INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
36th session
Agenda item 5

92FUND/EXC.36/10
16 March 2007
Original: ENGLISH

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

(held on 14 and 16 March 2007)

Chairman: Mr John Gillies (Australia)

Vice-Chairman: M. Léonce Michel Ogandaga Agondjo (Gabon)

Opening of the session

0.1 The Chairman opened the 36th session of the Executive Committee and welcomed delegates to the venue of Inmarsat for the second time. He also welcomed Mr Willem Oosterveen in his first meeting as Director of the IOPC Funds.

0.2 The Director stated that these were times of change for the Secretariat. He intended to build on the legacy left by the former Director, Mr Måns Jacobsson, whilst finding a new balance which would build on the strengths of the Secretariat. He anticipated that there would be changes over time but that they would be introduced on a step-by-step basis. He stated that he would appreciate the views of Member States regarding such changes in the operation of the Organisation and its Secretariat in the future. The Director announced that it had been decided, upon a suggestion by the Chairman, that new or recent incidents would from now on normally be introduced by the Secretariat with the help of PowerPoint presentations, since these could describe each incident in a clearer and more visible manner.

0.3 The Chairman reminded the Committee of the sad passing of Mr Igor Ponomarev, permanent representative to IMO of the Russian Federation, since the session of the Committee in October 2006 and expressed to his family and to the Russian delegation the sincere condolences of other delegations and sadness at the loss of a much respected colleague and friend.

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 92FUND/EXC.36/1.

2 Examination of credentials

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

Assembly should also examine the credentials of the Executive Committee (Executive Committee's Rules of Procedure, Rule (iv)). 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 relevant Rules of Procedure.

2.2 In accordance with Rule (iv) of the Executive Committee's Rules of Procedure the delegations of Bahamas, Cameroon and Singapore were appointed to the Credentials Committee

2.3 The following members of the Executive Committee were present:

Australia	France	Malaysia
Bahamas	Gabon	Netherlands
Cameroon	Germany	Singapore
Canada	Japan	Spain
Denmark	Lithuania	Turkey

2.4 After having examined the credentials of the delegations of the members of the Executive Committee, the Credentials Committee reported in document 92FUND/EXC.36/2/1 that all the above-mentioned members of the Executive Committee had submitted credentials which were in order.

2.5 The following Member States were represented as observers:

Algeria	Ireland	Poland
Angola	Italy	Portugal
Argentina	Latvia	Qatar
Belgium	Liberia	Republic of Korea
Bulgaria	Malta	Russian Federation
China (Hong Kong Special Administrative Region)	Marshall Islands	Sweden
	Mexico	Tunisia
Colombia	Monaco	United Arab Emirates
Cyprus	Morocco	United Kingdom
Dominican Republic	Nigeria	Uruguay
Finland	Norway	Vanuatu
Ghana	Panama	Venezuela
Greece	Papua New Guinea	
Guinea	Philippines	

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

Brazil	Saudi Arabia
Ecuador	Syrian Arab Republic

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

Intergovernmental organisations:

International Oil Pollution Compensation Fund 1971 (1971 Fund)
International Oil Pollution Compensation Supplementary Fund (Supplementary Fund)

International non-governmental organisations:

BIMCO
Comité Maritime International (CMI)
International Association of Classification Societies Ltd (IACS)
International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)
International Group of P & I Clubs
International Tanker Owners Pollution Federation Ltd (ITOPF)
International Union of Marine Insurance (IUMI)
Oil Companies International Marine Forum (OCIMF)

3 Incidents involving the 1992 Fund

3.1 *Erika*

3.1.1 The Executive Committee took note of the developments regarding the *Erika* incident as set out in documents 92FUND/EXC.36/4, 92FUND/EXC.36/4/Add.1 and 92FUND/EXC.36/4/Add.2.

Maximum amount available for compensation

3.1.2 It was recalled that the maximum amount available for compensation under the 1992 Civil Liability Convention and the 1992 Fund Convention (135 million SDR) had been calculated by the Director, following the instructions by the Executive Committee, at FFr1 211 966 811 corresponding to €184 763 149 (£123.6 million).

Shipowner's limitation fund

3.1.3 It was recalled that at the request of the shipowner, the Commercial Court in Nantes had issued an order in March 2000 opening limitation proceedings. It was also recalled that the Court had determined the limitation amount applicable to the *Erika* at FFr84 247 733 corresponding to €12 843 484 (£8.6 million) and had declared that the shipowner had constituted the limitation fund by means of a letter of guarantee issued by the shipowner's liability insurer, the Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual).

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

Undertakings by Total SA and the French Government

3.1.5 The Committee recalled that Total SA had undertaken not to pursue claims against the 1992 Fund or against the limitation fund constituted by the shipowner or his insurer relating to its costs arising from operations in respect of the wreck, the clean-up of shorelines and disposal of oily waste, and a publicity campaign to restore the image of the Atlantic coast, if and to the extent that 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.

3.1.6 It was recalled that the French Government had also undertaken not to pursue claims for compensation against the 1992 Fund or the limitation fund established by the shipowner or his insurer if and to the extent that such claims would result in the maximum amount available under the 1992 Conventions being exceeded, but that the French Government's claims would rank before any claims by Total SA if funds were available after all other claims had been paid in full.

Claims situation

3.1.7 The Committee noted that as at 14 February 2007, 6 997 claims for compensation had been submitted for a total of €387 million (£259 million), including a claim for €179 million (£120 million) by the French State for clean-up operations carried out as a result of the incident. It was also noted that 98.4% of the claims had been assessed and that some 1 058 claims, totalling €24 million (£16 million), had been rejected.

3.1.8 The Committee noted that compensation payments had been made in respect of 5 665 claims for a total of €128 million (£79.8 million), out of which Steamship Mutual had paid €12.8 million (£8.6 million) and the 1992 Fund €115.2 million (£71.2 million).

Payments to the French Government

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

3.1.10 It was also recalled that in December 2003 the Director had decided that there was a sufficient margin to enable the 1992 Fund to commence payments to the French State and that the Fund had initially paid €10.1 million (£7 million), corresponding to the French Government's subrogated claim in respect of the supplementary payments to claimants in the tourism sector, followed in October 2004 by a further payment of €6 million (£4.2 million) relating to the French Government's supplementary payments made under the scheme to provide emergency payments to claimants in the fishery, mariculture and salt producing sectors administered by the Office national interprofessionnel des produits de la mer et de l'aquaculture (OFIMER), a government agency attached to the French Ministry of Agriculture and Fisheries. It was noted that in December 2005 the 1992 Fund had made a payment on account to the French State of €15 million (£10.3 million) towards the costs incurred by the French authorities in the clean-up response followed by a further payment in October 2006 of €10 million (£6.7 million).

3.1.11 It was noted that the Director continued to monitor the situation and would consider later in 2007, in the light of the developments of the court proceedings, whether a further payment could be made to the French State.

Criminal proceedings

3.1.12 The Committee recalled that on the basis of a report by an expert appointed by a magistrate in the Criminal Court in Paris, criminal charges had been brought in that Court against the master of the *Erika*, the representative of the registered owner (Tevere Shipping), the president of the management company (Panship Management and Services Srl), the management company itself, the deputy manager of Centre Régional Opérationnel de Surveillance et de Sauvetage (CROSS), three officers of the French Navy who were responsible for controlling the traffic off the coast of Brittany, the classification society Registro Italiano Navale (RINA), one of RINA's managers, Total SA and some of its senior staff.

3.1.13 It was noted that the trial, which started on 12 February 2007, was expected to last for four months. It was also noted that the 1992 Fund, although not directly involved in the trial, was following the proceedings since there could be developments of interest to the Fund.

Legal proceedings

3.1.14 The Committee recalled that the Conseil Général of Vendée and a number of other public and private bodies had brought actions in various courts against the shipowner, Steamship Mutual, companies in Total SA and others requesting that the defendants should be held jointly and

severally liable for any claims not covered by the 1992 Civil Liability Convention and that the 1992 Fund had requested to be allowed to intervene in the proceedings. It was noted that so far only procedural hearings had been held.

3.1.15 It was recalled that the French State had brought actions in the Civil Court in Lorient against Tevere Shipping Co Ltd, Panship Management and Services Srl, Steamship Mutual, Total Transport Corporation, Selmont International Inc, the limitation fund referred to in paragraph 3.1.3 above and the 1992 Fund, claiming €190.5 million (£127.5 million).

3.1.16 It was also recalled that four companies in Total SA had taken legal actions in the Commercial Court in Rennes against the shipowner, Steamship Mutual, the 1992 Fund and others claiming €143 million (£95.7 million).

3.1.17 It was recalled that Steamship Mutual had brought action in the Commercial Court in Rennes against the 1992 Fund, requesting the Court, *inter alia*, to note that Steamship Mutual had paid €12 843 484 (£8.6 million) corresponding to the limitation amount applicable to the shipowner and that therefore it had fulfilled all its obligations under the 1992 Civil Liability Convention. It was also recalled that Steamship Mutual had requested the Court to order the 1992 Fund to reimburse it any amount that it would have paid in excess of the limitation amount.

3.1.18 The Committee recalled that claims totalling €497 million (£332.7 million) had been lodged against the shipowner's limitation fund constituted by Steamship Mutual and that this amount included the claims by the French Government and Total SA. It was noted, however, that most of these claims, other than those of the French Government and Total SA, had been settled and that it appeared therefore that these claims should be withdrawn against the limitation fund to the extent that they related to the same loss or damage. It was also recalled that the 1992 Fund had received from the liquidator of the limitation fund formal notifications of the claims lodged against that fund.

