INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
37th session
Agenda item 5

92FUND/EXC.37/9
12 June 2007
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# RECORD OF DECISIONS OF THE THIRTY-SEVENTH SESSION OF THE EXECUTIVE COMMITTEE

(held on 12 and 15 June 2007)

Chairman: Mr John Gillies (Australia)

Vice-Chairman: Mr Léonce Michel Ogandaga Agondjo (Gabon)

*Opening of the session*

## 1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 92FUND/EXC.37/1.

## 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 those of the Assembly, the Credentials Committee established by the Assembly should also examine the credentials of the Executive Committee (Executive Committee's Rules of Procedure, Rule (iv)).

2.2 The Executive Committee noted that, in accordance with Rule 10 of the Assembly's Rules of Procedure, at its 3rd session the 1992 Fund Administrative Council, acting on behalf of the 1992 Fund Assembly, had appointed the delegations of Algeria, Germany, Latvia, Panama and Singapore to the Credentials Committee.

2.3 The following members of the Executive Committee were present:

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|---|---|---|
| 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.37/2/1 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:

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| Algeria | Ireland | Panama |
| Belgium | Italy | Philippines |
| Bulgaria | Latvia | Poland |
| China (Hong Kong Special Administrative Region) | Liberia | Qatar |
| | Malta | South Africa |
| Estonia | Marshall Islands | Sweden |
| Finland | Mexico | United Kingdom |
| Ghana | Nigeria | Venezuela |
| Grenada | Norway | |

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

Pakistan Saudi Arabia

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

*Intergovernmental organisations:*

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

*International non-governmental organisations:*

Comité Maritime International (CMI)
International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)
International Group of Liquefied Natural Gas Importers (GIIGNL)
International Group of P&I Clubs
International Tanker Owners Pollution Federation Ltd (ITOPF)
Oil Companies International Marine Forum (OCIMF)

## 3 Incidents involving the 1992 Fund

3.1 *Erika*

3.1.1 The Executive Committee took note of the developments regarding the *Erika* incident as set out in documents 92FUND/EXC.37/4, 92FUND/EXC.37/4/Add.1 and 92FUND/EXC.37/4/Add.2.

*CLAIMS SITUATION*

3.1.2 The Committee noted that as at 7 May 2007, 7 003 claims for compensation had been submitted for a total of €387.7 million (£263.5 million), including a claim for a total of €179 million (£121.7 million) by the French State for clean-up operations carried out as a result of the incident. It was noted that 98.4% of the claims had been assessed and that some 1 058 claims, totalling €24 million (£16.3 million), had been rejected. It was also noted that payments of compensation had been made in respect of 5 666 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 STATE*

3.1.3 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).

3.1.4 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 further recalled 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).

3.1.5 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.

3.1.6 The Executive Committee agreed with the Director's decision to monitor the situation in the light of the developments in the court proceedings and to continue making further payments to the French State to the extent that there was a sufficient margin between the total amount of compensation available and the Fund's exposure in respect of other claims.

*CRIMINAL PROCEEDINGS*

3.1.7 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.

3.1.8 It was recalled that the trial, which had started on 12 February 2007, was expected to last for four months. The Committee noted that the 1992 Fund, although not a party, was following the proceedings through its lawyer in France.

3.1.9 The French delegation informed the Committee that the trial was due to conclude on 13 June 2007 and that the judgement was expected some time in January 2008.

*LEGAL PROCEEDINGS*

3.1.10 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 the Commercial Court in Nantes had declared that the action brought by the Conseil Général of Vendée had lapsed (périmée) since there had been no activity by the parties for more than two years.

3.1.11 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 and the 1992 Fund, claiming €190.5 million (£129.5 million).

3.1.12 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 (£97.2 million).

3.1.13 It was further 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 (£8.7 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.

3.1.14 The Committee recalled that claims totalling €497 million (£337.8 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 recalled, 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.

3.1.15 It was recalled that legal actions against the shipowner, Steamship Mutual and the 1992 Fund had been taken by 796 claimants. It was noted that by 7 May 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 also noted that actions by 261 claimants (including 142 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 €58.5 million (£39.8 million).

3.1.16 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*

*Commercial Court in Lorient*

3.1.17 The Committee noted that the owner of two toy shops in Lorient and Vannes had submitted a claim for loss of income allegedly suffered as a result of the *Erika* incident and additional costs related to the production of a sales catalogue and the relocation of one of the shops. It was noted that the 1992 Fund had assessed the loss of income but rejected the claim for additional costs since, in the Fund's view, the production of sales catalogues and the relocation of business premises were normal commercial practices and, therefore, there was not a sufficient link of causation between the claimed costs and the *Erika* incident.

3.1.18 It was noted that in a judgement rendered in April 2007 the Commercial Court in Lorient had stated that it was not bound by the Fund's criteria for admissibility of claims and that it was for the Court to interpret the concept of 'pollution damage' in the 1992 Conventions and to apply it in

each individual case by determining whether there was a sufficient link of causation between the event and the damage. The Committee noted, however, that the Court had accepted the Fund's views on the absence of a link of causation and had held that the claimant had not proved to have suffered losses beyond the loss of income assessed by the Fund. It was noted that so far the claimant had not appealed against the judgement.

*Commercial Court in Quimper*

3.1.19 The Committee took note of the judgements rendered in April 2007 by the Commercial Court in Quimper in respect of twelve claims from businesses in the tourism sector and one claim from a fish wholesaler, for pure economic losses allegedly due to the *Erika* incident.

3.1.20 It was noted that nine of the claims had been accepted by the Fund in respect of losses in 2000, albeit sometimes for lower amounts, but had been rejected by the Fund in respect of losses in 2001, since in respect of that year there was not a sufficient link of causation between the alleged losses and the contamination. The Committee noted that in the judgements the Court had stated that, although it was clear that the *Erika* incident had had an effect on the businesses in the tourism sector in 2001, that effect had been diluted amongst a combination of other causes from which it was not possible to distinguish the relative weights in the downturn experienced in 2001. It was noted that the Court had rejected the claims for losses in 2001 since the claimants had not shown that there was a link of causation between the contamination and their alleged losses in 2001.

3.1.21 The Committee noted that a fish wholesaler had submitted a claim for alleged losses suffered in 2000, arguing that the pollution had spoiled the image of the quality of the products sold by the claimant. It was noted that the 1992 Fund had rejected the claim since the claimant had not proved any loss. It was noted that the Fund had also argued that there was no link of causation between the alleged losses and the contamination since the claimant's business was located outside the affected area, there was no dependence on the affected resources and the claimant had alternative sources of supply. The Committee noted that in its judgement the Court had considered previous judgements on similar cases rendered by an appeal court that had stated that it was for the national courts to interpret the concept of 'pollution damage' in the 1992 Conventions and to apply it in each individual case by determining whether there was a sufficient link of causation between the event and the damage. It was noted that the Commercial Court had considered that even if the claimant's business was not strictly located in the area affected by the pollution, an official study had indicated that there had been a market disaffection towards sea produce and, therefore, a loss of income in the related sector. It was noted, however, that the Court had concluded that the claimant had not proved any losses and had for that reason rejected the claim.

