INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
38th session
Agenda item 6

92FUND/EXC.38/12
19 October 2007
Original: ENGLISH

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

(held on 15 and 19 October 2007)

Chairman: Mr John Gillies (Australia)

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

Opening of the session

In opening the session, the Chairman informed the Executive Committee that since its June 2007 session the Deputy Director/Technical Advisor, Mr Joe Nichols, had retired from his post within the Secretariat. On behalf of the Committee, the Chairman expressed appreciation for Mr Nichols' outstanding contribution to the work of the Executive Committee over the years and wished him well in his retirement.

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 92FUND/EXC.38/1.

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)).

2.2 The Executive Committee noted that, in accordance with Rule 10 of the Assembly's Rules of Procedure, at its 12th session the 1992 Fund Assembly had appointed the delegations of China, Colombia, Estonia, Ghana and United Kingdom 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.38/2/1 that all except one of the above-mentioned members of the Executive Committee had submitted credentials which were in order. The Committee reported orally that the credentials in respect of Cameroon had been accepted provisionally pending correction of certain deficiencies[<1>].

2.5 The following Member States were represented as observers:

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

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

Peru 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)
Conference of Peripheral Maritime Regions (CPMR)
European Chemical Industry Council (CEFIC)
International Association of Classification Societies Ltd (IACS)
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)
International Union of Marine Insurance (IUMI)
Oil Companies International Marine Forum (OCIMF)

<1> Note by the Director: These deficiencies had not been rectified when the final version of this Record of Decisions was issued.

3 Incidents involving the 1992 Fund

3.1 Overview

The Executive Committee took note of document 92FUND/EXC.38/3, which contained summaries of the situation in respect of all eight incidents dealt with by the 1992 Fund since the Committee's 34th session, held in October 2006.

3.1.1 Incident in Germany

3.1.2 The Executive Committee took note of the information contained in document 92FUND/EXC.38/4 in respect of an incident in Germany.

The incident

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

Legal actions

3.1.4 It was recalled that in July 1998 the Federal Republic of Germany had brought legal actions in the Court of first instance in Flensburg against the owner of the Russian tanker *Kuzbass* (88 692 GT) and his insurer, the West of England Ship Owners' Mutual Insurance Association (Luxembourg) (West of England Club), claiming compensation for the cost of the clean-up operations for an amount of DM2.6 million or €1.3 million (£890 000). It was also recalled that the 1992 Fund had been notified in November 1998 of the legal actions and that in August 1999 the 1992 Fund had intervened in the proceedings in order to protect its interests. It was further recalled that in order to prevent their claims against the Fund becoming time-barred at the expiry of the six-year period from the date of the incident, the German authorities had taken legal action against the 1992 Fund in June 2002.

3.1.5 The Executive Committee recalled that in December 2002 the Court of first instance had rendered a part-judgement holding that the owner of the *Kuzbass* and the West of England Club were jointly and severally liable for the pollution damage. It was recalled, however, that the Court had acknowledged that the German authorities had failed to provide conclusive evidence that the *Kuzbass* was the vessel responsible, but had considered that the circumstantial evidence pointed overwhelmingly to that conclusion.

3.1.6 It was recalled that the shipowner and the West of England Club had appealed against the judgement arguing that the *Kuzbass* could not have reached the alleged dumping area in the time available, that the chemical analyses of the pollution samples did not provide conclusive proof that the oil had originated from the *Kuzbass* and that there had been three other vessels in the southern North Sea at the relevant time that had previously carried cargoes of Libyan crude oil and which could therefore have caused the pollution.

3.1.7 The Committee recalled that at a hearing in December 2004, the Schleswig-Holstein Appeal Court had indicated that on the basis of the evidence submitted to date, it was far from convinced that the *Kuzbass* had been the source of the pollution, drawing particular attention to other potential ship sources that the German authorities had failed to investigate. It was also recalled that the Court had stated that on the basis of the documentation submitted to date, the prospects of the shipowner/West of England Club succeeding in the appeal were significantly better than those of the German Government and had strongly recommended that the parties reached an out-of-court settlement to the effect that the recoverable costs would be shared between the German Government and the shipowner/West of England Club on a 92%-8% basis.

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

3.1.9 It was recalled that at its March 2005 session the Executive Committee had decided to authorise the Director to seek an out-of-court settlement with all other parties involved (ie, the Federal Republic of Germany, the shipowner and the West of England Club) and conclude such a settlement on behalf of the 1992 Fund, provided the amount to be paid by the shipowner and the West of England Club was increased above the 18% originally offered. It was also recalled that the shipowner and the West of England Club had subsequently increased their offer to 20% and that the Director had accepted the proposed settlement offer.

3.1.10 The Committee noted that in January 2007 the German authorities had provided further documentation in support of their claim and that, following a meeting between the authorities and the 1992 Fund in June 2007, the claim had been settled for DM2 513 055 or €1 284 905 (£870 000).

3.1.11 It was noted that negotiations with the German Government were ongoing in respect of the interest to be paid by the 1992 Fund and of the costs incurred by the German Government in respect of the proceedings before the District Court in Flensburg and the Schleswig-Holstein Court of Appeal. It was also noted that it was expected that a settlement would be reached in the near future, following which all legal actions by the German Government against the shipowner, the West of England Club and the 1992 Fund would be withdrawn.

3.1.12 One delegation enquired whether the 1992 Fund would pay compensation for legal costs incurred in cases of unsuccessful litigation. The Director stated that the normal practice followed by the Fund was to compensate for reasonable legal costs incurred by the claimant to pursue its claim in court.

3.2 *Erika*

3.2.1 The Executive Committee took note of the developments regarding the *Erika* incident as set out in documents 92FUND/EXC.38/5 and 92FUND/EXC.38/5/Add.1.