3.1.19 It was noted that legal actions against the shipowner, Steamship Mutual and the 1992 Fund had been taken by 796 claimants, that by 14 February 2007 out-of-court settlements had been reached with 440 of these claimants and that the courts had rendered judgements in respect of 95 claims. It was noted that actions by 266 claimants (including 144 salt producers) were pending and that the total amount claimed in the pending actions, excluding the claims by the French State and Total SA, was €58.7 million (£39 million).

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

COURT JUDGEMENTS IN RESPECT OF CLAIMS AGAINST THE 1992 FUND[<1>]

3.1.21 The Committee took note of 11 judgements in respect of claims against the 1992 Fund made public since the Executive Committee's October 2006 session.

Court of Appeal in Rennes

Cancellation of millennium party

3.1.22 The Committee recalled that an insurer had made a subrogated claim against the 1992 Fund for €630 000 (£422 000) in respect of a claim it had paid to a group of hotels in La Baule for losses incurred as a result of the cancellation of a major millennium party which was to have taken place on the local beach. It was recalled that the 1992 Fund had rejected the claim on the

[<1>] The judgements were rendered also against the shipowner and Steamship Mutual. In order not to burden the text in paragraphs 3.1.21-3.1.51, reference is made only to the 1992 Fund.

grounds that the claimant had not submitted sufficient information to enable the Fund to assess the losses and that the insurer had not taken into account the income received by the hotels for the period of the millennium festivities, which should have been deducted from the amount claimed for losses due to the cancellation of the event.

3.1.23 It was recalled that in a judgement rendered in December 2004 the Court of first instance had estimated the income over the period of the millennium festivities at €200 000 (£134 000) and that the Court had ordered the shipowner, Steamship Mutual and the 1992 Fund to pay the insurer the balance of €430 000 (£288 000), but that the 1992 Fund had appealed against this judgement.

3.1.24 The Committee noted that in a judgement issued in November 2006 the Court of Appeal in Rennes had stated that it was not bound by the criteria for admissibility laid down by the 1992 Fund but that they could provide a useful point of reference for national courts. It was noted that, in the Court of Appeal's view, the decision to cancel the festivities had been due to a storm and not to the pollution and that therefore there was no link of causation between the cancellation of the festivities and the *Erika* incident. It was noted that the Court of Appeal had overturned the judgement by the Court of first instance and rejected the claim since the insurer had not established any direct and certain relationship between his obligation to indemnify the hotel group and the *Erika* incident. It was noted that the claimant had appealed against the judgement before the Court of Cassation.

Owner of a crêperie

3.1.25 It was recalled that the owner of a crêperie in Morbihan had submitted a claim relating to loss of income allegedly due to the *Erika* incident, but that the claim had been rejected by the 1992 Fund since the claimant had bought the crêperie on 31 May 2000, ie six months after the *Erika* incident had taken place, when he was fully aware of the consequences the incident could have on his commercial activity. The Committee recalled that in its judgement, the Commercial Court in Vannes had noted the position taken by the governing bodies of the 1992 Fund, ie that in order for a claim to be admissible there should be a sufficient link of causation between the pollution and the loss or damage allegedly suffered by the claimant and had referred to the admissibility criteria established by the governing bodies for claims for pure economic loss. It was recalled that the Court, noting that the claimant had purchased the business with full knowledge that the incident had taken place and the consequences it could have on its activity, had held that the claimant had not proved that the reduction in turnover was a consequence of the pollution and had, for that reason, rejected the claim. The Committee recalled that the claimant had appealed against the judgement.

3.1.26 It was noted that in January 2007 the Court of Appeal in Rennes had confirmed the judgement rendered by the Commercial Court in Vannes and had held that the claimant had not established that he had suffered a loss. It was noted that so far the claimant had not appealed against the judgement before the Court of Cassation.

Claim by a student who had failed to obtain expected employment

3.1.27 It was recalled that at its October 2005 session, the Executive Committee had considered a claim for loss of income for €978 (£650) presented by a student who, contrary to what had been the case in 1998 and 1999, had not been employed in the summer of 2000 at a camping site in Névez, Department of Finistère, as a kitchen assistant. It was recalled that this claim had been rejected by the 1992 Fund on the grounds that there was not a sufficient link of causation between the alleged loss and the oil pollution resulting from the *Erika* incident.

3.1.28 The Committee recalled that the student had brought legal action in the Commercial Court in Rennes maintaining that, had it not been for the *Erika* incident, he would, as in previous years, have been employed at the camping site. It was recalled that in the proceedings the 1992 Fund

had argued that the claim did not fulfil the Fund's criteria for admissibility and that, in any event, as a seasonal worker the student should have been able to find work outside the area affected by the oil spill.

3.1.29 It was recalled that the Commercial Court, considering that the camping site was located in the contaminated area and that its activities had been greatly affected by the oil spill, had concluded that the student's activity at the camping site was highly integrated with the economy of the affected area, that as a student he was very dependant on this employment and that he could not have taken other employment as a kitchen assistant, since this would have made it necessary for him to leave the place where his parents lived. It was recalled that the Court had accepted the claim and had ordered the shipowner, Steamship Mutual and the 1992 Fund to pay the claimed amount of €978 (£650) plus legal interest and an amount of €3 000 (£2 000) in costs. It was also recalled that the Court had decided that the judgement was immediately enforceable whether or not an appeal was lodged.

3.1.30 The Committee recalled that this claim, although for a very low amount, gave rise to a question of principle, namely whether claims by persons who as a result of an oil pollution incident were laid off work or had not been given expected employment were admissible for compensation under the 1992 Conventions.

3.1.31 It was recalled that at that session the Committee had decided that the Fund's policy regarding claims for losses suffered by employees laid off temporarily, put on part-time work or made redundant should not be changed and that the Fund should continue to reject such claims. It was also recalled that the Committee had instructed the Director to appeal against the judgement.

3.1.32 The Committee noted that in a judgement rendered in February 2007, the Court of Appeal in Rennes had reversed the Court of first instance's judgement and rejected the claim. It was noted that the Court had stated that the criteria for admissibility of claims contained in the Claims Manual could not be assimilated to agreements between the parties in the sense of Article 31.3 of the Vienna Convention on the Law of Treaties nor to international custom in the sense of the same Vienna Convention. It was noted that the Court had also stated that it was for the national courts to decide the interpretation of the term 'pollution damage', but that in doing so they should take into account the terms of the 1992 Conventions, which by virtue of the French Constitution had a higher value than internal law and that the criteria for admissibility of claims, in particular the criterion not to compensate 'second degree' tourism claims, was internal to the Fund. It was also noted that the Court had stated that under the 1992 Conventions the national courts were competent to determine whether there was a sufficient link of causation between the event and the damage and that in this case the link of causation had not been proved, since the student who was employed in August 2000 had not shown that the reason he had not been employed in July 2000 was as a consequence of the reduction in tourism resulting from the *Erika* incident and had not provided evidence that he had attempted to obtain employment elsewhere. The Committee noted that so far the claimant had not appealed against the judgement before the Court of Cassation.

Claim by a company letting commercial premises

3.1.33 It was recalled that the owner of a company letting commercial premises to a take-away business had submitted a claim for €6 329 (£4 200) for loss of income allegedly suffered in 2000, 2001 and 2002 due to the *Erika* incident and that the Fund had rejected the claim on the grounds that the claimant had provided services to other businesses in the tourist industry but not directly to tourists, and that for that reason, there was not a sufficient link of causation between the contamination and the alleged loss.

3.1.34 It was recalled that in its judgement, rendered in December 2005, the Civil Court in Saint-Nazaire had stated that it was not bound by the criteria for admissibility laid down by the

1992 Fund, which were internal to the Organisation and did not have a supranational character, and that under French law, a claim for compensation was admissible if the claimant could prove that there was a sufficient link of causation between the event and the damage. The Committee recalled that the Court had decided that, as regards the claim for loss of income in 2000, there had been a reduction in the letting of the premises and that this loss should be considered as directly related to the *Erika* incident and had ordered the shipowner, Steamship Mutual and the 1992 Fund to pay compensation to the claimant for loss of rental income in 2000 at €1 618 (£1 100) plus €1 300 (£870) for costs but had rejected the claim for losses in 2001 and 2002 on the grounds of a lack of a link of causation.

3.1.35 It was recalled that since the judgement was at variance with the criteria for admissibility of claims adopted by the 1992 Fund's governing bodies with regard to 'second degree' claims in the tourism sector, and bearing in mind that the 1992 Fund had rejected a number of other 'second degree' claims arising from the *Erika* incident, and in order to respect the principle of equal treatment of claimants, the Committee, at its February 2006 session had endorsed the Director's decision to appeal against the judgement in spite of the very low amount involved.

3.1.36 The Committee noted that in a judgement rendered in February 2007, the Court of Appeal in Rennes had reversed the first instance judgement and rejected the claim. It was noted that the Court, after stating that the 1992 Fund's criteria for admissibility of claims were not binding on the national courts, had considered that other factors unrelated to the incident had had an impact on the business and had decided that the claimant had not established that there was a link of causation between the alleged loss and the contamination. The Committee noted that so far the claimant had not appealed against the judgement before the Court of Cassation.