3.1.22 The Committee noted that the owner of a camping and a property letting agent had submitted claims for losses in 2000, which had been assessed by the 1992 Fund at a lower amount. It was noted that in the judgements the Court had agreed with the Fund's assessment of the claims.

3.1.23 It was noted that the owner of a restaurant had submitted a claim for alleged losses suffered due to the *Erika* incident in 2000, which had been assessed by the 1992 Fund at a lower amount and that that amount had been paid to the claimant. It was noted that since the owner had purchased the restaurant in June 1999, the Fund had not considered the business data for the preceding years when the restaurant was under a different ownership and had instead based its assessment on a study, commissioned by the French Ministry of Economy, of the losses suffered generally in the tourism sector as a result of the spill. It was also noted that the claimant had subsequently submitted a claim for losses suffered in 2001, which had been rejected by the Fund since the claimant had not proved that there was a sufficient link of causation between the alleged losses and the contamination. The Committee noted that the claimant had brought an action against the Fund claiming €15 329 (£10 419) as a complement for the losses in 2000 and €24 774 (£16 839) for losses suffered in 2001. It was noted that, in its judgement, the Court had rejected the losses

suffered in 2001 for the same reasons as those stated in paragraph 3.1.20 but accepted the claim for losses in 2000. The Committee noted that the Court had stated that in the assessment of the losses it was not unreasonable to take into account the business figures of previous years, independently of the business ownership and that it would be artificial to base the assessment on a theoretical study. It was noted that the Court had, therefore, awarded the claimant €15 329 (£10 419) for losses in 2000 in addition to the amount already paid by the Fund. The Committee noted that the 1992 Fund had not appealed against the judgement.

3.1.24 It was noted that so far none of the claimants had appealed against the judgements.

3.1.25 The Executive Committee expressed its satisfaction that although the French Courts had stated that they were not bound by the Fund's criteria for admissibility of claims, most of their judgements mirrored these criteria. It was pointed out that if the French Courts had not, by and large, agreed with the 1992 Fund's assessments of claims that would have questioned the validity of the admissibility criteria adopted by the Fund.

3.1.26 One delegation suggested that the 1992 Fund should consider taking measures in Member States to encourage their national courts to apply the 1992 Fund's criteria for the admissibility of claims in order to guarantee uniformity in the application of the international Conventions.

3.1.27 The Director stated that although the suggestion made by the delegation would appear *prima facie* worthwhile, it would in fact be very difficult to implement it. The Director pointed out that it was impossible for the 1992 Fund to impose its criteria for admissibility of claims on national courts since the criteria reflected the interpretation of the international Conventions by the 1992 Fund's governing bodies only. He also pointed out that, in order to implement the suggestion, it would require either a change in the international Conventions or the establishment of a supranational court to deal with claims for pollution damage under the Conventions.

*Civil Court in Saint Nazaire*

Claim by salt producers

3.1.28 The Committee took note of the judgement rendered in May 2007 by the Civil Court in Saint Nazaire in respect of 136 claims from salt producers in Guérande for losses caused by a lack of production in 2000 as a result of an imposed ban on water intake as well as for losses caused by the late start of the 2001 season and for the costs of restoration of salt ponds in 2001.

3.1.29 It was recalled that the 1992 Fund and Steamship Mutual had considered that salt production had been possible in Guérande in 2000, but that as a result of the interruption caused by the ban on water intake, the maximum yield would have been 20% of that expected for that year and that interim compensation payments had been made to the claimants for the outstanding 80%.

3.1.30 It was also recalled that, with regard to the claims for restoration costs and for loss of production in 2001, Steamship Mutual and the 1992 Fund had taken the view that, since salt production was possible at the end of 2000, the restoration of the ponds and the decision not to produce salt in 2001 were not a consequence of the *Erika* incident.

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

3.1.32 It was recalled that, in the light of the court expert's findings, the 1992 Fund had approached claimants with the objective of exploring the possibility of reaching out-of-court settlements and

that such settlements had been reached with 23 of the salt producers in Guérande but that claims were still pursued in court by 136 salt producers from that area.

3.1.33 It was noted that the Court had stated that it was not bound by the Fund's criteria for admissibility of claims and that it was for the Court to interpret the concept of 'pollution damage' and 'preventive measures' in the 1992 Conventions and to apply it in each individual case.

3.1.34 The Committee noted that, with regard to the claim for loss of production in 2000, the Court, after reviewing the scientific analysis carried out by the court expert and considering the views expressed by other experts presented by the salt producers, had considered that there was no scientific consensus on the health risks and efficiency of the booms deployed, that the risk of pollution from the presence of oil in the vicinity of the salt ponds, the oil removal operations in the *Erika* and the oil remaining on the rocky shore nearby had made it reasonable to maintain a complete closure of the salt ponds to prevent the entry of oil that would have caused substantial damage to the ponds and that the decision not to produce salt in 2000 had been a reasonable measure to prevent or minimise pollution damage.

3.1.35 It was noted that the Court had accepted that the loss of salt production in 2001 was also a consequence of the *Erika* incident since the oil in the vicinity of the salt ponds had only been removed during the spring of 2001 and clean-up operations were still carried out in 2001 on rocky shores nearby. It was noted, however, that the Court had decided to reduce the compensation amount by 50% to take into account the impact that the exceptional rainfall in 2001 had had on the salinity of the salt ponds. It was also noted that the Court had accepted that the costs incurred to restore the salt ponds in 2001 were an unavoidable consequence of the decision not to produce salt in 2000 but that it had decided to reduce the compensation amount by 50% due to the exceptional rainfall in 2001.

3.1.36 The Committee noted that the Court had granted the salt producers the amount of €1 494 257 (£1 016 000)[<1>] and had ordered the provisional execution of the judgement. It was noted that so far none of the claimants had appealed against the judgements.

3.1.37 It was noted that the Director, with the help of the 1992 Fund's French lawyer and the Fund's experts, was examining the judgements to decide whether the 1992 Fund should appeal.

Claim by a Co-operative of salt producers

3.1.38 The Committee took note of the judgement rendered in May 2007 by the Civil Court in Saint Nazaire in respect of a claim by a Co-operative of salt producers in Guérande for commercial loss, loss of image and additional costs incurred as a result of the *Erika* incident.

3.1.39 It was noted that the 1992 Fund and Steamship Mutual had considered that salt production had been possible in Guérande in 2000 and that since the Co-operative had a stock of salt available sufficient to maintain sales in 2000, the losses claimed by the Co-operative were not admissible for compensation under the Conventions.