CLAIMS SITUATION

3.2.2 The Executive Committee noted that as at 30 August 2007, 6 998 claims for compensation had been submitted for a total of €388.5 million (£264 million), including a claim for a total of €179 million (£121.8 million) by the French State for clean-up operations carried out as a result of the incident. It was noted that 99.7% of the claims had been assessed and that some 1 048 claims, totalling €32 million (£21.7 million), had been rejected. It was also noted that payments of compensation had been made in respect of 5 751 claims for a total of €129 million (£85.1 million), out of which Steamship Mutual had paid €12.8 million (£8.6 million) and the 1992 Fund €116.2 million (£76.5 million).

PAYMENTS TO THE FRENCH STATE

3.2.3 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.

3.2.4 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 and October 2006 the 1992 Fund had made payments to the French State of €15 million (£10.3 million) and €10 million (£6.7 million) respectively, on account towards the costs incurred by the French authorities in the clean-up response.

3.2.5 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, including the criminal trial, whether a further payment could be made to the French State.

CLAIMS BY SALT PRODUCERS AND A CO-OPERATIVE IN GUÉRANDE

Claims by salt producers

3.2.6 It was recalled that in May 2007 the Civil Court in Saint Nazaire had rendered a judgement 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.

3.2.7 The Committee recalled 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 and 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. It was recalled that, for these reasons the Court had held that the decision not to produce salt in 2000 had been a reasonable measure to prevent or minimise pollution damage.

3.2.8 It was also recalled 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 had still been carried out in 2001 on rocky shores nearby. It was recalled, 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 recalled 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.

3.2.9 The Committee recalled that the Court had granted the salt producers the amount of €1 494 257 (£1 016 000) and had ordered the provisional execution of the judgement.

3.2.10 The Committee noted that in June 2007 the Director, together with the 1992 Fund's French lawyer, had examined the judgement in order to decide whether the 1992 Fund should appeal.

3.2.11 It was noted that the Director had considered that there was no matter of principle involved in the dispute since the Fund had agreed that the spill had caused pollution damage in Guérande and that the Court had arrived at a balanced judgement by considering that the costs incurred to restore the salt ponds in 2001 were an unavoidable consequence of the decision not to produce salt in 2000, which in the Court's view had been a reasonable decision under the circumstances, and by reducing the compensation amounts by 50% to take into account the impact of the exceptional rainfall in 2001. It was noted that the Director had also considered that the salt producers had informed the 1992 Fund that they were prepared not to appeal against the judgement provided the Fund took the same decision. The Committee noted that the Director had therefore decided that

the best interest of the 1992 Fund would be protected by agreeing with the salt producers that the parties would not appeal against these judgements.

Claim by a Co-operative of salt producers

3.2.12 It was recalled that in May 2007 the Civil Court in Saint Nazaire had rendered a judgement 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.

3.2.13 It was recalled 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 recalled 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 recalled that the Court had decided 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.

3.2.14 The Committee recalled 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.

3.2.15 The Committee recalled that the court had agreed with the 1992 Fund and had rejected the claim for commercial loss in the amount of €7.1 million (£4.8 million), but that the court had granted the claim for the campaign to counteract the loss of image for some €378 000 (£257 000). It was noted that the Co-operative of salt producers had appealed against the judgement.

LEGAL PROCEEDINGS

3.2.16 It was noted that 420 legal actions against the shipowner, Steamship Mutual and the 1992 Fund had been taken by 796 claimants, that by 30 August 2007 the courts had rendered 113 judgements in actions taken by 250 claimants and that 64 legal actions by 150 claimants were pending. It was also noted that the total amount claimed in the pending actions, excluding the claims by the French State and Total SA, was €57.7 million (£39 million).

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

LEGAL PROCEEDINGS BY THE COMMUNE DE MESQUER AGAINST TOTAL

3.2.18 It was recalled that one delegation had informed the Committee at its June 2007 session 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. It was recalled that the delegation had asked the Director to explain what impact, if any, these legal proceedings would have on the 1992 Fund. It was also recalled that the French delegation had pointed out that the legal action had been brought by a local authority and that the French Government was not party to these proceedings and 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.

3.2.19 It was also recalled that the Director had stated that he would investigate the matter and report to the Executive Committee at its next session in October 2007.

Developments since the June 2007 session

3.2.20 The Committee noted that the 1992 Fund's French lawyer had investigated the matter and had informed the Director that the French Supreme Court had referred three questions to the European Court of Justice for an opinion, namely:

- Whether the fuel oil transported as cargo on board the *Erika* was in fact a residue under European law.

- Whether a cargo of fuel oil that accidentally escaped from a ship could, since it has been mixed with seawater and sediments, be construed as a residue under European law.

- If the cargo on board the *Erika* was not a residue but became a residue after accidentally escaping from the ship, would the companies of the Total group be considered responsible for the residues even though the cargo was being transported by a third party?

3.2.21 It was noted that in the Director's view it was unlikely that the European Court of Justice would find that the cargo on board *Erika* was not persistent oil and that therefore the Court's opinion was not likely to have an effect on the applicability of the 1992 Civil Liability and Fund Conventions.

3.2.22 It was also noted that the 1992 Fund was following these legal proceedings and that the Director would inform the Executive Committee of its outcome and of any consequences it might have for the 1992 Fund.

Considerations by the Executive Committee

3.2.23 One delegation requested a clarification from the Secretariat as to whether, if the European Court of Justice were to consider that the cargo on board the *Erika* was a residue, that finding would make the cargo owner liable and whether this decision would be in contravention of the 1992 Civil Liability Convention, which does not allow a direct liability of the cargo owner.

3.2.24 The Secretariat replied that if the cargo owner were found to be in breach of European Union law regarding rules for the treatment and manipulation of residues, that might give grounds, under European Union law, for the 1992 Fund to commence a recourse action against the owner of the cargo on board the *Erika*.

3.2.25 The French delegation stated that the position of the French State was that the oil transported by the *Erika* had become a residue only when it had escaped from the ship and that it hoped that the European Court of Justice would arrive at the same conclusion.

3.2.26 Another delegation enquired whether it was known when the question had been referred to the European Court of Justice. That delegation stated that usually information on cases brought before the European Court of Justice was sent to the European Union Member States in order to give the Member States the opportunity to express an opinion on the questions under consideration.