Claim by the owner of a bar

3.1.37 It was recalled that the owner of a bar in Carnac, which had commenced business in June 2000 had submitted a claim relating to losses allegedly suffered in 2000 as a result of the *Erika* incident and had brought an action before the Court on 8 September 2003. It was recalled that, in accordance with the position taken by the Executive Committee in February 2003, the Fund had argued that as regards losses before 8 September 2000 the claim was time-barred under Article 6 of the 1992 Fund Convention, and that the rest of the claim should be rejected on the grounds that it had not been proved that there was a sufficient link of causation between the alleged losses and the contamination resulting from the *Erika* incident. It was recalled that in December 2005 the Court had rejected the claim on the grounds that the claimant had not proved that he had suffered any loss and that the Court had not addressed the issue of the time bar. The Committee recalled that the claimant had appealed against the judgement.

3.1.38 It was noted that in a judgement rendered in February 2007 the Court of Appeal in Rennes had rejected the appeal. It was noted that the Court, after stating that the 1992 Fund's criteria for admissibility of claims were not binding on the national courts, had also stated that Article VIII of the 1992 Civil Liability Convention and Article 6 of the 1992 Fund Convention established a double condition, namely that a legal action should be presented within three years of the date when the damage occurred and within six years of the date when the incident took place and had decided that the claimant's right to receive compensation for losses suffered before 8 September 2000 was time-barred since the legal action had been presented on 8 September 2003. It was also noted that the Court had rejected the rest of the claim, ie for the losses allegedly suffered after 8 September 2000, since the claimant had not proved that he had suffered a loss nor that there was a link of causation with the *Erika* incident. The Committee noted that so far the claimant had not appealed against the judgement before the Court of Cassation.

Commercial Court in La Roche sur Yon

Property letting

3.1.39 The Committee noted that an estate agent based in Saint Jean de Monts had submitted a claim for losses in his commercial activity in 2000 and 2001, namely letting property to tourists, allegedly as a consequence of the *Erika* incident, but that the 1992 Fund had rejected the claim on the grounds that the claimant had failed to establish that there was a link of causation between the reduction in income and the incident.

3.1.40 It was noted that in a judgement rendered in December 2006, the Court had rejected the claim. The Committee noted that, after stating that the Fund's criteria for admissibility of claims were not binding on the judge who should determine in each individual case whether there was a sufficient link of causation between the event and the damage, the Court had agreed with the Fund that the reduction in the claimant's income was a result of factors unrelated to the incident and had held that the claimant had not proved that there was a link of causation between the reduction in income and the incident. It was noted that so far the claimant had not appealed against the judgement.

Restaurant owner

3.1.41 The Committee noted that the owner of a restaurant in Noirmoutier had submitted a claim for losses suffered during 2000 but that the 1992 Fund had considered that the claimant had not suffered a loss and had rejected the claim. It was noted that, in taking its decision, the 1992 Fund had considered that the claimant's turnover in 2000 had increased in relation to 1999 and that the claimant had obtained a benefit from the incident as a result of the additional meals provided to the fire brigade personnel who had carried out clean-up operations in the area.

3.1.42 It was noted that in a judgement rendered in December 2006, the Court, after stating that the Fund's criteria for admissibility of claims were not binding on the judge, had held that it had not been demonstrated that the claimant had suffered a loss as a result of the incident and had for this reason rejected the claim. The Committee noted that so far the claimant had not appealed against the judgement.

Commercial Court in Quimper

Tourist boat operator

3.1.43 The Committee noted that the owner of a company operating sailing boats for tourists in Concarneau had submitted claims for losses between January and September 2000 and for losses between October 2000 and September 2001. It was noted that the 1992 Fund had agreed the losses between January and September 2000, but had rejected the claim for losses between October 2000 and September 2001 since it considered that the claimant had not suffered an economic loss.

3.1.44 It was noted that in a judgement rendered in February 2007 the Commercial Court in Quimper had rejected the claim. The Committee noted that, after stating that the Fund's criteria for admissibility of claims were not binding on national courts, the Court had held that the claimant had not established a link of causation between the alleged loss and the contamination and had not demonstrated that it had suffered a loss as a result of the incident either. It was noted that so far the claimant had not appealed against the judgement.

Civil Court in Saint Nazaire

Fisherman

3.1.45 The Committee noted that a fisherman had submitted six claims totalling €36 593.86 (£24 000) relating to loss of income suffered between January and June 2000 due to the *Erika* incident and that the 1992 Fund had assessed the claim for January 2000 at an amount of €1 280.57 (£850). It was noted that the Fund had also assessed the losses suffered between February and June 2000 but that it had been informed that the claimant had already received compensation for these losses from the French Government through OFIMER under a scheme to provide emergency payments to claimants in the fishery and mariculture sectors. The Committee noted that, since the French Government had acquired the claimant's rights by subrogation, the Fund had paid the French Government the monies advanced by OFIMER. It was noted, however, that the claimant had brought proceedings against the Fund claiming compensation totalling €53 212.29 (£35 600) in respect of loss of income, additional bank and social charges and mental suffering ('préjudice moral').

3.1.46 It was noted that in a judgement rendered in February 2007 the Court had held that, after taking into account the amounts received from OFIMER, the 1992 Fund should pay compensation to the claimant in the amount of €2 821.65 (£1 900). The Committee noted that the Court had considered that the claimant had failed to prove that he had suffered additional bank and social charges and that, with regard to the claim for mental suffering ('préjudice moral'), the claimant was unable to justify the reason or the quantum of the claim. It was noted that so far the claimant had not appealed against the judgement.

Commercial Court in Lorient

Claims by two tour operators

3.1.47 The Committee noted that two tour operators in the United Kingdom specialising in selling holidays in various European countries had submitted claims for losses suffered in 2000 and 2001 as a result of the *Erika* incident. It was noted that the 1992 Fund had settled and paid the claims for losses suffered in 2000 but had rejected the claims for losses in 2001 on the grounds that the claimants had not established a link of causation between the alleged damage and the contamination caused by the incident. The Committee noted that both claimants had brought proceedings before the Commercial Court in Lorient.

3.1.48 The Committee took note of the two judgements rendered by the Court in Lorient in February 2007 in respect of these two claims. It was noted that, after stating that the Fund's criteria for admissibility of claims were not binding on the national courts, the Court had held in both cases that the claimants had not established that there was a link of causation between the alleged loss and the incident and had for that reason rejected the claims. It was also noted that so far neither of the claimants had appealed against the judgements.

3.1.49 It was noted with satisfaction that 90 judgements had been rendered by the French Courts and that the 1992 Fund had been successful in the great majority of them. It was also noted that although in most cases the judgements had stated that the 1992 Fund's criteria for admissibility of claims were not binding on the national courts, and that it was for the courts to decide whether a claimant had an admissible claim under the Conventions as interpreted in French law, the judgements rendered had arrived at the same conclusions as those of the Fund.

3.1.50 The French delegation, whilst acknowledging the independence of the French Courts with regard to the Fund's criteria, noted with satisfaction the apparent convergence of French jurisprudence with the Fund's criteria.

3.1.51 One delegation expressed its satisfaction that in most cases the French courts had reached the same conclusions that the Fund had reached by applying its criteria for admissibility of claims, which in its view indicated that the Fund's criteria worked well in practice.

3.2 *Prestige*

3.2.1 The Executive Committee took note of the information regarding the *Prestige* incident as set out in document 92FUND/EXC.36/5 submitted by the Director and document 92FUND/EXC.36/5/1 presented by the Spanish delegation.

AMOUNT AVAILABLE FOR COMPENSATION

3.2.2 It was recalled that the limitation amount applicable to the *Prestige* under the 1992 Civil Liability Convention was 18.9 million SDR or €22 777 986 (£15.2 million) and that on 28 May 2003 the shipowner had deposited this amount with the Criminal Court in Corcubión (Spain) for the purpose of constituting the limitation fund required under the 1992 Civil Liability Convention.

3.2.3 It was also recalled that the maximum amount of compensation available under the 1992 Conventions in respect of this incident, 135 million SDR, corresponded to €171.5 million (£114.8 million), including the amount actually paid by the shipowner and his insurer (Article 4.4 of the 1992 Fund Convention).

LEVEL OF PAYMENTS

Consideration in May 2003

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

Consideration in October 2005

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

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

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

State	Apportionment (%)	Apportionment (amounts) (rounded figures)	Bank Guarantees[<2>]
Spain	85.90%	€115 000 000	€78 850 000
France	13.55%	€18 100 000	-
Portugal	0.55%	€740 000	€510 500
Total	100.00%	€133 840 000	-

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

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

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

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

Developments after the October 2005 session

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

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

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

[<2>] The amounts of the bank guarantees correspond to the differences between the apportioned amounts and 15% of the assessed amounts, ie Spain €115 000 000 - €36 150 000 (€241 million at 15%) = €78 850 000; Portugal €740 000 - €229 500 (€1 530 000 at 15%) = €510 500.

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

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

CLAIMS FOR COMPENSATION

Spain

3.2.10 The Committee noted that as at 14 February 2007 the Claims Handling Office in La Coruña had received 839 claims totalling €610.7 million (£408.8 million) including nine claims from the Spanish Government totalling €559.4 million (£374.4 million) submitted during the period October 2003 – October 2006. It was recalled that in September 2005 a group of 58 associations from Galicia, Asturias and Cantabria representing 13 600 fishermen and shellfish harvesters had withdrawn a claim for €132 million (£90 million) against the 1992 Fund, since the associations had signed settlement agreements with the Spanish State on behalf of the victims. It was noted that a number of other claimants who had settled with the Spanish Government under the Royal Decrees referred to in paragraphs 3.2.27 to 3.2.32 had also withdrawn their claims.