3.1.40 It was noted that the Court had made a similar statement as in the other judgements that it was not bound by the Fund's criteria for admissibility of claims (paragraph 3.1.33). It was noted that the Court had stated that it was not the Co-operative but the salt producers who actually produced salt, that the claim by the Co-operative could therefore not be for loss of production but for loss of sales and that it was for the Co-operative to prove that it had suffered a loss of profit as a result of the pollution. It was noted that the Court had considered that the Co-operative had had a stock of some 28 611 tons of salt and that it had therefore been able to maintain sales at the normal level, even in the absence of salt production in 2000. The Committee noted that the Court had decided

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[<1>] Conversion of Euros into Pounds sterling has been made on the basis of the exchange rate at 7 May 2007 (€1 = £0.6797).

that the Co-operative had not been able to demonstrate that it had suffered a commercial loss as a result of the *Erika* incident and had for that reason rejected that item claimed.

3.1.41 The Committee noted that, with regard to the claim for loss of image, the Court had stated that the Co-operative's decision to inform the public that it had a substantial stock of salt available for sale and to run a marketing campaign to inform and reassure consumers had been a reasonable measure to mitigate its loss which had been effective since the Co-operative had not experienced a substantial reduction in sales. It was noted that for that reason the Court had granted the Co-operative the amount of €378 041.68 (£256 950) but had not granted the amount of €266.44 (£180) corresponding to VAT and non-justified costs.

3.1.42 It was noted that, with regard to the claim for additional costs incurred to minimise pollution damage (costs of monitoring the booms, filtration devices, analysis of the water, etc.), the Court had decided that those measures were reasonable and had been taken to prevent pollution damage and that it had granted the amount of €21 346.98 (£14 500). It was also noted that the Court had rejected other additional costs incurred in the amount of €136 345.46 (£92 600) since they referred to the time spent by the salt producers defending their interests and coordinating their activities, which were not directly linked to the *Erika* incident.

3.1.43 It was further noted that the Court had granted the Co-operative an amount of €12 000 (£8 150) to cover the legal and other costs incurred.

3.1.44 The Committee noted that so far the claimant had not appealed against the judgement.

3.1.45 It was noted that the Director, with the help of the 1992 Fund's French lawyer and the Fund's experts, was examining the judgements to decide whether the 1992 Fund should appeal.

3.1.46 One delegation expressed its interest in the judgements and asked the Secretariat to keep the Committee informed as to whether the 1992 Fund would appeal. It was pointed out that the Fund should make sure that any appeal was lodged in time. The Director stated that the Secretariat had only been notified of the judgements the previous week and that therefore it had not had enough time to examine them in consultation with the Fund's lawyer. The Director also stated that he would, if necessary, instruct the Fund's lawyer to lodge an appeal in order to protect the Fund's interests.

3.1.47 The Executive Committee instructed the Director to examine the judgements and to report to the Committee at its October 2007 session with his proposal or decision in respect of lodging an appeal against the judgements.

*Legal proceedings by the Commune de Mesquer against Total*

3.1.48 One delegation informed the Committee that a legal action had been brought by the Commune de Mesquer against Total before the French Courts, where it had been argued that the cargo on board the *Erika* was in fact a residue and that the French Supreme Court had referred this question to the European Court of Justice for an opinion. That delegation asked the Director to explain what impact, if any, these legal proceedings would have on the 1992 Fund. The French delegation informed the Committee that the legal action had been brought by a local authority and that the French Government was not party to these proceedings. That delegation pointed out that even if the European Court of Justice were to decide that the cargo on board the *Erika* was a residue, it was difficult to determine what implications the decision could have on the 1992 Fund.

3.1.49 The Director stated that he was not aware of these legal proceedings but that he would investigate the matter and report to the Executive Committee at its next session in October 2007.

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.37/5 submitted by the Director.

*LEVEL OF PAYMENTS*

3.2.2 It was recalled that in April 2006 the level of payments had been increased from 15% to 30% 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.

*CLAIMS FOR COMPENSATION*

*Spain*

3.2.3 The Committee noted that as at 7 May 2007 the Claims Handling Office in La Coruña had received 839 claims totalling €610.7 million (£415 million), including nine claims from the Spanish Government totalling €559.4 million (£380.2 million) submitted during the period October 2003 - October 2006.

3.2.4 It was noted that the claims by the Spanish Government related to costs incurred in respect of at sea and on shore clean-up operations, removal of the oil from the wreck, compensation payments made in relation to the spill on the basis of national legislation (Royal Decrees)[<2>] 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 claim for the removal of the oil from the wreck, initially for €109.2 million (£74.1 million), had been reduced to €24.2 million (£16.3 million) to take account of funding obtained from another source.

3.2.5 It was recalled that the first claim received from the Spanish Government in October 2003 for €383.7 million (£260.8 million) had been assessed on an interim basis by the Director in December 2003 at €107 million (£72.7 million) and that the 1992 Fund had made a payment of €16 050 000 (£11.1 million), corresponding to 15% of the interim assessment. It was also recalled that the Director had made a general assessment of the total of the admissible damage in Spain, concluding that the admissible damage would be at least €303 million (£206 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. The Committee recalled that the 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.

3.2.6 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 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 the oil from the wreck.

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[<2>] For details regarding the scheme of compensation set up by the Spanish Government see document 92FUND/EXC.36/5, section 9.

3.2.7 The Committee recalled that in March 2006 the 1992 Fund had made an additional payment of €56 365 000[<3>](£38.5 million) to the Spanish Government, in accordance with the distribution of the amount payable by the 1992 Fund in respect of the *Prestige* incident, as authorised by the Executive Committee at its October 2005 session (document 92FUND/EXC.30/10, paragraph 3.7.73).

3.2.8 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 claims based on national legislation (Royal Decrees) that were assessed by the Consorcio de Compensación de Seguros (Consorcio)[<4>]. 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 further recalled that the Spanish Government had submitted claims for the costs incurred by the regions of Galicia for €28 million (£19 million) and Asturias for €3.3 million (£2.24 million).

3.2.9 The Committee recalled 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 (£380.2 million) and that further adjustments to claims would be made in respect of the payments by the Spanish Government to two of the regions affected by the *Prestige* incident (Cantabria and the Basque Country), the cost for treatment of residues and the individual assessments by the Consorcio.

3.2.10 The Committee noted that many meetings had been held between representatives of the Spanish Government and of the 1992 Fund, that a considerable amount of further information had been provided in support of its claims and that co-operation with representatives of the Spanish Government was continuing, with progress being made on the assessment of all the claims submitted by the Government. It was noted that in May 2007 a meeting had been held with representatives of the Spanish Government to discuss a provisional assessment recently carried out in relation to the at sea and on shore clean-up operations by the Ministries of Defence, of the Environment and of Public Works (Fomento). The Committee noted that further discussions between representatives of the Spanish Government and the 1992 Fund were ongoing.