3.2.27 The Director agreed to investigate this issue and inform the 1992 Fund Member States accordingly.

COURT JUDGEMENTS IN RESPECT OF CLAIMS AGAINST THE 1992 FUND

Claim by three salt producers in Noirmoutier

3.2.28 The Committee recalled that claims for lost salt production for the 2000 and 2001 seasons, caused by the imposed ban on water intake, had also been received from producers in Noirmoutier. It was recalled that the 1992 Fund and Steamship Mutual had considered that salt production had been possible in 2000, but that the maximum yield would have been 30% of that expected for the

year and that compensation payments had been made to the salt producers for the outstanding 70%. It was also recalled that the 1992 Fund and Steamship Mutual had rejected the claim for losses in 2001. It was noted that 80 producers had accepted the Fund's assessment whereas three had pursued claims in court claiming losses of €40 869.18 (£27 800) for the 2000 session and €25 847.25 (£17 500) for the 2001 session.

3.2.29 The Committee noted that in a judgement rendered in June 2007 the Civil Court of Sables d'Olonne had rejected the claims by the three salt producers in Noirmoutier. It was noted that, with regard to the claim for the 2000 season, the Court had stated that the three producers had settled the claims by signing a full and final settlement agreement which was a binding document between the parties. With regard to the claim for the 2001 season, it was noted that the Court had stated that the salt producers had not presented any evidence in support of their allegations, that they had not adequately maintained the salt ponds in 2000 and that a report from an expert submitted by the 1992 Fund and Steamship Mutual had shown the impact that the exceptional rainfall in 2001 had had on the salinity of the salt ponds.

Claim by the owner of a restaurant

3.2.30 The Committee noted that the owner of a restaurant in Guidel-Plage had submitted a claim for €43 617 (£30 000) for losses in 2000 and €107 265 (£73 000) for losses in 2001. It was noted that the 1992 Fund had assessed the losses in 2000 at €29 039 (£20 000) but had rejected the claim for 2001 because, in the Fund's view, there was not a sufficient link of causation between the claimed losses in 2001 and the *Erika* incident. It was noted that the claimant had not agreed with the assessments and had brought proceedings before the Commercial Court in Lorient.

3.2.31 It was noted that in a judgement rendered in July 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. It was also noted that the Court had considered that the *Erika* incident had not had a significant impact on the 2001 tourism season since, according to the studies carried out, the results of 2001 had been the consequence of factors unrelated to the oil spill. The Committee noted that the Court had therefore adopted 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.

Claim by the owner of a tourist train

3.2.32 The Committee noted that the owner of a company managing tourist trains in Carnac, Quiberon and Vannes had submitted a claim for €69 546 (£47 000) for losses in 2000 and €69 625 (£47 000) for losses in 2001 and that the 1992 Fund had assessed the losses in 2000 at €67 291 (£45 800) but had rejected the claim for 2001 because, in the Fund's view, there was not a sufficient link of causation between the claimed losses in 2001 and the *Erika* incident. It was noted that the claimant had not agreed with the assessments and had brought proceedings before the Commercial Court in Lorient.

3.2.33 The Committee noted that in a judgement rendered in September 2007 the Commercial Court in Lorient had stated that the claimant had not established a sufficient link of causation between the loss of income and the *Erika* incident and that the results of 2001 had been the consequence of factors unrelated to the oil spill. It was noted that the Court had therefore adopted the Fund's views on the absence of a link of causation and had rejected the claim. The Committee noted that so far the claimant had not appealed against the judgement.

Claim by a manufacturer of high pressure cleaning equipment for oyster producers

3.2.34 It was noted that the manufacturer of high pressure cleaning equipment for oyster producers had submitted a claim for €201 150 (£136 900) for losses suffered in 2000 as a result of the *Erika* incident and that the 1992 Fund had assessed the claim at €52 927 (£36 000). It was also noted that the claimant had not agreed with the assessments and had brought proceedings before the Commercial Court in Lorient.

3.2.35 The Committee noted that, in a judgement rendered in September 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. It was however noted that the Court, taking into account that the claimant had experienced financial difficulties prior to the *Erika* incident and considering that the manufacturer had failed to establish that there was a link of causation between the loss and the incident, had held that the claimant had not proved to have suffered losses beyond the loss of income assessed by the Fund. The Committee noted that when this document was issued, the claimant had not appealed against the judgement.

3.2.36 One delegation expressed satisfaction with the fact that even though the French courts had sometimes made the statement that they were not bound by the 1992 Fund's criteria for admissibility of claims, the French courts had, in the great majority of cases, agreed with the Fund's assessment of the claims.

3.3 *Slops*

3.3.1 The Executive Committee took note of the developments regarding the *Slops* incident as set out in document 92FUND/EXC.38/6.

3.3.2 It was recalled that the *Slops*, although originally designed and constructed for the carriage of oil in bulk as cargo, had undergone a major conversion, including the removal of its propeller and deactivation of its engine, since when it had remained permanently at anchor and used exclusively as a waste oil storage and processing unit.

3.3.3 The Committee recalled that at its July 2000 session it had decided that the floating waste oil reception facility *Slops* should not be considered a 'ship' for the purpose of the 1992 Civil Liability Convention and the 1992 Fund Convention and that these Conventions did not apply to this incident (document 92FUND/EXC.8/8, paragraph 4.3.8).

3.3.4 The Committee recalled that in February 2002, two Greek companies had taken legal actions in the Court of first instance in Piraeus against the registered owner of the *Slops* and the 1992 Fund, claiming compensation for costs of clean-up operations and preventive measures for €1 536 528 (£1.0 million) and €786 832 (£530 000) plus interest, respectively. It was recalled that the companies had alleged that they had been instructed by the owner of the *Slops* to carry out clean-up operations and to take preventive measures in response to the oil spill and that they had requested the owner of the *Slops* to pay the above-mentioned costs but that he had failed to do so.