3.2.11 The Committee recalled that the claims by the Spanish Government related to costs incurred in respect of at sea and onshore clean-up operations, removal of the oil from the wreck, compensation payments to fishermen and shellfish harvesters, tax relief for businesses affected by the spill, administration costs, costs relating to publicity campaigns and costs incurred by local authorities and paid by the Government. It was recalled that the claims originally included items for the cost of clean-up operations in the Atlantic National Park amounting to €11.9 million (£7.97 million) but that these items had been withdrawn since funding for these operations had been obtained from another source. It was also recalled that the claim for the removal of the oil from the wreck, initially for €109.2 million (£73 million), had been reduced to €24.2 million (£16 million) to take account of funding obtained from another source.

3.2.12 It was recalled that the first claim received from the Spanish Government in October 2003 for €383.7 million (£256.8 million) had been assessed on an interim basis by the Director in December 2003 at €107 million (£71.6 million), and that the 1992 Fund made a payment of €16 050 000 (£11.1 million), corresponding to 15% of the interim assessment. The Committee recalled that the Director had also made a general assessment of the total of the admissible damage in Spain, and had concluded that the admissible damage would be at least €303 million (£202.8 million) and that on that basis, and as authorised by the Assembly, the Director had made an additional payment of €41 505 000 (£28.5 million), corresponding to the difference between 15% of €383.7 million or €57 555 000 and 15% of the preliminarily assessed amount of the Government's claim, €16 050 000. It was recalled that this payment had been made against the provision by the Spanish Government of a bank guarantee covering the above-mentioned difference (ie €41 505 000) from the Instituto de Credito Oficial, a Spanish bank with high standing in the financial market, and an undertaking by the Spanish Government to repay any amount of the payment decided by the Executive Committee or the Assembly.

3.2.13 It was recalled that at its February 2006 session the Executive Committee had decided that some of the costs incurred in 2003 in respect of sealing the oil leaking from the wreck and various surveys and studies were admissible in principle, but that the claim for costs incurred in 2004 relating to the removal of oil from the wreck was inadmissible (document 92FUND/EXC.32/6,

paragraph 3.2.80). It was noted that, in accordance with the Executive Committee's decision, an assessment was being carried out of the admissible costs of activities that had a bearing on the assessment of the pollution risk posed by the oil in the wreck, incurred by the Spanish Government in 2003 prior to the removal of oil from the wreck.

3.2.14 It was recalled that in May 2006 the Spanish Government had submitted to the 1992 Fund a claim for the cost incurred in the payment of the claims assessed by the Consorcio de Compensación de Seguros (Consorcio)[<3>] (cf paragraphs 3.2.29 – 3.2.31).

3.2.15 It was also recalled that in August 2006 the Spanish Government had submitted to the Claims Handling Office a claim for the costs incurred by the 67 towns that had been paid by the Government, 51 in Galicia, 14 in Asturias and two in Cantabria, for a total of €5.8 million (£3.9 million) and that the 1992 Fund's experts were examining the claim. It was recalled that the Spanish Government had also submitted claims for the costs incurred by the regions of Galicia for €28 million (£18.7 million) and Asturias for €3.3 million (£2.2 million).

3.2.16 The Committee noted that after a number of adjustments, the Spanish Government had indicated in December 2006 that the total amount of its claims was €559 376 830 (£374.4 million) and that further adjustments would be made in respect of the claims for payments by the Spanish Government to two of the regions affected by the *Prestige* incident (Cantabria and the Basque Country), the treatment of residues and the individual assessments by the Consorcio.

3.2.17 It was 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 co-operation with representatives of the Spanish Government was continuing and that progress was being made on the assessment of all the claims submitted by the Government.

3.2.18 It was noted that the Spanish State was continuing to work on the submission of the outstanding claims and cooperating with the IOPC Funds' experts on the analysis of the documentation already submitted, in order to avoid duplication of claims.

3.2.19 The Committee noted that of the claims other than those of the Spanish Government 88.8% had been assessed for €3.7 million (£2.5 million) and that interim payments totalling €484 500[<4>] (£326 000) had been made in respect of 153 of the assessed claims, mainly at 30% of the assessed amount. It was noted that of the remaining claims, four were being assessed, 10 were in progress, 190 were awaiting a response from the claimant, 77 were awaiting further documentation, 381 (totalling €27.4 million (£18.34 million)) had been rejected and 15 had been withdrawn by the claimants.

France

3.2.20 The Committee noted that as at 14 February 2007, 475 claims totalling €118.6 million (£79.4 million) had been received by the Claims Handling Office in Bordeaux and that 86% of those claims 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 400 claims had been assessed at €49 million (£32.8 million), that 399 claims had been approved for €45.7 million (£30.6 million) and that interim payments totalling €3.95 million (£2.6 million) had been made at 30% of the assessed amounts in respect of 286 of the approved claims. It was noted that the remaining approved

---

<3> 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.

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

claims awaited a response from the claimants or were being re-examined following the claimants' disagreement with the assessed amount. It was also noted that 45 claims totalling €2.1 million (£1.4 million) had been rejected because the claimants had not demonstrated that a loss had been suffered due to the incident.

3.2.21 It was recalled that in May 2004, the French Government had submitted a claim for €67.5 million (£45.2 million) in relation to the costs incurred for clean-up and preventive measures and that the 1992 Fund and the London Club had provisionally assessed the claim at €31.2 million (£20.9 million). It was recalled that a request for further information had been sent to the French Government in August 2005 in order to enable the experts appointed by the 1992 Fund and the London Club to complete the assessment and that such information and further supporting documentation had been received in February 2006. The Committee noted that the Fund's experts were carrying out a detailed assessment of the claim.

3.2.22 It was noted that a further 59 claims totalling €10.5 million (£7 million) had been submitted by local authorities for costs of clean-up operations, that 27 of these claims had been assessed and approved at €3.4 million (£2.3 million) and that interim payments totalling €1 million (£675 000) had been made in respect of 22 claims at 30% of the assessed amounts.

3.2.23 It was also noted that 125 claims had been submitted by oyster farmers totalling €12.2 million (£8.2 million) for losses allegedly suffered as a result of market resistance due to the pollution, that 118 of them, totalling €1.76 million (£1.2 million) had been assessed at €468 007 (£313 257) and that payments totalling €116 410 (£77 918) had been made in respect of 81 of these claims at 30% of the assessed amounts. It was noted that four claims were not supported by any documentation and that requests had been made to these claimants to provide detailed information to support their claims.

3.2.24 It was noted that the Claims Handling Office had received 194 tourism-related claims totalling €25.3 million (£16.9 million), that 168 of these claims had been assessed at a total of €12.2 million (£8.2 million) and that interim payments totalling €2.6 million (£1.7 million) had been made at 30% of the assessed amounts in respect of 114 claims.

Portugal

3.2.25 The Committee recalled that in December 2003 the Portuguese Government had submitted a claim for €3.3 million (£2.2 million) in respect of the costs incurred in clean-up and preventive measures and that additional documentation submitted in February 2005 included a supplementary claim for €1 million (£669 000), also in respect of clean-up and preventive measures. It was recalled that the claims had finally been assessed at €2.2 million (£1.5 million) and that the Portuguese Government had accepted this assessment. It was also recalled that since, as mentioned above, the Portuguese Government had decided not to provide a bank guarantee, in August 2006 the 1992 Fund had made a payment of €328 488 (£222 600), corresponding to 15% of the final assessment although this did not preclude the payment of further compensation to the Portuguese Government in the event that the Executive Committee were to increase the level of payments unconditionally.

PAYMENTS AND OTHER FINANCIAL ASSISTANCE BY THE SPANISH AUTHORITIES

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

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

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

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

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

3.2.30 It was recalled that the 1992 Fund had been informed by the Spanish Government in 2004 that claims, which under the Decrees would be subject to individual assessment, would be assessed by the Consorcio. It was noted that 971 claims totalling €230 million (£154 million) had been received by the Consorcio. The Committee recalled that since the Royal Decrees provided that the assessment of claims would be made following the criteria used to apply the 1992 Civil Liability and Fund Conventions, meetings had been held between representatives of the Consorcio and of the 1992 Fund to discuss the criteria.

3.2.31 The Committee recalled that the Consorcio had requested the assistance of the experts appointed by the London Club and the 1992 Fund in the assessment of 241 of these claims for a total of €47.8 million (£32 million). It was recalled that a number of the claims that had been referred to these experts were not supported by sufficient evidence to demonstrate the loss claimed and that the Consorcio had requested further evidence and information from the claimants. It was noted that the experts of the Consorcio and the experts appointed by the London Club and the 1992 Fund had made joint assessments of 194 claims, 187 of which, for €20.3 million (£13.6 million), had been approved by the 1992 Fund and the London Club for €2.4 million (£1.6 million). It was noted that 134 claims, included in the 241 claims which the Consorcio had requested assistance with, had also been submitted directly to the Claims Handling Office and that details of the assessments of 83 of these claims had been provided to the Consorcio.

3.2.32 It was recalled that at the Executive Committee's May 2006 session the Spanish delegation had informed the Committee that 381 of the claims assessed by the Consorcio had been rejected due to lack of supporting documentation or lack of evidence of the loss and that, from the assessment of 90% of the claims examined through this procedure, it could be deduced that the maximum amount to be paid by the Spanish Government in respect of these claims would be some €50 million (£33.5 million).