3.2.11 It was noted that as at 7 May 2007, 89.3% of the claims, other than those of the Spanish Government, had been assessed for €3.8 million (£2.6 million) and that interim payments totalling €484 791 (£329 512)[<5>] 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, two were being assessed, eight though assessed were pending clarification, 193 were awaiting a response from the claimants, 74 were awaiting further documentation, 385 (totalling €27.8million (£18.9 million)) had been rejected and 15 had been withdrawn by the claimants.

*France*

3.2.12 The Committee noted that by 7 May 2007, 479 claims totalling €118.7 million (£80.7 million) had been received by the Claims Handling Office in France. It was noted that of the 479 claims submitted to the Claims Handling Office, 88% had been assessed by 7 May 2007, that many of the remaining claims lacked sufficient supporting documentation and that such documentation had been requested from the claimants. It was noted that 422 claims had been assessed at €49 million (£33.3 million), that 417 claims had been approved for €47.9 million (£32.6 million)

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<3> The Director was authorised to pay the Spanish Government €57 365 000 (£39 million) but, as requested by the Spanish Government, the 1992 Fund 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

<4> A state-owned insurance organisation set up to pay claims for damage not normally covered by commercial insurance policies, such as damage due to terrorist activities or natural disasters.

<5> Compensation payments made by the Spanish Government to claimants have been deducted when calculating the interim payments.

and that interim payments totalling €4.2 million (£2.85 million) had been made at 30% of the assessed amounts in respect of 300 of the approved claims. It was further noted that the remaining approved claims were awaiting a response from the claimants or were being re-examined following the claimants' disagreement with the assessed amount. It was also noted that 50 claims totalling €12.3 million (£8.4 million) had been rejected because the claimants had not demonstrated that a loss had been suffered due to the incident.

3.2.13 The Committee recalled that in May 2004 the French Government had submitted a claim for €67.5 million (£45.9 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 (£21.2 million). It was noted that further documentation had since been provided by the French Government and that the Fund's experts were carrying out a detailed further assessment of the claim.

3.2.14 It was noted that a further 59 claims, totalling €10.5 million (£7.14 million), had been submitted by local authorities for costs of clean-up operations, that 31 of these claims had been assessed and approved at €3.45 million (£2.34 million) and that interim payments totalling €1 million (£679 700) had been made in respect of 22 claims at 30% of the assessed amounts.

3.2.15 It was also noted that 128 claims had been submitted by oyster farmers totalling €9 million (£6.12 million) for losses allegedly suffered as a result of market resistance due to the pollution, that the experts engaged by the London Club and the 1992 Fund had examined these claims and that as at 7 May 2007, 122 of them, totalling €8.56 million (£5.8 million), had been assessed at €468 231 (£318 256). It was further noted that payments totalling €127 539 (£86 688) had been made in respect of 85 of these claims at 30% of the assessed amounts.

3.2.16 It was noted that as at 7 May 2007 the Claims Handling Office had received 194 tourism-related claims totalling €25.3 million (£17.2 million), that 174 of these claims had been assessed at a total of €12.7 million (£8.63 million) and that interim payments totalling €2.8 million (£1.9 million) had been made at 30% of the assessed amounts in respect of 123 claims.

*Portugal*

3.2.17 The Committee recalled that in December 2003 the Portuguese Government had submitted a claim for €3.3 million (£2.24 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 (£679 700), 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 since 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. It was recalled that 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.

3.3 *Solar 1*

3.3.1 The Executive Committee took note of the information regarding the *Solar 1* incident as set out in document 92FUND/EXC.37/6.

*THE INCIDENT*

3.3.2 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 recalled that an unknown, but substantial, quantity of oil had been released from the vessel after it had sunk and that the sunken wreck had continued to release oil, albeit in

ever decreasing quantities. It was noted that, following an operation to remove the remaining oil from the wreck, it had been found that virtually the entire cargo had been spilled.

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

3.3.4 It was also 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.

3.3.5 It was further 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.

3.3.6 It was recalled 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 Shipowners' Club's correspondent in the Philippines together with a staff of five people.

*THE 1992 CONVENTIONS AND STOPIA*

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

3.3.8 It was recalled that the limitation amount applicable to the *Solar 1* in accordance with 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 (STOPIA) 2006 whereby the limitation amount applicable to the tanker under that Convention is increased, on a voluntary basis, to 20 million SDR (£15.8 million). It was recalled, however, 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. It was also recalled that under STOPIA, 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 is the less.

3.3.9 The Committee recalled that the Director and the Shipowners' Club had agreed that the 1992 Fund should assume responsibility for compensation payments once the Shipowners' 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 Shipowners' Club up to the STOPIA limit, payments to be made by the Shipowners' Club within two weeks of being invoiced by the Fund.

*CLAIMS FOR COMPENSATION*

*Claims workshops*

3.3.10 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.

*Clean up and preventive measures*

3.3.11 The Committee noted that by 11 May 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 by the Shipowners' Club and the Fund.

3.3.12 It was noted that a claim by Petron Corporation for PHP196 million (£2.1 million) for the costs of shoreline clean up had been provisionally assessed for a total of PHP118 million (£1.25 million) and that an interim payment for that amount had been made.

3.3.13 It was noted that the Philippine Coastguard had submitted a claim for PHP439 806 223 (£4.7 million) in respect of its role in the response to the spill. The Committee noted that the claim did not have sufficient supporting information to allow the Shipowners' Club and the Fund to carry out an assessment and that the Shipowners' Club and the Fund had written to the Coastguard requesting detailed supporting information in respect of their claim.

3.3.14 It was also noted that the Shipowners' Club had paid ¥45.1 million (£195 000) for the cost of the underwater survey of the wreck that was conducted shortly after the incident and a further US$5 810 726 (£2.9 million) for the cost of the oil removal operations.

3.3.15 The Committee noted that claims had also been received from individuals who had fabricated sorbent booms from indigenous materials and that those claims were being assessed.

*Fisheries and mariculture*

3.3.16 The Committee recalled 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. It was recalled that after the removal of duplicate claims the losses of 11 361 claimants had been assessed at a total of PHP120.3 million (£1.3 million). It was also recalled 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 some 11 000 claimants from the five municipalities had received compensation totalling PHP113 million (£1.2 million).

3.3.17 It was also recalled that between September 2006 and January 2007 some 12 000 fisherfolk living in the coastal areas of Iloilo province had submitted claims. It was noted that these claims had been assessed and processed in the same way as those on Guimaras Island but that the extent and duration of the pollution in Iloilo Province was considerably less than on Guimaras Island and that the assessed losses reflected this. The Committee noted that some 11 358 claims had been assessed for a total of PHP56 937 752 (£601 000), that compensation payments to individual claimants had been completed on 2 May 2007 and that a total of 11 323 claimants had received compensation.