3.3.5 Concerning the actions against the 1992 Fund, it was recalled that the Court had held in its judgement that the *Slops* fell within the definition of 'ship' laid down in the 1992 Civil Liability Convention and the 1992 Fund Convention. It was recalled that the Court had ordered the 1992 Fund to pay the companies €1 536 528 (£1.0 million) and €786 832 (£530 000) respectively, ie the amounts claimed, plus legal interest and costs. The Committee recalled that the Fund had appealed this decision to the Greek Court of Appeal.

3.3.6 It was recalled that the Court of Appeal had rendered its judgement on 16 February 2004, holding that the *Slops* did not meet the criteria required by the 1992 Civil Liability Convention and the 1992 Fund Convention and rejecting the claims. It was recalled that the Court had interpreted the word 'ship' as defined in Article I.1 of the 1992 Civil Liability Convention as a seaborne unit which carried oil from place A to place B. It was also recalled that the claimants had appealed this decision to the Greek Supreme Court.

3.3.7 It was recalled that the Supreme Court had issued a judgement in June 2006, holding that at the time of the incident the *Slops* should be regarded a 'ship' as defined in the 1992 Conventions as it had the character of a seaborne craft which, following its modification into a floating separating unit, stored oil products in bulk and, furthermore, it had the ability to move by towing with a consequent pollution risk without it being necessary for the incident to take place during the carriage of the oil in bulk. It was also recalled that the Supreme Court, having decided that the 1992 Conventions were applicable to the incident, had held that the case be referred back to the Court of Appeal to examine the merits of the substance of the dispute ie the quantum of the claim, etc.

3.3.8 The Committee noted that in light of the judgement by the Greek Supreme Court, the Director had assessed the claim with the assistance of the International Tanker Owners Pollution Federation Limited (ITOPF), that the claimants had submitted documents in respect of costs totalling some US$2 536 419 (£1.3 million) and that the claim had been provisionally assessed at US$1 308 778 (£0.7 million). It was noted that a hearing at the Greek Court of Appeal had taken place in October 2007, at which the Fund was asked to submit ancillary pleadings in respect of its appeal.

3.3.9 It was noted that the Director had written to the Hellenic Coastguard, who had supervised the response activities, requesting them to provide details of the response activities in order to assist with the assessment of the above claims.

3.3.10 The Committee noted that, although the claimants had maintained that the owner of the *Slops* had no assets apart from the *Slops*, which had been destroyed in the fire at the time of the incident and did not even have scrap value, the Director was investigating the possibility of recovering any compensation paid to claimants for damage arising from the incident from the owner of the *Slops*, who is liable under Article III, paragraph 1, of the 1992 Civil Liability Convention. It was noted that the Director was also investigating the possibility of recovering from the Greek authorities, which had allowed the *Slops* to operate within Greek waters without insurance, possibly in contravention with Article VII, paragraph 1, of the 1992 Civil Liability Convention.

3.3.11 The Greek delegation stated that under Greek legislation that had entered into force in 2001 any coastal oil tanker which was actually carrying less than 2 000 tons of persistent oil as cargo, as well as any Greek-registered Floating Storage Facilities, permanent or not, within Greek territorial waters, irrespective of the quantity of persistent oil stored in bulk on board, were required to maintain adequate insurance or other financial guarantee for oil pollution damage.

3.3.12 The Greek delegation also stated that given the possible intention of the 1992 Fund of commencing legal action against the Hellenic Republic, the Greek Government had sought legal advice by the competent legal office of the State. The Committee noted that the legal opinion had concluded that the competent Greek Authorities had not been called upon to intervene in the legal proceedings which had been initiated by the two Greek anti-pollution companies in 2002 and that the Hellenic Republic had no legitimate interest to intervene in such legal proceedings. It was noted that the legal opinion stated that at the time of the *Slops* incident there was no requirement imposed by law that Floating Storage Facilities should have a compulsory insurance. It was further noted that according to the legal opinion the legal uncertainty had been clarified in the legal proceedings which ended with the judgement rendered by the Greek Supreme Court which, according to Article 7.6 of the 1992 Fund Convention, was binding for the parties involved in such proceedings, namely the 1992 Fund and the two anti-pollution companies, but not for the Greek Government, since it was not a party to these proceedings. The Committee noted that according to the legal opinion it could not reasonably be claimed nor justified that the competent Greek authorities had any liability for the *Slops* incident and the consequent pollution arising thereof and that such a claim could not become enforceable by law, either. It was noted that the legal opinion also underlined that, by virtue of Article 6 of the 1992 Fund, no action could be brought after six years from the date of the incident which had caused the damage.

3.3.13 The Director stated that the 1992 Fund was complying with its obligation to investigate the circumstances of the incident and that if the *Slops* had been found to be a ship under the 1992 Civil Liability Convention, the Greek State could have been in breach of its obligations

under that convention. The Director stated that the 1992 Fund would continue the investigation and would report to the Committee with its conclusion.

3.3.14 It was noted that in August 2007 the Fund had received a letter from a third Greek company requesting compensation for a sum of US$985 000 (£500 000) in respect of preventive measures carried out in response to the incident and that further information had been requested from this claimant.

3.4 *Prestige*

3.4.1 The Executive Committee took note of the information regarding the *Prestige* incident set out in documents 92FUND/EXC.38/7 submitted by the Director and 92FUND/EXC.38/7/1 submitted by Spain.

CLAIMS FOR COMPENSATION

3.4.2 The Committee took note of the claims situation as at 30 August 2007, as set out in document 92FUND/EXC.38/7, section 2.

CLAIMS BY THE SPANISH GOVERNMENT

3.4.3 The Committee noted that as at 4 October 2007 the Spanish Government had submitted 11 claims totalling €673.4 million (£455.9 million), relating 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), 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.

3.4.4 It was 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 (£19 million) and Asturias for €3.3 million (£2.2 million).

3.4.5 The Committee noted that in October 2007 the Spanish Government had submitted a claim for the compensation payments made by the Government to individual claimants as assessed by the Consorcio de Compensación de Seguros, totalling €19 066 946 (£12.9 million), bringing the total amount claimed by the Spanish Government to €673.4 million (£455.9 million). It was also noted that several of those claims had been assessed with the co-operation of experts from the 1992 Fund.