PAYMENTS AND OTHER FINANCIAL ASSISTANCE BY THE FRENCH AUTHORITIES

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

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

INVESTIGATIONS INTO THE CAUSE OF THE INCIDENT

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

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

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

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

COURT ACTIONS

Spain

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

3.2.40 It was recalled that the Spanish Government had taken legal action in the Criminal Court in Corcubión on its own behalf and on behalf of regional and local authorities as well as on behalf

of 971 other claimants or groups of claimants. The Committee noted that a number of other claimants had also taken legal actions and that the Court was assessing whether these claimants were eligible to join the proceedings.

France

3.2.41 The Committee noted that the French Government and 227 other claimants had taken legal action against the shipowner, the London Club and the 1992 Fund in 16 courts in France requesting compensation totalling some €131 million (£87.7 million), including €67.7 million (£45.3 million) claimed by the Government.

3.2.42 It was recalled that in March 2003 two oyster farmers unions and an association had brought an action, included in the actions referred to in paragraph 3.2.41, against the shipowner, the London Club, the owner of the cargo/charterer of the vessel, the Spanish State, the American Bureau of Shipping (ABS), the classification society of the *Prestige*, and Bureau Veritas, the previous classification society that had certified the *Prestige* before ABS. It was also recalled that in June 2006 the Fund had been joined in the proceedings as a defendant.

Portugal

3.2.43 The Committee noted that the Portuguese State had taken legal action in the Maritime Court in Lisbon against the shipowner, the London Club and the 1992 Fund claiming compensation for €4.3 million (£2.9 million) but that following the settlement of the claim referred to in paragraph 3.2.25, the Portuguese State had withdrawn its action in December 2006.

United States

3.2.44 The Committee recalled that the Spanish State had taken legal action against ABS before the Federal Court of first instance in New York requesting compensation for all damage caused by the incident, estimated initially to exceed US$700 million (£357 million)[<5>] and estimated later to exceed US$1 000 million (£510 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 had been negligent in granting classification.

3.2.45 It was recalled that ABS had denied the allegation made by the Spanish State and had in its turn taken action against the State, arguing that if the State had suffered damage this had been caused in whole or in part by its own negligence. It was also 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, but that the New York Court had dismissed the counterclaim by ABS on the ground that the Spanish State was entitled to sovereign immunity. It was further recalled that ABS had sought reconsideration by the Court or permission to appeal.

3.2.46 The Committee recalled that in July 2006 the New York Court had confirmed its decision on the Spanish State's entitlement to sovereign immunity, but had granted ABS permission to resubmit its counterclaim on different grounds. It was recalled that in July 2006 ABS had resubmitted its counterclaim, designed to fall within the sovereign immunity exception in that it did not seek relief exceeding in amount or different in kind from that sought by Spain and that ABS sought indemnity from the Spanish State in the event that any third party obtained a judgement against ABS as a result of the incident. It was noted that in September 2006 the Spanish State had requested that the ABS counterclaim be dismissed on the grounds that the

---

[<5>] The conversion of the US$ has been made on the basis of the exchange rate as at 14 February 2007 (1 US$ = £0.5099).

Court lacked subject matter jurisdiction but that the New York Court had not yet taken any decision on this request.

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

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

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

3.2.50 The Committee recalled that in August 2006 the New York Court had rejected the appeal by the Spanish State, considering that both parties to the proceedings should have access to the same material and that failure by the Spanish State to make the documents and material requested available to ABS would place ABS in a situation of unfair disadvantage in that it would affect ABS's right of defence. It was recalled that in a decision not subject to appeal the Court had ordered the Spanish State to produce the documents and material by 30 September 2006.

3.2.51 It was recalled that the Spanish State had reviewed its position and that in August 2006 had submitted a request to the Court in Corcubión to be authorised to disclose to ABS the documents and material referred to above. The Committee recalled that the Spanish State had argued that the decisions by the New York Court and the Corcubión Court had placed the Spanish State in a difficult position in that a New York Court had ordered the State to do something, namely to disclose all documents in the Corcubión Court file, and the Court in Corcubión had ordered the State to do the contrary, namely not to disclose those documents. It was recalled that the Spanish State had mentioned that a confidentiality agreement had been concluded between the State and ABS in respect of any documents and material disclosed and that the Spanish State had further argued that if the documents and materials requested were not made available, it would damage the State's position before the New York Court. The Committee noted that in September 2006 the Court in Corcubión had authorised the disclosure to the New York Court of all the documentation relevant to the *Prestige* case and that in January 2007 a lawyer acting on behalf of ABS had visited the Court in Corcubión and examined the documents in the Court file.

3.2.52 The Committee recalled that in June 2006 the Spanish State had submitted a request to the New York Court that the Court should order ABS to produce financial records, arguing that the

financial records would demonstrate that ABS had diverted revenue and resources, and that, as a result, ABS had not adequately addressed surveyor training and staffing deficiencies. It was also recalled that ABS had maintained that the financial records were not relevant at the liability stage of the litigation.

3.2.53 It was recalled that the New York Court had denied the Spanish State's request holding that the financial records were not relevant to the issue of whether or not there were deficiencies in ABS's performance in respect of the *Prestige* and that the Spanish State had not appealed against this decision.

3.2.54 The Committee noted that in November 2006 the judge supervising discovery had ruled on a motion by ABS to compel the Spanish State to produce all e-mail communications from the casualty period of 12–20 November 2002. It was noted that the judge had found that the State had failed either to preserve e-mail communications or to conduct a diligent search when ABS first sought production of those communications. It was noted that finding that a search for the e-mail communications at that late date may be futile, the judge had invited ABS to make a request for the relief, remedy or sanction it deemed appropriate. It was also noted that a request by the Spanish State that the judge should reconsider his decision was denied, but that the State had appealed.

3.2.55 The Committee noted that in view of the judge's invitation, ABS had filed a motion seeking sanctions for the Spanish State's failure to produce the e-mail communications. It was noted that ABS had requested dismissal of the action or dismissal of certain parts of the action, or a ruling that at trial an adverse inference should be drawn against the State for its failure to produce the e-mails and that ABS had requested, in any event, recovery of its costs and fees associated with the dispute over the production of the e-mails. The Committee noted that no decision had yet been taken on ABS's request.

3.2.56 The Spanish delegation presented document 92FUND/EXC.36/5/1, which set out some additional points to the document submitted by the Director. It was noted that the Spanish State had opposed the motion by ABS seeking sanctions since the Spanish State had produced e-mails corresponding to the days when the incident occurred and ABS had not shown that the e-mails contained information relevant to the proceedings. The Committee noted that the Court had not yet rendered its judgement on that matter.

3.2.57 The Spanish delegation thanked the Secretariat and the staff of the Claims Handling Office in La Coruña for the work carried out in the processing of the very voluminous documentation presented by the Spanish State in support of its claims.

3.3 *N°7 Kwang Min*

3.3.1 The Executive Committee took note of the developments regarding the *N°7 Kwang Min* incident as set out in document 92FUND/EXC.36/6.

3.3.2 It was recalled that on 24 November 2005 the Korean tanker *N°7 Kwang Min* (160 GT) had collided with the Korean fishing vessel *Chil Yang N°1* (139 GT) in the port of Busan, Republic of Korea and that a total of 37 tonnes of heavy fuel oil had escaped into the sea from a damaged cargo tank.

Claims for compensation

3.3.3 The Committee recalled that 12 claims totalling Won 2.7 billion (£1.5 million) in respect of costs of clean-up and preventive measures had been settled for a total of Won 1.9 billion (£1.1 million) and that one claim had been rejected.

3.3.4 It was recalled that the owners of six live seafood restaurants located in the polluted area had submitted claims for alleged mortalities of fish as a result of oil entering their aquaria via submerged seawater intakes, for loss of earnings as a result of cancellations of bookings and for other unspecified damages. It was recalled that the claims, totalling Won 163 million (£89 000), had been settled at Won 3.1 million (£1 860).

3.3.5 It was also recalled that claims totalling Won 154 million (£84 000) by 81 women divers for loss of earnings due to interruption of their shellfish harvesting and sales activities had been settled for Won 36 million (£20 000). It was recalled that further fishery claims totalling Won 93 million (£51 000) by ten boat owners were settled at Won 51 million (£28 000).

3.3.6 The Committee recalled that claims by nine seaweed (sea mustard) culturists totalling Won 371 million (£203 000) for property damage and production disruption had been assessed at Won 42 million (£22 000) and that one claim had been rejected. It was recalled that six of the claimants had settled their claims for a total of Won 33 million (£12 000). It was also recalled that two claimants who had initially agreed with the assessed amount, had at a later stage refused to accept the proposed settlement and had commenced legal actions against the owners of the two vessels involved in the incident (cf paragraph 3.3.10 below).

3.3.7 The Committee noted that no further claims were expected out of this incident.

Legal actions

3.3.8 The Committee recalled that the results of the investigation into the cause of the incident by the Busan Maritime Safety Tribunal had concluded that the liability ratio between the owner of the *N°7 Kwang Min* and the owner of the fishing vessel *Chil Yang N°1* was 40:60. It was however noted that the owner of the *N°7 Kwang Min* had filed an appeal with the Korean Central Marine Safety Tribunal against this decision and that the Tribunal had decided that the apportionment of the liabilities between the owner of *N°7 Kwang Min* and the owner of the fishing vessel *Chil Yang N°1* was 35:65.

3.3.9 It was recalled that upon investigations into the financial status of the owner of the fishing vessel *Chil Yang N°1* it had emerged that he owned a building, of unknown value but estimated to exceed the limitation amount applicable to the vessel under the Korean Commercial Code, ie 83 000 SDR (£65 000).

3.3.10 It was recalled that two seaweed culturists had commenced legal actions in the Busan District Court against the owners of the two vessels involved in the incident (cf paragraph 3.3.6 above).

