been given to the shipowner by the master and that the designated person was immediately preoccupied with arranging a contract with a salvage company.
- 3.2.92 It was noted that the report stated that the actions of the salvor remained to be studied and that the information requested from the salvors had not been supplied to BEAmer.
- 3.2.93 With regard to the decisions taken by the Spanish authorities to distance the ship from the coast, it was noted that the report mentioned that the investigators had not received from the Spanish maritime authorities the information necessary to understand completely the decision process. It was also noted that the report considered that although the initial pollution was relatively minor and the ship had held together for several days the information provided by the shipowner and the classification society guaranteeing the strength of the ship did not seem to have been sufficient to satisfy the various coastal authorities, and in the eyes of the maritime authorities of the coastal state, the possible places of refuge in the Galician rías were not suitable to contain an eventual massive pollution.
- 3.2.94 It was noted that the report stated that since metallurgical analysis on a minimum of significant samples would not be carried out and made public, it did not seem possible to develop the conclusions further.

An examining magistrate in Brest

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

The 1992 Fund's involvement

- 3.2.96 The Committee took note of the information provided and instructed the Director to continue to follow the ongoing investigations through its Spanish and French lawyers and to make further analysis of the reports on the investigations carried out.

4 Any other business

The Executive Committee took note of the information contained in document 92FUND/EXC.29/5 concerning the ratification situation in respect of the 1992 Fund Convention and the 2003 Protocol to that Convention (Supplementary Fund Protocol). It noted that there were at the time of the session 88 Member States of the 1992 Fund and that six more States would become Members within the next eleven months. The Committee also noted that

<5> The maximum bending moment at time of departure from the loading post was 43% of the maximum permissible in calm water. This increased to 125% after the flooding of the starboard side tanks caused by the damage to the shell plating and then to 163% of the calm water limit when the port side ballast tanks were filled.

<6> As a result of the loss of electrical power that occurred when the ship listed to 30°.

there were at the time of the session nine Member States of the Supplementary Fund and that two more States, Sweden and the Netherlands had ratified the Protocol which would bring the number of Supplementary Fund Member States to 11 by 16 September 2005.

5 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.29/WP.1, was adopted, subject to certain amendments.