3.4.6 It was further noted that the Spanish Government had indicated that further adjustments to claims would be made in respect of the cost for treatment and disposal of oily residues collected during the clean-up operations

Removal of oil from the wreck

3.4.7 It was recalled that the claim for the removal of the oil from the wreck, initially for €109.2 million (£73.9 million), had been reduced to €24.2 million (£16.4 million) to take into account funding obtained from another source.

3.4.8 It was also 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 (cf Annual Report 2006, pages 111-114). It was noted that, in accordance with the Executive Committee's decision, an assessment was being carried out of the admissible costs of activities in connection with 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.

Progress on the assessment

3.4.9 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 the Government's claims, 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.

3.4.10 It was recalled that in May 2007 a meeting had been held with representatives of the Spanish Government to discuss a provisional assessment 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). It was noted that as a result of the queries raised in this provisional assessment the Spanish Government had submitted further information, which was being analysed by the 1992 Fund's experts.

3.4.11 It was noted that the 1992 Fund had carried out a provisional assessment of the claim for the compensation payments made by the Government to the fisheries sector and that a meeting with representatives of the Spanish Government would take place in the near future.

3.4.12 The Committee also noted that in June 2007 the 1992 Fund had received further information from the Spanish Government regarding the amount of funding it had received from the European Union following the incident and that the Fund was examining the information provided and its bearing on the assessment of the claims submitted by the Spanish Government.

3.4.13 The Spanish delegation, in its presentation of document 92FUND/EXC.38/7/1, stated that the Spanish Government continued to co-operate with the experts from the IOPC Funds in the examination and analysis of the substantial documentation already submitted, providing further explanatory documentation and identifying, where appropriate, sources of funding by the European Union that the Spanish Government had received.

COURT ACTIONS IN SPAIN

3.4.14 The Committee noted that some 3 570 claims had been lodged in the legal proceedings before the Criminal Court in Corcubión (Spain), 597 of which involved persons having submitted claims directly to the London Club and 1992 Fund through the Claims Handling Office in La Coruña. It was noted that details of the claims made in 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 also noted that some 1 900 of these claims had been paid by the Spanish Government under the Royal Decrees or by the 1992 Fund through the Claims Handling Office in La Coruña, that a number of claimants who had been paid by the Spanish Government under the Royal Decrees had withdrawn their claims from the court proceedings and that it was expected that more claimants would withdraw their court actions for the same reason.

3.4.15 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. It was 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.

COURT ACTIONS IN FRANCE

3.4.16 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 (£88.7 million), including €67.7 million (£45.8 million) claimed by the Government. It was noted that a number of claimants had received compensation from the Fund and had undertaken to withdraw their court actions, but that as at 30 September 2007 only five actions had been officially withdrawn, bringing the number of actions to 223 and the total claimed amount to €127.5 million (£86.3 million).

COURT ACTIONS IN PORTUGAL

3.4.17 The Executive Committee recalled 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 its claim out of court, the Portuguese State had withdrawn its action in December 2006.

COURT ACTIONS IN UNITED STATES

Claim and counterclaim

3.4.18 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 to exceed US$1 000 million (£497 million), arguing that, *inter alia*, 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.

3.4.19 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 was caused in whole or in part by its own negligence. It was also recalled that ABS had made a counterclaim and requested 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. It was recalled that the New York Court had dismissed the counterclaim by ABS on the grounds that the Spanish State was entitled to sovereign immunity and that ABS had sought reconsideration by the Court or permission to appeal.

3.4.20 It was 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 also 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. It was further recalled 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. The Committee recalled that in September 2006 the Spanish State had requested that the ABS counterclaim be dismissed on the grounds that the Court lacked subject matter jurisdiction but noted that so far the New York Court had not taken any decision on this request.

ABS acting as an agent or servant of the shipowner

3.4.21 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.

3.4.22 In its presentation of document 92FUND/EXC.38/7/1, the Spanish delegation informed the Committee that the Spanish State had opposed the request by ABS, arguing that classification

societies could not be considered agents or servants of the shipowner under the 1992 Civil Liability Convention.

3.4.23 It was noted that the Court had not yet taken a decision on the request.

Discovery of e-mail communications

3.4.24 It was recalled 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 recalled that the judge had found that the State had failed either to preserve e-mail communications or to conduct a diligent search when ABS had first sought production of those communications. It was recalled that, finding that a search for the e-mail communications at that late date might be futile, the judge had invited ABS to make a request for the relief, remedy or sanction it deemed appropriate. It was noted that a request by the Spanish State that the judge should reconsider his decision had been denied but that the State had appealed.

3.4.25 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, requesting 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. It was noted that ABS had requested, in any event, recovery of its costs and fees associated with the dispute over the production of the e-mails.

3.4.26 It was noted that in June 2007 the New York Court had issued an order partly granting and partly denying ABS's motion. It was noted that the Court had awarded ABS its legal fees incurred in seeking to compel the production of the e-mails by the Spanish State and had ordered ABS to submit an account of the time spent and costs incurred in making its motion but that the Court had not dismissed the action by the Spanish State, nor any part thereof, as requested by ABS, finding that although the State had a duty to preserve the evidence and had breached that duty, there was no evidence that the State's actions were wilful, intentional, taken in bad faith or the result of gross negligence. It was also noted that the judge had not accepted ABS' position that negative inferences should be drawn from the failure of the Spanish State to produce the e-mails, finding that ABS had not proved that the missing e-mails were relevant to its case. It was noted that the Court had ordered the Spanish State to continue its search for the relevant e-mail records and to produce them, if found, to ABS on an ongoing basis. The Committee noted that the Spanish State had not appealed against this decision.

3.4.27 The Committee noted that ABS had filed a motion asking the judge to partially reconsider his decision but that the Spanish State had filed pleadings opposing that motion for reconsideration.