3.3.11 The Committee recalled that the Director had instructed the 1992 Fund's lawyers in the Republic of Korea to take steps for the Fund to intervene in the court proceedings in order to explore the possibility to recover the sums paid in compensation for this incident. The Committee noted that as a result of the lawyers' investigation the Fund had commenced recourse action against the two shipowners.

3.3.12 It was noted that in January 2007 the owner of the *Chil Yang N°1* had made an application to the Busan District Court for the commencement of limitation proceedings in order to limit his liability to the applicable limitation amount, ie 83 000 SDR (cf paragraph 3.3.9 above).

3.3.13 The Committee noted that on 6 March 2007 the Busan District Court had delivered its decision for the commencement of the limitation proceedings and that any claimants subject to the limitation proceedings should register their claims with the Limitation Court by 13 April 2007.

3.3.14 It was also noted that the Director had instructed the Fund's lawyers to take steps for the Fund to intervene as a claimant in the limitation proceedings in order to recover to the extent possible the sums paid in compensation for this incident.

3.4 *Solar 1*

3.4.1 The Executive Committee took note of the information regarding the *Solar 1* incident as set out in document 92FUND/EXC.36/7 which was introduced with the help of a PowerPoint presentation.

The incident

3.4.2 The Committee recalled that on 11 August 2006 the Philippines registered tanker *Solar 1*, (998 GT), laden with a cargo of 2 081 tonnes of industrial fuel oil, had sank in heavy weather in the Guimaras Straits, some ten nautical miles south of Guimaras Island, Republic of the Philippines. It was noted that an unknown, but substantial, quantity of oil had been released from the vessel after it had sunk and that the sunken wreck continued to release oil, albeit in ever decreasing quantities.

3.4.3 It was recalled that the *Solar 1* was entered with the Shipowners' Mutual Protection and Indemnity Association (Luxembourg) (Shipowners' Club).

3.4.4 The Committee recalled that the Shipowners' Club and the 1992 Fund had jointly requested an expert from the International Tanker Owners Pollution Federation Limited (ITOPF) to travel to the Philippines and monitor the spill response and to provide technical advice. It was also recalled that the 1992 Fund had engaged a lawyer in the Philippines to assist it in dealing with any legal issues which may arise from the incident.

3.4.5 The Committee noted that the Shipowners' Club and the Fund had established a claims liaison office in Iloilo to assist with the handling of claims and that the office was being managed by the Club's correspondent in the Philippines together with a staff of six people.

Applicability of the 1992 Conventions and STOPIA 2006

3.4.6 The Committee recalled that the Republic of the Philippines was a party to the 1992 Civil Liability and Fund Conventions.

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

3.4.8 It was recalled that the Director and the Shipowners' Club had agreed that the 1992 Fund should assume responsibility for compensation payments once the Club had paid compensation up to the limitation amount applicable to the *Solar 1* under the 1992 Civil Liability Convention and that the 1992 Fund would then seek regular reimbursements from the Club up to the STOPIA 2006 limit, payments to be made by the Club within two weeks of being invoiced by the Fund.

Concerns expressed by the Shipowners' Club

3.4.9 The Committee recalled that in October 2006 the Shipowners' Club had informed the 1992 Fund that on the basis of its investigations into the background of the incident, and in particular issues of causation, it had serious concerns over the shipowner's operation of the vessel, which would warrant the Club revoking insurance cover against the shipowner. It was however recalled that the Club had also informed the Fund that it had decided not to attempt to avoid any liability pursuant to Article VII.8 of the 1992 Civil Liability Convention, which provided, *inter alia*, that the insurer may avail itself of the defence that the pollution damage resulted from the wilful misconduct of the shipowner.

3.4.10 It was recalled that the Shipowners' Club had informed the Director that it intended, nevertheless, to reserve its right under Article III.3 of the 1992 Civil Liability Convention, to oppose claims from third parties, in particular Petron Corporation, the charterers of the *Solar 1*, whose negligence, in the Club's view, had caused or contributed to the pollution damage. It was noted that claims from such third parties were only likely to be in respect of preventive measures.

3.4.11 The Committee recalled that the Fund's position as regards claims for the cost of preventive measures was different from that of the shipowner in the light of the last sentence of Article 4.3 of the 1992 Fund Convention which reads 'However, there shall be no such exoneration of the Fund with regard to preventive measures'. It was recalled that in accordance with Article 4.3, the 1992 Fund would therefore be liable to pay any claims for reasonable costs of preventive measures made by third parties even where the negligence of such parties may have caused or contributed to the pollution damage. It was noted that if the Fund were to pay such claims, it would not, or at least not for the time being, be reimbursed by the Shipowners' Club under the terms of STOPIA 2006.

3.4.12 It was recalled that the 1992 Fund was not in a position to comment on the allegations by the Shipowners' Club of contributory negligence on the part of third parties and had therefore reserved its position in this respect. It was recalled, however, that the Fund intended to examine all the evidence available to establish whether there had been contributory negligence on the part of any claimant who had undertaken preventive measures and to report its findings to the Committee at its next session in June 2007.

Impact of the spill

3.4.13 It was recalled that the Guimaras Straits contained a group of islands, the shorelines of which included sandy beaches, rocky shores, coral reefs, seagrass beds and mangroves. It was also recalled that the south-west coast of Guimaras Island contained a national marine reserve and an aquaculture research centre, that its inshore waters supported an important small-scale fishery with a large proportion of the coastal communities engaged in subsistence fishing and that coastal and onshore aquaculture was also widespread. It was further recalled that there was a modest tourism industry on the island.

3.4.14 It was recalled that oil had stranded on the south and south-west coasts of Guimaras Island and a number of small islets off the south-east coast and that these coasts were dominated by mangrove forests, particularly vulnerable to the smothering effects of oil. It was also recalled that lesser quantities of oil had stranded on the east and north-east coasts of Iloilo province including the north of Ajuy Bay and the Conception Islands.

3.4.15 It was recalled that about 124 kilometres of shoreline and around 500 hectares of mangrove had been polluted to varying degrees. It was also recalled that the Department of Environment and Natural Resources (DENR) and researchers from the University of the Philippines in Visayas had embarked on a study of the short and long-term effects of the oil on the mangrove trees.

3.4.16 The Committee noted that the oil spill had had a major impact on small-scale fisheries on Guimaras Island and that around 7 000 individuals engaged in fishing had been directly affected by the pollution either as a result of contamination of their fishing gear or the presence of oil in their fishing grounds. It was noted that a further 4 000 individuals engaged in fishing off parts of the island that had not been polluted had reported experiencing difficulties in selling their catch due to public perception that all fish from Guimaras Island might be contaminated.

3.4.17 It was noted that the spill had also impacted aquaculture facilities and that the Bureau of Fisheries and Aquatic Resources of the Philippines had reported that about 90 operators of fishponds had been affected to varying degrees. It was also noted that significant areas of seaweed culture had been reported to have been affected by the oil.

3.4.18 It was recalled that a fishery expert and an aquaculture expert with experience of working in the Philippines had been engaged by the Shipowners' Club and the 1992 Fund to attend on site to make an overall assessment of the losses and to assist claimants with the submission of claims.

3.4.19 The Committee recalled that Guimaras Island was very dependent on its beaches to attract visitors and that the spill had had a major impact on tourist businesses. It was recalled that the Shipowners' Club and the 1992 Fund had engaged tourism experts, used by the Fund in previous incidents, who had travelled to the affected area and met with many potential claimants to gain a better understanding of the nature of their businesses and the impact of the spill on their operations and to advise them on how to submit their claims for compensation. It was also recalled that most of the beach resorts in Guimaras island were small, privately-owned enterprises with relatively low revenue levels and that many had experienced considerable hardship but that there were a few resorts located on small islets off Guimaras Island, generally offering a better standard of facility, which catered for a higher percentage of foreign markets.

Clean-up operations

3.4.20 The Committee recalled that the Philippine Coast Guard, as the lead government agency for spill response in the Philippines, had taken overall control of the clean-up operations. It was recalled that the at-sea response had focused on the application of chemical dispersants to the freshly released oil using a light aircraft and vessels and that attempts had been made to protect some sensitive sites using commercial booms and home-made booms.

3.4.21 It was recalled that Petron Corporation had assumed the responsibility for organising and managing the shoreline clean up, which had been largely undertaken by residents of affected villages recruited by Petron under a 'cash for work' programme. It was also recalled that around 1 500 individual residents had participated in the shoreline clean up at the height of the response and that by the time that the operations had been completed in early November 2006 a total of some 63 000 man-days had been expended in these operations.

3.4.22 It was also noted that shoreline clean up had been undertaken using predominantly manual methods and primarily focused on sandy beaches on the south coast of Guimaras Island and that about 2 100 tonnes of oily waste had been generated from shoreline cleaning.

Claims for compensation

Claims workshops

3.4.23 The Committee recalled that the Funds' Deputy Director/Technical Adviser and one of the Claims Managers, together with a representative of the Shipowners' Club, had made two visits to the Philippines in September and October 2006 to conduct a series of claims workshops with representatives of central government, provincial governments and claimants. It was recalled that the meetings had been arranged by representatives of Petron Corporation, the charterers of the *Solar 1*.

Clean-up and preventive measures

3.4.24 It was noted that by 31 January 2007 claims by three contractors totalling US$6.6 million (£3.4 million) in respect of costs of clean up at sea had been assessed for a total of US$4.5 million (£2.3 million) and that interim payments totalling US$3.7 million (£1.9 million) had been made.