3.3.18 It was noted that in February 2007 a law firm in Manila had informed the Fund that it represented some 1 027 fisherfolk from Guimaras Island in the pursuit of their claims and that shortly afterwards the law firm had submitted claims totalling PHP280.3 million (£3.0 million). It was noted that, although no details had been provided in support of the alleged losses, these were reportedly based on the assumption that the effects of the spill would last 20 months. It was noted that the Shipowners' Club and the Fund had informed the law firm that, of their 1 027 clients, 166 had already settled their claims having signed full and final settlement agreements to that effect and that a further 228 claimants had already received settlement offers. It was also noted that in April 2007 the Shipowners' Club and the Fund had informed the law firm that, since the remaining oil had been successfully removed from the wreck of the *Solar 1*, there was no possibility of paying any further compensation to the group of claimants that had already settled their claims and that the offers already made to the group of 228 claimants still stood. It was also noted that the Shipowners' Club and the Fund had informed the law firm that, as regards their remaining 633 clients, further documentary evidence was required to confirm that they were *bona fide* fisherfolk and that they had suffered pollution damage. It was further noted that the

Shipowners' Club and the Fund had informed the law firm that compensation could only be paid in respect of losses actually incurred and not on the basis of predicted future losses.

3.3.19 The Committee noted that by 11 May 2007 a further 102 000 claims registration forms had been received from claimants on Guimaras Island and that this number, combined with the number of claimants that had previously submitted claims, represented about 80% of the population of Guimaras Island. It was noted that the majority of the claims registration forms were incomplete and that a significant number were from people under the age of 18 years, the minimum age at which people are allowed to engage in fishing. The Committee noted that it was likely that most, if not all, of these claims would be rejected by the Shipowners' Club and the Fund.

3.3.20 It was noted that by 11 May 2007 the Shipowners' Club and the 1992 Fund had received 407 claims from seaweed farmers for alleged damage to their crop caused by the oil, that the total amount claimed where the claimant had included a claimed amount in the claim form was PHP52 265 526 (£553 000) and that these claims were being assessed.

3.3.21 It was also noted that by 11 May 2007 the Shipowners' Club and the 1992 Fund had received 313 claims from fish pond operators and that the nature of the losses differed among the claimants, with some alleging that oil had entered their ponds through broken dykes or open sluices (gates) causing fish mortalities, others claiming losses due to their decision to harvest their fish early to avoid contamination and others claiming for losses due to a reduction in fish prices. It was noted that the total amount claimed where the claimant had included a claimed amount in the claim form was PHP340 209 239 million (£3.6 million). It was further noted that the claims were poorly documented with many claimants being unable to prove that they had the necessary licenses, ownership or tenureship to legally operate the ponds or that their ponds were in operation at the time of the incident. The Committee noted that as at 11 May 2007 some 11 claims had been assessed at a total of PHP1.6 million (£16 800) and that the Shipowners' Club and the Fund had written to the remaining claimants requesting further information from them.

*Tourism*

3.3.22 The Committee noted that by 11 May 2007 the Shipowners' Club and the 1992 Fund had received 317 claims in the tourism sector, mainly from owners of small resorts and tour boat operators, for a total of PHP147 677 105 (£1.6 million), including supplementary claims from tour boat operators and resort owners who had received interim compensation for their losses for the period between 11 August 2006 and 31 September 2006. It was noted that 49 claims had been settled for a total of PHP1 501 195 (£15 870). It was also 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. It was further noted that it was likely that many of the resort owners would submit claims for further losses during 2007.

3.3.23 It was noted that by 11 May 2007 some 17 claims totalling PHP5 775 599 (£61 000) had been received from owners of beach property claiming for damage and loss of sand from their property due to the clean-up operations and that these claims were being assessed.

*Post-spill studies and reinstatement measures*

3.3.24 It was recalled that in November 2006 the Department of Environment and Natural Resources (DENR) had submitted to the Shipowners' 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 recalled 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 recalled, 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 recalled that the Shipowners' 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 recalled, however, that the Shipowners' 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.

*Miscellaneous claims*

3.3.25 It was noted that claims had been submitted by owners of convenience stores in Guimaras Island alleging reduction in sales as a result of the incident and that the claims would be rejected since the Shipowners' Club and the Fund considered that the claims were not closely linked to the contamination.

3.3.26 It was also noted that claims had been received from individuals who alleged that oily debris collected along the shore line had been stored within their property before being shipped off for disposal and that the claims were being assessed.

3.3.27 It was further noted that the local government units in the municipalities of San Lorenzo, Sibunag and Nueva Valencia had submitted claims for a total of PHP18 665 892 (£199 000) in respect of various costs and daily salaries of the municipal staff who had been involved in the response to the incident and that the claims were being assessed.

3.3.28 One delegation requested that the Secretariat report the claims situation in the form of a table at the next meeting.

3.3.29 The Director stated that he would endeavour to produce such a table for the next meeting. He stated, however, that in view of the dynamic state of the incident and the claims handling process, there was a possibility that this table might be outdated by the time of the meeting.

*Forged letters sent to local government authorities*

3.3.30 The Committee was informed that in late May 2007, the Shipowners' Club's correspondent, who was responsible for managing the local claims liaison office, reported to the Shipowners' Club and the Fund that letters purported to be sent from the Fund and signed by the Deputy Director were being sent to local government officials in Guimaras informing them, *inter alia*, that the second batch of fishery claims (cf paragraph 3.3.19 above) would be paid in June 2007.

3.3.31 The Committee noted that the letters were forgeries. It further noted, that on advice from the Fund's lawyers in the Philippines, the Director had lodged a police report of the event and published an advertisement in a local newspaper informing the residents of Guimaras that such letters were forgeries, that the second batch of claims was still being processed and that the date of any payments to the second batch claimants was still undecided.

3.3.32 The Committee noted that the advertisement also stated that a letter to the respective Mayors of the relevant Municipalities would be sent once the assessments of the second batch claims were completed. The Committee noted that the Director was investigating who was responsible for these forgeries.

3.3.33 The delegation from the Philippines stated that it regretted the circulation of these fraudulent letters and that the Philippine Government had taken measures by issuing a statement to the local press condemning those responsible for the circulation of these letters. That delegation also stated

that the Philippine Government was dealing with this matter at national level and that it was undertaking its own investigation. That delegation further stated that the Philippine Government would work closely with the Fund to try and identify those involved in the production of these letters and also to prevent similar occurrences.

*Concerns expressed by the Shipowners' Club*

3.3.34 The Committee recalled that the Shipowners' Club had decided in November 2006 that it intended to reserve its right under Article III.3 of the 1992 Civil Liability Convention to oppose claims from Petron Corporation, the charterer of the *Solar 1* whose negligence, in the Shipowners' Club's view, caused or contributed to the pollution damage.