3.4.28 It was noted that in July 2007 ABS had filed a motion seeking an award of legal fees and costs incurred in making its motion to compel discovery, in the amount of $1.2 million (£600 000) but that the Spanish State had opposed that motion. The Committee noted that so far there had been no decision from the court in this respect.

3.4.29 The Spanish delegation, in its presentation of document 92FUND/EXC.38/7/1 stated that the Spanish State had already examined, gathered and produced all e-mail correspondence to ABS as required by the Court's order.

3.5 *Al Jaziah 1*

3.5.1 The Executive Committee took note of the information contained in document 92FUND/EXC.38/8 (cf document 71FUND/AC.22/12/1) concerning the *Al Jaziah 1* incident.

3.5.2 It was recalled that the *Al Jaziah 1* incident had occurred in the United Arab Emirates (UAE) and involved both the 1992 and the 1971 Funds. It was also recalled that the *Al Jaziah 1* had not been covered by any liability insurance, that claims totalling Dhs 7.9 million (£1.1 million) had been submitted to the Funds in relation to clean up and pollution prevention and that these claims had been settled and paid at Dhs 6.4 million (£870 000). The Committee further recalled that the Funds would not be required to make any further compensation payments.

3.5.3 It was recalled that, at their October 2002 sessions, the governing bodies of the 1992 and 1971 Funds had decided that the Funds should pursue recourse action against the shipowner.

3.5.4 The Executive Committee recalled that the Funds had commenced legal action in the Abu Dhabi Court of first instance against the shipowning company and its sole proprietor in January 2003, requesting that the defendants be ordered to pay Dhs 6.4 million (£870 000) to the Funds, the amount to be distributed equally between the 1992 Fund and the 1971 Fund.

3.5.5 It was recalled that in November 2003 the Abu Dhabi Court of first instance had issued a preliminary judgement appointing an expert to investigate the nature of the incident and the payments made by the Funds.

3.5.6 The Committee recalled that the expert had submitted his report to the Court in July 2006 and that the expert's report had confirmed the following:

- The incident had caused pollution damage to various parties within the Emirate of Abu Dhabi.
- The Funds had paid a total of Dhs 6.4 million (£870 000) in compensation to those affected by the pollution.
- The ship had not been registered as an oil tanker and its insurance policies had expired.
- The shipowner was liable for the damage caused by the incident.

3.5.7 It was recalled that the expert had appeared to suggest that the Funds had paid claims without scrutinising them. It was also recalled that the expert had made the point that there was gross negligence on the part of the UAE authorities in permitting the ship, which was not a tanker, to load a cargo of oil and allowing it to depart in bad weather. It was recalled that the expert had suggested that the lack of appropriate legislation in the UAE dealing with the licensing authority and loading facilities had contributed directly to the incident. It was further recalled that the expert had concluded that considering the lack of such legislation, the UAE authorities should be partly liable for paying compensation for the damage arising from this incident.

3.5.8 The Committee recalled that in September 2006 the Funds had submitted a memorandum to the Court which set out their comments on the expert's report. The Committee also recalled that the Funds had agreed with the main conclusions reached by the expert.

3.5.9 It was recalled that in the memorandum, the Funds had commented on the expert's view in relation to the payments made to claimants. It was further recalled that the Funds had explained that all claims had been assessed on the basis of the admissibility criteria established by the Funds' Member States. It was also recalled that the Funds had stated that the expert's opinion that the UAE authorities should be partly liable for this incident was incorrect since under the Conventions the shipowner had strict liability. It was recalled that the Funds had therefore requested the Court to hold the shipowner solely liable for the damage arising from this incident and to order the sole proprietor of the shipowning entity to pay the Funds Dhs 6.4 million (£870 000).

3.5.10 The Committee recalled that in October 2006 the shipowner had submitted a memorandum to the Court setting out his objections to the expert's findings, stating that the Abu Dhabi authorities should be responsible for at least 90% of the damages arising from the incident as they had

allowed an unauthorised ship to load an oil cargo and subsequently allowed the ship to depart in bad weather and that the expert's findings as regards the payments made by the Funds should be rejected as the expert had relied on photocopied documents to reach his conclusion.

3.5.11 It was noted that in November 2006, the Court had instructed the expert to submit a supplementary report addressing the issues raised by the shipowner and the Funds. It was also noted that between November 2006 and September 2007 the Court had adjourned the case six times as the expert had not submitted the report.

3.5.12 The Committee noted that in September 2007 the Funds had submitted pleadings to the Court setting out the work carried out by the Funds in order to assist the expert to complete the report and had requested the Court to instruct the expert to submit the report within a fixed time-frame. It was also noted that the Court had agreed with the Funds' request and had instructed the expert to submit the report by October 2007.

3.5.13 The Committee noted that there had been no developments on this issue at the time of the session.

3.6 *Solar 1*

3.6.1 The Executive Committee took note of the information regarding the *Solar 1* incident as set out in document 92FUND/EXC.38/9.

The Incident

3.6.2 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 recalled that, following an operation to remove the remaining oil from the wreck, it had been found that virtually the entire cargo had been spilled.

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

3.6.4 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.

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3.6.5 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 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 is the less.

3.6.6 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 2006 limit, payments to be made by the Shipowners' Club

within two weeks of being invoiced by the Fund.

Concerns expressed by the Shipowners' club

3.6.7 The Committee recalled that in October 2006 the Shipowners' Club had informed the 1992 Fund 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 Club's view, had caused or contributed to the pollution damage.

3.6.8 It was 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 and that the 1992 Fund would therefore be liable to pay any claims for reasonable costs of preventive measures even where the claimant's negligence might have caused or contributed to the pollution damage.

3.6.9 It was recalled that in May 2007, the Club had informed the Director that they had examined the issues of causation in relation to this incident and that the Club had decided not to continue to oppose claims by Petron Corporation under Article III.3 of the 1992 Civil Liability Convention. The Committee noted that in June 2007, the Club had reimbursed the Fund the amount of PHP118 Million (£1.25 million) paid by the Fund to Petron Corporation early in 2007.