3.4.25 It was noted that a claim by Petron Corporation for PHP188 million (£2.0 million) for the costs of shoreline clean up had been provisionally assessed for a total of PHP105 million (£1.1 million) and that an interim payment of PHP105 million (£1.1 million) had been made. The Committee noted that in view of the allegation by the Shipowners' Club that Petron Corporation's negligence had caused or contributed to the pollution damage (cf paragraphs 3.4.9 – 3.4.11 above) the Club had refused to pay Petron Corporation's claim for compensation for its costs in connection with clean up and preventive measures and that the 1992 Fund had therefore agreed to pay Petron Corporation's claim pending the outcome of the investigation into the cause of the incident.

3.4.26 It was noted that the Shipowners' Club had paid ¥45.1 million (£195 000) for the cost of the underwater survey of the wreck.

3.4.27 The Committee noted that claims from 42 households for a total of PHP838 000 (£8 800) had been received for hardship and inconvenience due to enforced evacuation by local authorities. It was noted that these claimants had been evacuated by the authorities due to concerns on their part about possible dangerous levels of hydrogen sulphide in the vicinity of their homes. The Committee noted however that the experts appointed by the Shipowners' Club and the 1992 Fund had confirmed that the alleged hydrogen sulphide could not have originated from the oil spilt from the *Solar 1*. It was noted that therefore the Shipowners' Club and the Fund had taken the view that claims for compensation for the economic consequences of the evacuation were not admissible in principle and that these claims had therefore been rejected.

Fisheries and mariculture

3.4.28 The Committee noted that in October 2006 the Shipowners' Club and the 1992 Fund had received 13 535 completed claims registration forms from fisherfolk living in the five municipalities on Guimaras Island but that after the removal of 2 174 duplicate claims the information from each of the remaining 11 361 claim registration forms had been entered into a claims database for each of the municipalities. It was noted that losses for all claimants had been assessed on the basis of 12 weeks' interruption of normal fishing, which corresponded to the time taken to complete shoreline clean-up operations. The Committee noted that the total losses of the 11 361 claimants had been assessed at PHP120.3 million (£1.3 million) and that over 97% of the claimants had agreed to settle their claims on the basis of these assessments. It was noted that in view of the fact that the claimants were not represented by any fishery association or co-operative that could act on their behalf, the Shipowners' Club and the 1992 Fund had decided to pay each claimant individually and that by 31 January 2007 a total of 10 978 claimants from the five municipalities on Guimaras Island had received compensation totalling PHP117 million (£1.3 million).

3.4.29 The Committee noted that more than 12 000 fisherfolk living in the coastal areas of Iloilo Province had submitted claims registration forms and that some 11 000 claims had been assessed at PHP57 million (£600 000). It was noted that if the claimants were to accept the assessments, payments could commence in April 2007.

3.4.30 It was noted that in November 2006 the Shipowners' Club and the 1992 Fund had received 77 claims totalling PHP725 000 (£7 600) from seaweed farmers for alleged damage to their crop caused by the oil. It was noted that these claims were being assessed.

3.4.31 It was also noted that in December 2006 the Shipowners' Club and the 1992 Fund had received 90 claims from fish pond operators totalling PHP316 million (£3.3 million) and that these claims were being assessed.

Tourism

3.4.32 The Committee noted that by 31 January 2007 the Shipowners' Club and the 1992 Fund had received 70 claims in the tourism sector, mainly from owners of small resorts and tour boat operators for a total of PHP108 million (£1.1 million) and that 45 claims had been settled for a total of PHP851 000 (£9 000). It was noted that a claim for PHP100 million (£1.1 million) for the alleged loss of investment in an island resort over a period of 25 years had been rejected on the grounds that such a claim was inadmissible in principle. The Committee noted that it was likely that many of the resort owners would submit claims for further losses during 2007.

Post-spill studies and reinstatement measures

3.4.33 It was noted that in November 2006 the Department of Environment and Natural Resources (DENR) had submitted to the Shipowers' Club and the 1992 Fund its proposed financial requirements for undertaking a post-spill environmental monitoring programme and the rehabilitation of coastal natural resources, in particular mangroves, the costs of which had been put at PHP130 million (£1.4 million). The Committee noted that the Shipowners' Club and the Fund had informed DENR that whilst in principle they supported the proposal to monitor the effects of the oil on mangroves, it was too early to decide on the need for reinstatement measures or the establishment of mangrove nurseries. It was noted, however, that the Shipowners' Club and the Fund had agreed in principle to the proposal to collect oiled and un-oiled debris from the tidal channels of eight mangrove sites in order to promote greater tidal exchange and flushing, which would help to reinstate mangrove trees that were under stress from the oil adhering to their root systems and the surrounding sediments. The Committee noted that the Club and the Fund had pointed out that DENR would have to provide the initial funding for these measures itself and then claim compensation for the costs after the work had been completed. It was noted, however, that the Club and the Fund had advised DENR that the proposed studies to measure air, water and soil quality were not, in their view, technically justified and that it was unlikely that claims for the costs of these programmes would meet the Fund's admissibility criteria.

Property damage

3.4.34 The Committee noted that by 31 January 2007, the Shipowners' Club and the 1992 Fund had received 16 claims for a total of PHP3.9 million (£41 000) for damage to beach front properties due to the removal of sand during the clean-up operations and that these claims were being assessed. It was also noted that five claimants had submitted claims for a total of PHP347 500 (£3 650) for the use of their land for the temporary storage of collected oily debris.

Miscellaneous claims

3.4.35 The Committee noted that in December 2006, the Regional Department of Social Welfare had submitted a claim for PHP5.3 million (£55 700) in respect of costs of food and supplies, cash for work programme for alternative livelihood and for improvements to roads and drainage. It was noted that the Fund had informed the claimants that these claims raised important questions of principle and had asked for further details prior to submitting them to the Executive Committee for its consideration. It was noted that the supporting documentation had arrived too late to be considered by the Committee at this session and that its consideration would be deferred until the June 2007 session.

3.4.36 It was noted that claims had also been submitted by 13 local stores for loss of income totalling PHP1.1 million (£11 600) and that these claims were being assessed.

Operation to remove the remaining cargo from the vessel

3.4.37 It was recalled that at its October 2006 session the Executive Committee had considered the question as to whether an operation to remove the remaining oil from the wreck was technically justified and whether a claim for the cost of such an operation was admissible in principle. The Committee recalled that early indications had been that the costs of operations to quantify and remove any remaining oil would be between US$8 to 12 million (£4 to £7 million) depending on the quantity of oil found on board.

3.4.38 The Committee recalled that given the circumstances, in particular the likelihood that a significant quantity of oil remained on board and the fact that the vessel was located in a seismically active area and in close proximity to sensitive economic and environmental resources, the Director had agreed with the experts that provided that the cost of an operation to remove as much of the remaining cargo from the vessel as possible was not disproportionate to the risks of pollution damage resulting from the further release of oil, such an operation would, in their opinion, be justified.

3.4.39 It was recalled that the Executive Committee had decided that the claim for the cost of removing the oil from the *Solar 1* was admissible in principle.

3.4.40 The Committee noted that in November 2006, the Shipowners' Club had signed a contract with an underwater engineering company to carry out the removal of the oil remaining in the wreck of the *Solar 1*. It was noted that the oil removal operation had commenced on 12 March 2007.

3.4.41 The Committee noted that depending on the quality of the recovered oil it would either be refined or used as a fuel in a cement factory.

3.4.42 It was noted that a contingency plan was in place in case there was an accidental spill of oil during the operation and that local responders under the control of the Philippine Coastguard would be on standby throughout the operation.

3.4.43 A number of delegations, including the Philippines delegation, thanked the Director and the Secretariat for the proactive approach taken by the 1992 Fund and the efficient way in which the claims had been handled. They also expressed their satisfaction that the operation to remove the oil from the wreck had already started.

3.4.44 The Committee noted that the Club's decision to reserve its right under Article III.3 of the 1992 Civil Liability Convention would not affect the limit under STOPIA 2006 but that if the Committee were to agree with the Club's position, the Fund would be liable to pay compensation to Petron Corporation and would not be entitled to reimbursement from the Club.

3.4.45 The Committee noted that the ship was on a time charter to Petron Corporation, which had used the *Solar 1* on many occasions for the transport of oil between ports in the Philippines. It was further noted that the Club had alleged that the vessel had been overloaded and that this had been the main cause of the sinking.

3.4.46 All delegations that intervened expressed their appreciation for the use of a PowerPoint presentation in the introduction of the document. Those delegations stated that an illustrative presentation helped them to understand the aftermath of the incident. A number of delegations suggested that such presentations should be made available on the Funds' website in the same way as the documents.

3.4.47 The Director stated that he would give further consideration to making PowerPoint presentations available, but that the Funds' website might not be the most appropriate way, although delegations could always obtain copies directly from the Secretariat.

3.4.48 The Director stated that the *Solar 1* was a unique incident in that although the financial consequences were not that high, a very large number of claims had arisen which had presented a heavy workload and new challenges for the Secretariat.

3.5 *Shosei Maru*

3.5.1 The Executive Committee took note of the information regarding the *Shosei Maru* incident as set out in document 92FUND/EXC.36/8 which was introduced with the help of a PowerPoint presentation.