3.3.35 The Committee was informed that the Shipowners' Club had reported to the Director that it had reviewed its position and had no longer any difficulty in paying admissible claims submitted by Petron Corporation. The Committee also noted that the Shipowners' Club had therefore reimbursed the 1992 Fund PHP118 million (£1.25 million) that had been paid in compensation to Petron Corporation. The Committee further noted that as a result of the change in the Shipowners' Club's position, the information contained in paragraphs 3.1 to 3.5 of the document 92FUND/EXC.37/6 was no longer applicable.

3.3.36 The Committee noted that in the event that the total amount of compensation arising from this incident fell below the STOPIA contributions limit of 20 million SDR (£15.8 million), the Fund would not be required to levy in respect of this incident.

3.3.37 Some delegations expressed their satisfaction with the application of STOPIA and noted that it was working well in practice. These delegations also expressed their satisfaction with the resolution of the outstanding issues between the Shipowners' Club and Petron Corporation and were pleased to note that the Shipowners' Club had reimbursed the Fund all payments it had made to Petron Corporation.

*CLAIMS FOR CONSIDERATION BY THE EXECUTIVE COMMITTEE*

*Claims by the Regional Department of Social Welfare and Development*

3.3.38 The Committee noted that in December 2006, the Regional Department of Social Welfare (DSWD) had submitted a claim for PHP3.3 million (£35 000) in respect of costs of providing relief assistance to the 5 400 households whose livelihoods had been most adversely affected by the incident and that the assistance was in the form of the provision of basic food commodities for the daily subsistence of the families involved over the first few days after the incident. It was noted that the claim consisted of the costs of the food items, packaging and distribution of the relief goods. It was noted that the majority of those who had received food aid were dependent on fishing as their primary source of income and that the Shipowners' Club and the Fund had taken the view that the relief assistance provided by DSWD had been justified in the circumstances. It was also noted that those who had received the aid had been directly affected by the contamination by oil spilled from the *Solar 1* and that the Shipowners' Club and the Fund had therefore taken the view that the claim by DSWD was admissible in principle. The Committee noted that the claim had been assessed for a total of PHP2.8 million (£30 000).

3.3.39 The Committee noted that DSWD had also submitted a claim for PHP2.0 million (£21 000) in respect of the funding of a 'cash for work' programme instigated to relieve economic hardship of those fisherfolk most adversely affected by the pollution who had not been engaged in the 'cash for work' programme instigated by Petron Corporation for undertaking shoreline clean-up operations (document 92FUND/EXC.34/11, paragraph 3.4). It was noted that the 'cash for work' programme instigated by DSWD had lasted for a period of five to seven days and had involved about 1 000 families in a number of activities, such as improvements to roads and drainage, food

production and community cleaning. It was noted that DSWD considered that the activities provided the families with a more dignified source of income than relief assistance.

3.3.40 The Committee noted that most, if not all, of the people engaged as a result of DSWD initiative had eventually been compensated by the Shipowners' Club and the Fund for their economic losses arising from the disruption to fishing, considered to have lasted 12 weeks, and that it could therefore be argued that those that were engaged in DSWD's cash for work programme and were compensated by the Shipowners' Club and the Fund had received compensation in excess of their actual losses.

3.3.41 It was noted that it was the Fund's normal policy to make deductions in respect of extra income as a result of an incident and that claimants were normally asked to indicate whether they had received any payments or interim compensation from public bodies in connection with the incident. It was noted, however, that deductions were not normally made for small amounts paid to individuals who had taken part in clean-up operations (cf document 71FUND/EXC.40/10, paragraph 3.5.33).

3.3.42 The Committee noted that the work carried out under the DSWD 'cash for work' programme did not relate to clean-up operations, but concerned activities of general benefit to the local communities and that, in the Director's view, it could be argued that the income earned by those engaged by DSWD should have been deducted from the assessed losses of those fisherfolk that were involved in its 'cash for work' programme. It was noted, however, that such deductions had not been considered, since, at the time of the assessments, the Shipowners' Club and the Fund had not been aware of DSWD's initiative, and because of the particular economic circumstances of the claimants and the method of assessment of their losses, they had not been asked to declare any additional income. The Committee noted that, in the Director's view, the claim by DSWD for the costs of its 'cash for work' programme was not admissible and that he proposed that the claim should be rejected on the grounds that the work carried out under the programme did not relate directly to clean up or preventive measures and that the fisherfolk engaged in the programme had received full compensation from the Shipowners' Club and the Fund for their economic losses resulting from the contamination.

3.3.43 Some delegations praised the DSWD's efforts in the aftermath of the incident and the 'cash for work' programme which was instigated to assist the victims of the *Solar 1* incident.

3.3.44 Most delegations agreed that despite the good intention of the 'cash for work' programme, this claim was not admissible because the work carried out under the programme did not relate to clean up or preventive measures. One delegation also stated that the Fund should not recover any amounts paid in compensation to the fisherfolk involved in the 'cash for work' programme.

3.3.45 The Executive Committee agreed with the Director's conclusion that the DSWD claim in respect of the 'cash for work' programme was not admissible and should be rejected.

*Claim for the loss of a barge*

3.3.46 The Committee noted that a claim had been submitted for PHP5 274 980 (£55 000) for the loss of a barge, which sank on 20 November 2006 whilst transporting oily waste generated from the clean-up operations to an oil disposal facility at Lugait, Misamis Occidental. It was noted that the claimant had also claimed PHP720 940 (£7 600) for the loss of equipment which was onboard the barge at the time of the sinking.

3.3.47 It was noted that the claimant had informed the Fund that the barge was not registered in the name of the claimant, but was subject to a Deed of Conditional Sale, which provided that the purchase price of the barge should be payable in instalments and that since the payments had not been completed at the time of the loss of the barge, the Deed of Absolute Sale and/or the registration for the transfer of ownership had not been executed. It was also noted that the claimant had stated

that at the time of the sinking, the barge did not carry any hull and machinery insurance and was not classed.

3.3.48 It was noted that in addition to participating in the clean up at sea, the claimant had been directed by the Philippine Coastguard to deploy three barges to serve as temporary storage facilities for the oily waste, one of which was the barge subject of this claim, and that the claimant had later been requested to transport the oily waste from Guimaras Island to the disposal facility. It was noted that attempts by the claimant to obtain P&I insurance for the barge and the other two barges had been unsuccessful but that the claimant had subsequently managed to secure the necessary permits from the Iloilo Regional Office of the Maritime Industry Authority (MARINA) to transport hazardous cargo. It was noted that, following pre-departure surveys by representatives of the Environmental Management Bureau (EMB) and the company that had agreed to receive the oily waste, the barge, laden with approximately 750 tonnes of oily waste contained in sacks, had departed for Lugait on 13 October 2006 under the tow of a tug and that after discharging its cargo in Lugait the tug/barge combination had returned to Guimaras Island.