Claims for compensation

3.6.10 The Committee took note of the claims situation as at 1 September 2007, as set out in document 92FUND/EXC.38/9, section 4.

3.6.11 One delegation stated that it was helpful to see the summary of the claims situation in a table as set out in document 92FUND/EXC.38/9, paragraph 4.1 so as to enable them to have a general view of the situation and that it would be useful to have this table updated at subsequent meetings.

Post-spill studies and reinstatement measures

3.6.12 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.

3.6.13 The Committee noted that, as no further correspondence had been received from the DENR, this proposal had not been registered as a claim.

Director's considerations

3.6.14 The Committee noted that this was the first incident where STOPIA 2006 applied and that the 1992 Fund was receiving regular reimbursements from the Shipowner's Club. It was noted that it

was however difficult to predict whether the amount of compensation payable in respect of this incident would exceed the STOPIA 2006 limit of 20 million SDR (£15.8 million) and therefore whether the 1992 Fund would be called to pay compensation in excess of that limit.

3.7 *Shosei Maru*

3.7.1 The Executive Committee took note of the information regarding the *Shosei Maru* incident as set out in document 92FUND/EXC.38/10.

The incident

3.7.2 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 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.

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

3.7.4 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

3.7.5 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.

3.7.6 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

3.7.7 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 replaced and destroyed.

Applicability of the 1992 Conventions and STOPIA 2006

3.7.8 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).

3.7.9 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 therefore the ship had not been entered into STOPIA 2006. The Committee recalled that as a consequence, if the total amount of damages exceeded the limitation amount applicable under 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, without being reimbursed by the Japan P&I Club.

3.7.10 The Committee noted that in September 2007, the Japan P&I Club had informed the 1992 Fund of its intention to establish a limitation fund in accordance with the relevant provisions of the 1992 Civil Liability Convention.

Claims for compensation

3.7.11 The Committee noted that as at 4 September 2007, nine claims, totalling ¥653 632 458 (£2.8 million) in respect of the costs of clean up and preventive measures taken by the Marine Disaster Prevention Center and a number of private contractors had been received by the Japan P&I Club and the 1992 Fund, five of which, totalling ¥72 328 308 (£310 000), had been settled by the Japan P&I Club at ¥66 852 433 (£286 000).

3.7.12 It was noted that a number of fisheries associations operating in the area affected by the spill had submitted claims totalling ¥304 480 561 (£1.3 million) for loss and damage to seaweed farms, loss and damage to other fishing operations and costs for counter-measures against the contamination and that these claims were being assessed.

3.7.13 It was also noted that claims totalling ¥10 764 358 (£46 000) had been submitted by a number of local authorities in respect of costs of preventive measures, that three claims totalling ¥8 326 723 (£36 000) had been submitted for costs related to the cleaning of hulls of commercial vessels and that these claims were being assessed.

3.7.14 The Committee noted that further claims were expected in respect of the clean-up operations and from the fisheries sector. It was noted that it had become clear that the total amount for damages admissible for compensation arising out of this incident was very 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).

3.8 *Dolly* and *N°7 Kwang Min*

3.8.1 The Executive Committee took note of the information regarding the *Dolly* and *N°7 Kwang Min* incidents as set out in document 92FUND/EXC.38/11.

Dolly

3.8.2 It was recalled that the *Dolly* had sunk on 5 November 1999 in 20 metres depth in Robert Bay, Martinique, whilst carrying some 200 tonnes of bitumen. The Executive Committee recalled that there was a national park, a coral reef and mariculture near the grounding site, that artisanal fishing was carried out in the area and that there were fears that fishing and mariculture would be affected if the bitumen were to escape.

3.8.3 It was recalled that the ship did not have any liability insurance. It was also recalled that the shipowner, a company in St Lucia, had been ordered by the authorities to remove the wreck but that it had not complied with the order, probably due to lack of financial resources.

3.8.4 The Committee recalled that since the shipowner had not taken any measures to prevent pollution, the French authorities had arranged for the removal of 3.5 tonnes of bunker oil and had requested three international salvage companies to investigate what measures could be taken to eliminate the threat of pollution by bitumen. It was recalled that these companies had submitted their proposals on the basis of diving inspections of the wreck carried out in October and November 2000 and that the French authorities had provided the 1992 Fund with copies of the proposals.

3.8.5 It was recalled that in July 2001 the Committee had concurred with the Director's opinion that, in view of the location of the wreck in an environmentally sensitive area, an operation to remove the threat of pollution by the bitumen would in principle constitute 'preventive measures' as defined in the 1992 Conventions and that the Committee had instructed the Director to examine with the 1992 Fund's experts and the French authorities the proposed measures to remove the bitumen.

3.8.6 It was recalled that in August 2004 the French authorities had informed the 1992 Fund that a contract had been awarded to a consortium comprising a French diving company and the managers of a yacht marina in Martinique. It was recalled that operations had commenced in October 2004, but that as a result of heavy sea conditions and a number of unforeseen practical problems, removal of the three tanks containing the bitumen from the hold had taken longer than planned and had proved more difficult than anticipated. It was recalled that by mid-December the contractors had removed the tanks from the hold with the aid of floatation bags and had laid them on the seabed near to the wreck where they had been left until March 2005 when the weather would be more conducive to towing the tanks to the dry dock.

3.8.7 The Committee recalled that operations had been resumed in March 2005 as planned but that as a result of further technical problems the towing of the tanks to shore and the removal of the bitumen had not been completed until July 2005.

Legal action

3.8.8 It was recalled that in October 2002 the French Government had taken legal action against the shipowner and the 1992 Fund claiming provisionally FFr1.2 million or €232 000 (£157 000) in respect of the costs of removing the bunker oil from the *Dolly*, stating in the writ of summons that further costs in excess of €2 million (£1.3 million) would be claimed in respect of the removal of the cargo.