The incident

3.5.2 The Committee noted that on 28 November 2006, the Japanese tanker *Shosei Maru* (153 GT) had collided with the Korean cargo vessel *Trust Busan* (4 690 GT) two kilometres off Teshima, in the Seto Inland Sea in Japan. It was noted that about 60 tonnes of heavy fuel oil and bunker diesel oil had escaped into the sea from a damaged cargo tank and the bunker oil tank of the *Shosei Maru*, that the remaining oil onboard had been transferred to another vessel and that the *Shosei Maru* had subsequently been towed to the port of Tonosho in Shodoshima.

3.5.3 It was noted that the *Shosei Maru* was insured with the Japan Ship Owners' Mutual Protection and Indemnity Association (Japan P&I Club).

3.5.4 The Committee noted that the 1992 Fund and the Japan P&I Club had appointed a team of Japanese surveyors to monitor the clean-up operations and to investigate the potential impact of the pollution on fisheries and mariculture.

Clean-up operations

3.5.5 It was noted that the owner of the *Shosei Maru* had requested the Japanese Maritime Disaster Prevention Centre to organise clean-up operations by using a number of private contractors, that the Kagawa Prefectural Government and several local authorities had also participated in the operations and that one vessel had been deployed to apply chemical dispersants to the oil at sea.

3.5.6 It was also noted that on-shore clean-up operations had been carried out in four locations in the Kagawa Prefecture and that private contractors had been appointed by the shipowner to undertake shoreline clean-up operations, using predominantly manual methods to remove bulk oil, followed by high-pressure water washing to remove oil stains. It was noted that several oil-stained piers, wharves and seawalls had been cleaned by means of high-pressure hot water guns using chemical solvents. The Committee noted that the clean-up operations had been concluded by 31 January 2007.

Impact of the spill

3.5.7 It was noted that approximately five kilometres of shoreline composed of rocks, boulders and pebbles, as well as port installations, had been polluted to varying degrees, and that drifting oil at sea had contaminated the hulls of a number of commercial and fishing vessels, including those engaged in the clean-up operations. It was also noted that the oil had affected a number of seaweed cultivation farms as it passed through the supporting structures, contaminating buoys, ropes, nets and the seaweed growing on the nets, which had had to be replaced and destroyed.

Applicability of the 1992 Conventions and STOPIA 2006

3.5.8 The Committee noted that the limitation amount applicable to the *Shosei Maru* under the 1992 Civil Liability Convention was 4.51 million SDR or ¥820 million (£3.4 million).

3.5.9 It was noted that the Japan P&I Club had informed the 1992 Fund that since the vessel was only engaged in coastal trade, it had not been insured through the pooling agreement of the International Group of P&I Clubs. It was also noted that the Japan P&I Club had informed the Fund that the owner of the *Shosei Maru* had not given written consent for the vessel to be entered in STOPIA 2006 and that the ship had therefore not been entered in the Agreement. The Committee noted that as a consequence, if the total amount of damages were to exceed the limitation amount applicable to the *Shosei Maru* under the 1992 Civil Liability Convention, the Fund would be required to pay compensation in respect of this incident without being subsequently reimbursed under STOPIA 2006.

Claims for compensation

3.5.10 The Committee noted that the clean-up operations and preventive measures would result in claims by the Japanese Government and by regional and local authorities. It was noted that claims were also expected for costs for cleaning of hulls of commercial and fishing vessels moored in the ports of Tonosho and Kose. It was also noted that claims would be submitted for the replacement of seaweed cultivating nets affected by the oil and for loss of earnings due to damaged seaweed.

3.5.11 It was noted that the claims in respect of clean-up operations and preventive measures had provisionally been estimated at some ¥640 million (£2.7 million), that claims in respect of costs for cleaning of hulls of commercial and fishing vessels had been provisionally estimated at some ¥30 million (£130 000) and that claims for the replacement of seaweed nets and loss of earnings were expected to total some ¥400 million (£1.7 million).

3.5.12 The Committee noted that the total amount of admissible claims may exceed the limitation amount applicable to the *Shosei Maru* under the 1992 Civil Liability Convention.

3.5.13 The Committee noted that the Japanese authorities were carrying out an investigation into the cause of the collision and that the outcome of the investigation would be reported to the Committee at a later session.

3.5.14 A number of delegations expressed their concern regarding the fact that some tankers in Japan were not entered in STOPIA 2006, which in their view highlighted the shortcomings of voluntary agreements. A number of delegations suggested that it would be useful if details of the total number of tankers that were not entered in STOPIA 2006 could be provided at the next Executive Committee session in June 2007. Those delegations also urged the International Group of P&I Clubs to extend STOPIA 2006 to as many vessels as possible and to actively encourage shipowners to enter their vessels into the Agreement.

3.5.15 The Committee noted that the current situation regarding coastal tankers insured by the Japan P&I Club and entered in STOPIA 2006 is as follows:

	Coastal Tankers	**Covered by STOPIA 2006**	**%**
100 GT or more	327	197	60
Below 100 GT	329	54	16
Total	656	251	38

3.5.16 The observer delegation of the International Group of P&I Clubs stated that it was unfortunate that this incident had involved a ship entered in a Club that was a member of the International Group of P&I Clubs but was not entered in STOPIA 2006 by virtue of the fact that it was not reinsured through the pooling agreement of the International Group of P&I Clubs. He further stated that all ships of not more than 29 548 tons that were reinsured through the pooling agreement of the International Group of P&I Clubs (so-called 'relevant ships') were automatically entered in STOPIA 2006 as stipulated in the Clubs' rule books. He indicated that

insurers could not force 'non-relevant' ships to join STOPIA 2006, although the International Group of P&I Clubs was doing its utmost to encourage all shipowners to enter into the Agreement.

3.5.17 The observer delegation of the International Group of P&I Clubs stated that in accordance with the Memorandum of Understanding between the International Group of P&I Clubs and the 1992 Fund, a list of the approximately 6 000 ships that were entered in STOPIA 2006 had been sent to the Funds' Secretariat. He pointed out that, at present, 251 small coastal tankers insured by the Japan P&I Club were entered in STOPIA 2006 compared to 193 the previous year. He also pointed out that there was another member of the International Group of P&I Clubs that insured 25 small coastal tankers that traded in the Philippines, which were not entered in STOPIA 2006.

3.5.18 The Committee noted that two fixed premium insurers that were not part of the pooling agreement of the International Group of P&I Clubs were giving consideration to participating in STOPIA 2006.

3.5.19 The International Group of P&I Clubs agreed to submit a document to the next Executive Committee session outlining details on the operational aspects of STOPIA 2006, the number of tankers falling outside of STOPIA 2006 and the efforts that the Clubs were undertaking to encourage shipowners to enter their vessels into STOPIA 2006.

3.5.20 The Executive Committee authorised the Director to make settlements of claims arising from the incident to the extent that they did not give rise to questions of principle not previously considered by the Committee.

4 Any other business

June 2007 sessions

4.1 The Executive Committee recalled that, at their October 2006 sessions, the governing bodies had agreed to accept the kind invitation by the Government of Canada to hold the June 2007 sessions of the IOPC Funds' governing bodies at the Headquarters of the International Civil Aviation Organization (ICAO) in Montreal.

4.2 The Committee noted the information submitted by the Government of Canada contained in the Annexes to documents 92FUND/EXC.36/9 and 92FUND/EXC.36/9/Add.1. It also noted that the IOPC Funds would be distributing information relating to the June 2007 meetings to delegates in the form of a leaflet before the end of the session.

4.3 The delegation of Canada drew the Committee's attention to the importance of making any accommodation reservations well in advance of the meetings given that the Canadian Grand Prix would take place in Montreal the weekend before and that accommodation during the weekend of 8–10 June 2007 would therefore be both limited in availability and expensive. That delegation recommended that any delegations planning to spend additional time in Canada should either do so at the end of the meeting week or spend the preceding weekend outside of Montreal, eg in Toronto or Ottawa. In response to a question from one observer delegation, the delegation of Canada informed the Committee that they had not block booked hotel accommodation on behalf of delegates since, as with meetings in London, it was the responsibility of delegations to make their own reservations. They pointed out that they had, however, provided a list of hotels located close to the ICAO building in document 92FUND/EXC.36/9 and that the ICAO had negotiated rates with the hotels on that list as well as others available on the ICAO website. That delegation pointed out, however, that the negotiated rates were unlikely to apply on the weekend preceding the meetings.

4.4 The delegation of Canada advised delegates to check the visa requirements for entry into Canada as listed on the Citizenship and Immigration Canada (CIC) website as indicated in document 92FUND/EXC.36/9. They suggested that delegations could also obtain further assistance in this regard by contacting the Canadian Embassy or High Commission in their respective countries.

4.5 It was noted that, for some delegations, the IOPC Funds' invitation to the meetings in Canada could be of assistance in obtaining a visa.

4.6 The delegation of Canada invited any delegates requiring further information relating to any aspects of the meetings in June to contact them. The Committee thanked the Government of Canada again for its invitation to hold the meetings in Montreal and also for the information provided at this session.

Venue for future sessions

4.7 The Committee noted that provisional arrangements had previously been made for the October 2007 sessions of the IOPC Funds' governing bodies to take place at Inmarsat in London and that it had been confirmed during the meeting that the IMO building would not be available for use until February or March 2008.

4.8 A number of delegations expressed the view that the October 2007 sessions should be held in London. The point was made that, although invitations to hold future sessions of the governing bodies in locations outside of London were welcome and should be considered, for October 2007 other factors should be taken into account, such as the venues for the IMO meetings immediately before and after those sessions and the budgetary implications for both delegates and the Secretariat.

4.9 The Executive Committee decided to hold the October 2007 sessions of the governing bodies at Inmarsat.

5 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.36/WP.1, was adopted, subject to certain amendments.