3.3.49 The Committee noted that the same tug/barge combination had subsequently been used to transport a further 750 tonnes of oily waste and that, following a pre-departure survey by MARINA and the company receiving the waste, it had departed for Lugait on 19 November. It was noted that on 20 November, despite there having been no adverse weather forecast, the tug and barge had encountered heavy seas and that, since there was no immediate area available to take shelter, the crew of the tug had decided to continue to head for Lugait. It was noted that on the night of 20 November the barge had started listing and taking in seawater and that the tug master had ordered his crew to cut the towline, but that in the event the towline had parted and the barge had sunk in about 300 metres of water, some three nautical miles off the coast of Misamis Occidental. It was also noted that when the tug had returned to the location of the sinking the following day it had recovered nothing and had not detected oil pollution in the area.

3.3.50 The Committee noted that the owners of the barge had stated that, but for the need to transport the oily debris from Guimaras Island to Lugait, the barge would not have encountered the rough seas which were the cause of the loss and that there was a direct causal link between the contamination caused by the spill from the *Solar 1* and the loss of the barge, since the barge was part of the clean-up measures to prevent or minimise pollution damage. It was also noted that the owners had maintained that they were not to blame for the loss of the barge, that proper steps had been taken to examine the weather and sea conditions before the tug and barge proceeded to Lugait, that they had at all times acted reasonably in undertaking the tow and that the loss of the barge was a direct cause of the company's involvement in the clean-up operation and was not from a new cause. It was further noted that the owners of the barge had referred to the 1992 Fund Claims Manual and, in particular, the statement that 'loss or damage caused by reasonable measures to prevent or minimise pollution damage was also compensated' and that such measures should include operations undertaken at sea.

3.3.51 It was noted that the owners of the barge had also made the point that had the barge not sunk the Fund would have been liable to pay for the costs of treating the 750 tonnes of oily waste, which would have been more than the claim for the loss of the barge, and that the Fund would therefore unjustly benefit at the expense of the barge owner if it were not compensated for the loss of the barge.

3.3.52 The Committee noted that the Director was of the opinion that the damage caused by the sinking of the barge could only be linked to the pollution caused by the *Solar 1* incident if it could be construed as 'further loss or damage caused by preventive measures' within the meaning of Article I, paragraph 6(b) of the 1992 Civil Liability Convention. It was noted that, since the text of that provision used the words 'caused by', in order for the damage to be admissible the claimant would have to demonstrate that at the time the preventive measure was taken there was a sufficiently close link of causation between the preventive measure and the further loss or damage that it allegedly caused and that for such a link to be established the claimant would at least have

to demonstrate that, at the time the preventive measure was taken, there was a significant likelihood that the barge laden with oily debris would sink during the voyage. It was noted that the Director was of the opinion that such likelihood did not at all exist and that the sinking of the barge had been due to unforeseen adverse weather conditions and therefore, in relation to the preventive measure of disposing of the oily debris, merely coincidental. The Committee noted that there was not, in the Director's opinion, a sufficiently close link of causation between the relevant preventive measure, ie the decision to transport oily debris by barge from Guimaras Island to Lugait, and the loss suffered by the sinking of the barge. It was also noted that the Director accepted that 'but for' the need to transport the oily debris from Guimaras Island to Lugait, the barge would not have encountered rough seas which had been the cause of the loss, but that in his view the need to transport oily debris by barge was, in legal terminology *condicio sine qua non* for the damage, but not the legally relevant cause. It was noted that on these grounds the Director proposed that the claim be rejected.

3.3.53 Some delegations were of the opinion that rejecting the claim on the basis of a lack of link of causation might be too severe and that the claim should be rejected on the basis that the claimant was not the registered owner of the barge. The Director stated that he did not accept that the 'but for' test submitted by the claimant was sufficient to demonstrate a sufficiently close link of causation and was of the opinion that this would be the case in most legal systems.

3.3.54 Most delegations supported the Director's analysis and agreed that there was not a sufficiently close link of causation between the preventive measures and the damage resulting from the sinking of the barge and that therefore the claim should be rejected. They further pointed out that rejecting the claim only on the ownership argument would create an opportunity for this claimant to try and recover this claim at a later date by providing evidence of ownership.

3.3.55 The Executive Committee decided that the claim for the loss of the barge was not admissible.

*OPERATION TO REMOVE THE REMAINING CARGO FROM THE VESSEL*

3.3.56 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.

3.3.57 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.

3.3.58 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.

3.3.59 The Committee recalled 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 operation had been carried out in March 2007. It was noted that only nine tonnes of oil had been found to be remaining in the wreck, that this oil had been successfully removed without any spillage and that the total cost of the operation was expected to be around US$6.0 million (£3.0 million).

3.4 *Shosei Maru*

3.4.1 The Executive Committee took note of the information regarding the *Shosei Maru* incident as set out in document 92FUND/EXC.37/7/Rev.1.

*THE INCIDENT*

3.4.2 The Committee recalled that on 28 November 2006, the Japanese tanker *Shosei Maru* (153 GT) had collided with the Korean cargo vessel *Trust Busan* (4 690 GT) three kilometres off Teshima, in the Seto Inland Sea in Japan. It was recalled 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.

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

3.4.4 It was also recalled that the 1992 Fund and the Japan P&I Club had appointed a team of Japanese surveyors to monitor the clean-up operations and investigate the potential impact of the pollution on fisheries and mariculture.

*CLEAN-UP OPERATIONS*

3.4.5 It was recalled 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.

3.4.6 It was also recalled that onshore 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 recalled that several oil-stained piers, wharves and seawalls had been cleaned by means of high-pressure hot water guns using chemical solvents. The Committee recalled that the clean-up operations had been concluded by 31 January 2007.

*IMPACT OF THE SPILL*

3.4.7 It was recalled 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 recalled 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 destroyed and replaced.

*APPLICABILITY OF THE 1992 CONVENTIONS AND STOPIA*

3.4.8 The Committee recalled 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).

3.4.9 It was recalled that the Japan P&I Club had informed the 1992 Fund that since the vessel was only engaged in coastal trade, it was not insured through the pooling arrangements of the International Group of P&I Clubs, that the owner of the *Shosei Maru* had not given its written consent for the vessel to be entered into the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006 and that the ship had not been entered into STOPIA. The Committee recalled that as a consequence, if the total amount of damages exceeded the 1992 Civil Liability Convention, the

Fund would be liable to pay the difference between the total assessed amount and the limit under the Convention.