Settlement with French Government

3.8.9 The Committee recalled that in March 2006 the French Government had submitted a claim for €1 388 361 (£940 000) for the costs of removing the bunker fuel and the bitumen cargo from the wreck and that in June 2006 the claim had been increased to €1 457 753 (£990 000) to take into account additional costs arising from the technical and meteorological problems.

3.8.10 It was recalled that the shipowner had not had the financial resources to pay any compensation and that the ship did not have any liability insurance and that for these reasons the Director had decided that the 1992 Fund should compensate the French Government under Article 4.1(b) of the 1992 Fund Convention.

3.8.11 It was noted that in October 2006 the 1992 Fund had paid the amount of €1 457 753 (£990 000) to the French Government in full and final settlement of all its losses arising out of the *Dolly* incident and that as a result of the settlement, the French Government had withdrawn the legal action against the 1992 Fund.

3.8.12 The Committee noted that since the last outstanding issue had been resolved the case was now closed.

N°7 Kwang Min

3.8.13 It was recalled that on 24 November 2005 the Korean tanker *N°7 Kwang Min* (160 GT) had collided with the Korean fishing vessel *N°1 Chil Yang* (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.

3.8.14 It was also recalled that in December 2005 the Korean Ministry of Maritime Affairs and Fisheries had informed the 1992 Fund that the *N°7 Kwang Min* was not insured for pollution liabilities and that the registered owner had insufficient financial assets to cover the claims for compensation for pollution damage arising from the incident.

Claims for compensation

3.8.15 The Executive Committee recalled that 12 claims totalling Won 2.7 billion (£1.4 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.

3.8.16 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 (£86 000), had been settled at Won 3.1 million (£1 860).

3.8.17 It was also recalled that claims totalling Won 154 million (£81 000) 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 (£49 000) by ten boat owners were settled at Won 51 million (£28 000).

3.8.18 The Committee recalled that claims by nine seaweed (sea mustard) culturists totalling Won 371 million (£196 000) 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.

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

Legal actions

3.8.20 The Committee recalled that the Busan Maritime Safety Tribunal had carried out an investigation into the cause of the incident and had concluded that the liability ratio between the owner of the *N°7 Kwang Min* and the owner of the fishing vessel *N°1 Chil Yang* was 40:60. It was also recalled 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 *N°1 Chil Yang* was 35:65.

3.8.21 It was also 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.

3.8.22 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 of recovering the sums paid in compensation for this incident and that as a result of the lawyers' investigation the Fund had commenced recourse action against the owners of the *N°1 Chil Yang* and *N°7 Kwang Min*.

Limitation proceedings by the owner of the N°1 Chil Yang

3.8.23 The Committee noted that in January 2007, the owner of the *N°1 Chil Yang* 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 under the Korean Commercial Code, ie SDR 83 000 or Won 125 638 796 (£66 300).

3.8.24 It was recalled 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 and that in April 2007, the claims of the 1992 Fund had been registered with the Busan District Court (Limitation Court).

3.8.25 The Committee noted that in August 2007, the Court had delivered its decision in relation to the limitation proceedings and that the assessment by the Limitation Court of the claims against the owner of the *N°1 Chil Yang* was as follows:

Claimant	Claim Amount	Court Assessment
Seaweed culturist	Won 68 868 500	Won 4 591 959
Seaweed culturist	Won 73 521 110	Won 5 305 481
N°7 Kwang Min's owner	Won 36 333 449	Won 26 183 887
The 1992 Fund	Won 1 327 101 137	Won 1 327 101 137

3.8.26 It was noted that if none of the parties lodged an appeal and the Court assessment became final the limitation fund of Won 125 638 796 (£66 300) would be distributed between the claimants in proportion with the assessments made by the Court and that in such a case, the 1992 Fund would be entitled to 97.35% of the *N°1 Chil Yang* limitation fund, or Won 122 million (£64 000).

3.8.27 It was noted that after the document was issued the two seaweed culturists had argued in the Busan District Court against the assessment made by the Limitation Court of the claims against the owner of the *N°1 Chil Yang*. It is expected that the Busan District Court will render its decision on the issue in the next months.

Recourse action against the owner of the N°7 Kwang Min

3.8.28 It was noted that the owner of the *N°7 Kwang Min* had two assets, namely an apartment and the *N°7 Kwang Min* tanker, both of which mortgaged for substantial amounts and that since the mortgagee banks had priority over any other creditors, it was unlikely that the 1992 Fund could recover any sums in respect of these properties.

3.8.29 It was noted that the owner of the *N°7 Kwang Min* had, as a result of the collision, also a claim against the owner of the *N°1 Chil Yang* that had been assessed by the Limitation Court at Won 26 183 887 (£13 800) and that since the limitation fund would have to be distributed in proportion with the court assessments, the owner of the *N°7 Kwang Min* would be entitled, subject to a possible appeal by other parties, to 1.97% of the limitation fund, some Won 2 400 000 (£1 200).

3.8.30 The Committee noted that the Director was of the view that the legal costs of a possible recourse action against the owner of the *N°7 Kwang Min* would exceed by far any sum that the 1992 Fund might be able to recover and therefore recommended the Executive Committee to instruct him not to pursue recourse action against the owner of the *N°7 Kwang Min*.

3.8.31 The Committee endorsed the view of the Director, and instructed him not to pursue recourse action against the owner of the *N°7 Kwang Min*.

4 Future sessions

4.1 The Executive Committee recalled that, at its 3rd session in June 2007, the Administrative Council, acting on behalf of the Assembly, had decided to accept the kind invitation of the Government of Monaco and hold sessions of the IOPC Funds' governing bodies in Monaco during the week commencing 10 March 2008 (cf document 92FUND/AC.3/A/ES.12/14, paragraph 11.2.5).

4.2 The Executive Committee noted that, at the Assembly's 12th session, the delegation of Monaco had provided additional information relating to the arrangements for the March meetings.

4.3 The Committee also noted that tentative arrangements had been also made for meetings of the IOPC Funds in London during the weeks of 23 June and 13 October 2008.

5 Any other business

No items were raised under this agenda item.

6 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.38/WP.1, was adopted, subject to certain amendments.