*CLAIMS FOR COMPENSATION*

3.4.10 The Committee noted that as at 16 May 2007 claims totalling ¥652 036 624 (£2.7 million) in respect of the costs of clean up and preventive measures had been received by the Japan P&I Club and the 1992 Fund and that six of these claims, totalling ¥5 435 708 (£23 000), had been settled by the Japan P&I Club at ¥5 339 820 (£22 000).

3.4.11 It was noted that a number of fisheries associations operating in the area affected by the spill had submitted claims totaling ¥304 385 363 (£1 275 000) for loss and damage to seaweed farms, loss and damage to other fishing operations and costs for counter-measures against the contamination. It was noted that these claims were being assessed by the experts engaged by the Japan P&I Club and the 1992 Fund.

3.4.12 The Committee noted that further claims were expected in the clean up and fisheries sectors . It was noted that since the Executive Committee's last session in March 2007, it had become clear that the total amount claimed for damages admissible for compensation arising out of this incident was likely to exceed the limitation amount applicable to the *Shosei Maru* under the 1992 Civil Liability Convention, ie 4.51 million SDR (£3.4 million).

## 4 Any other business

4.1 The Executive Committee took note of the information regarding the Small Tanker Oil Pollution Indemnification Agreement (STOPIA) 2006, as set out in document 92FUND/EXC.37/8, submitted by the International Group of P&I Clubs.

4.2 The Committee recalled that STOPIA had taken effect as from 20 February 2006. It was recalled that STOPIA was a contract between owners of small tankers to increase, on a voluntary basis, the limitation amount applicable to the tanker under the 1992 Civil Liability Convention and that the contract applied to pollution damage in States in which the 1992 Fund Convention was in force. It was also recalled that STOPIA provided that all tankers would be considered a 'Relevant Ship' if they were of 29 548 tons or less and were entered in one of the P&I Clubs which were members of the International Group of P&I Clubs and/or reinsured through the pooling arrangements of the International Group (cf document 92FUND/A.ES.10/13, Annex IV, Clause III (B) of STOPIA and the application to 'Relevant Ship').

4.3 It was noted that vessels that were insured with underwriters which were not members of the International Group, but which had reinsurance with the Group, were therefore also covered by STOPIA.

4.4 It was also noted that the Clubs in the International Group had amended their rules so that vessels of up to 29 548 GT that were reinsured through the Group's pooling arrangements were automatically entered in STOPIA.

4.5 It was noted that the effect of STOPIA was that the maximum amount of compensation payable by owners of all ships of 29 548 GT or less was 20 million SDR.

4.6 The Executive Committee noted that approximately 95% by tonnage of the world's tanker fleet were entered in the International Group of P&I Clubs, the vast majority of which were entered in STOPIA. It was noted that the International Group was required to notify the 1992 Fund every six months of the names of all ships entered in each International Group Club which were also entered in STOPIA, in accordance with Article 9 of the Memorandum of Understanding between the Funds and the International Group of P&I Clubs regarding joint claims settlement procedures and the undertakings by the Clubs in respect of the new voluntary arrangements of STOPIA and

TOPIA. It was noted that the list of such vessels sent by the International Group to the Fund Secretariat in the first half of 2007 contained 5 680 STOPIA tankers entered in International Group Clubs. It was also noted that the list also included a number of Japanese coastal tankers that were entered in the Japan Ship Owners' Mutual Protection & Indemnity Association (Japan P&I Club - a member Club of the International Group) but that, even though they were not automatically entered in STOPIA since they were not covered by the International Group's pooling arrangements, they had voluntarily agreed to enter in STOPIA.

4.7 It was noted that STOPIA had entered into force in the knowledge that a specific, and small, number of tankers entered in the International Group of P&I Clubs would not be entered in STOPIA by virtue of the fact that they were not reinsured through the Group's pooling arrangements and did not therefore have the benefit of insurance cover up to the higher limits provided by these pooling arrangements. It was also noted that the introduction to the text of STOPIA submitted to and considered by the 1992 and Supplementary Fund Assemblies in February/March 2006 (cf document 92FUND/A.ES.10/13) stated that a small number of tankers were insured within the International Group but outside the International Group's pooling arrangements, in particular certain Japanese coastal tankers.

4.8 The Committee noted that the situation with regard to STOPIA and such Japanese coastal tankers entered in the Japan P&I Club was as follows:

| | **Number of Japanese coastal Tankers entered in Japan P&I Club** | **Number of such vessels entered in STOPIA** | **% of total** |
|---|---|---|---|
| 2007/2008 | 617 | 251 | 41 |
| 2006/2007 | 645 | 251 | 39 |
| 2005/2006 | 651 | 193 | 30 |

4.9 It was noted that there had been a continuous decrease over recent years in the number of coastal tankers operating in Japanese waters due to the prolonged recession of coastal shipping in Japan (1 509 in 1999 to 1 135 in 2005), which was reflected in the decrease in the number of coastal Japanese tankers entered in the Japan P&I Club and that at the same time, there were a number of such vessels that had third party liability cover outside the International Group system (and therefore outside of STOPIA) from the commercial market.

4.10 The Committee noted that the majority of those coastal tankers that were entered in the Japan P&I Club were, however, small vessels of less than 200 GT and that the situation with regard to the Japanese coastal tankers currently entered in the Japan P&I Club of more than 200 GT was as follows:

| | **Coastal Tankers > than 200GT in Japan P&I Club** | **Entered in STOPIA** | **% entered in STOPIA** |
|---|---|---|---|
| 2007/2008 | 182 | 123 | 68 |

4.11 It was noted that there were also a much smaller number of tankers engaged in coastal trade that were entered with one other Club in the International Group that were not reinsured through the Group's pooling arrangements and, therefore, were also not automatically entered in STOPIA, as follows:

The Steamship Mutual Underwriting Association (Bermuda) Limited: 12 tankers.

4.12 The Committee noted that, in summary, the total number of tankers entered in the International Group of P&I Clubs and/or reinsured through the Group's pooling arrangements and automatically entered in STOPIA, and of those that were entered in one of the Group Clubs and not entered in STOPIA because they were not reinsured through the pooling arrangements, was as follows:

| | **Number of tankers entered in STOPIA** | **Number of tankers not entered in STOPIA** | **Total** | **% of total entered in STOPIA** |
|---|---|---|---|---|
| 2007/08 | 5680 | 378 | 6058 | 93.8 |

4.13 It was noted that, as could be seen from the increase in the number of coastal tankers entered in the Japan P&I Club and entered in STOPIA between 2005/06 – 2007/08, the Clubs in the International Group were continuously encouraging those entered tanker members that were not reinsured through the Group's pooling arrangements to enter STOPIA, that the Steamship Mutual Underwriting Association (Bermuda) Limited had also encouraged four such tanker owners to enter STOPIA last year and that this encouragement was continuous and on-going.

## 5 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.37/WP.1, was adopted, subject to certain amendments.