INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
41st session
Agenda item 5

92FUND/EXC.41/11
27 June 2008
Original: ENGLISH

RECORD OF DECISIONS OF THE FORTY-FIRST SESSION OF THE EXECUTIVE COMMITTEE

(held on 24 - 27 June 2008)

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.41/1.

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 4th session the 1992 Fund Administrative Council, acting on behalf of the 1992 Fund Assembly, had appointed the delegations of Cameroon, Denmark, Malaysia, Panama and Republic of Korea to the Credentials Committee.

2.3 The following members of the Executive Committee were present:

Australia	India	Qatar
Bahamas	Italy	Republic of Korea
Denmark	Japan	United Kingdom
Gabon	Malaysia	Venezuela
Germany	Netherlands	

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.41/2/1 that all the above-mentioned members of the Executive Committee had submitted credentials which were in order.

2.5 The following Member States were represented as observers:

Algeria	France	Papua New Guinea
Angola	Ghana	Philippines
Argentina	Greece	Poland
Belgium	Ireland	Portugal
Bulgaria	Latvia	Russian Federation
Cameroon	Liberia	Singapore
Canada	Malta	Spain
China (Hong Kong Special Administrative Region)	Marshall Islands	Sri Lanka
	Mexico	Sweden
Colombia	Morocco	Trinidad and Tobago
Cook Islands	Nigeria	Tunisia
Dominican Republic	Norway	Turkey
Fiji	Oman	Uruguay
Finland	Panama	

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

Benin	Kuwait	Syrian Arab Republic
Ecuador	Saudi Arabia	Ukraine

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

Intergovernmental organisations:

European Commission
Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea (REMPEC)

International non-governmental organisations:

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

3 Incidents involving the 1992 Fund

3.1 *Erika*

3.1.1 The Executive Committee took note of the developments regarding the *Erika* incident as set out in document 92FUND/EXC.41/3.

Claims situation

3.1.2 The Executive Committee noted that as at 12 May 2008, 7 130 claims for compensation, other than those made by the French Government and Total SA, had been submitted for a total of €211 million (£167.3 million) and that 99.7% of these claims had been assessed. It also noted that compensation payments totalling €129.5 million (£86.9 million) had been made in respect of 5 933 claims.

Criminal proceedings

3.1.3 The Executive Committee recalled that the Criminal Court in Paris had delivered a judgement in January 2008 holding the representative of the registered owner (Tevere Shipping), the president of the management company (Panship Management and Services Srl), the classification society Registro Italiano Navale (RINA) and Total SA criminally liable for the damage caused by the incident. It was recalled that the judgement had also made the four parties jointly and severally liable for the damage caused by the incident and had assessed the damages at €192.8 million (£152.9 million), including €153.9 million (£121.2 million) for the French State. It was also recalled that the four parties held criminally liable and a number of civil parties had appealed against the judgement.

3.1.4 It was also recalled that at the Executive Committee's 40th session, held in March 2008, the French delegation had stated that this was the first judgement in France where a court had awarded compensation for damage to the environment, and that the judgement had recognised the right of environmental protection organisations to claim compensation for material, moral and also environmental damage caused to the collective interest, which it was their purpose to protect.

3.1.5 It was further recalled that at that session several delegations had expressed concern that the Criminal Court in Paris had awarded compensation for moral and environmental damages when Article I.6(a) of the 1992 Civil Liability Convention (1992 CLC) restricted compensation for impairment of the environment to the costs of reasonable measures of reinstatement actually undertaken or to be undertaken. The Committee recalled that the judgement had interpreted Article III.4 of the 1992 CLC in such a manner that parties which normally would have been covered by that provision were found not to fall within its scope and that the judgement could have serious consequences for the international compensation regime.

3.1.6 The Committee recalled that the Director had stated that the Secretariat would study the judgement in detail to examine the implications it might have for the international compensation regime and for the 1992 Fund and that an examination of the possibilities of a recourse action against any of the parties found responsible for the damages caused by the incident would be part of such a study.

Debate

3.1.7 The French delegation reminded the Committee that the judgement of the Criminal Court had been appealed and that it was expected that the Court of Appeal would reach its decision in 2009. That delegation also stated that the French State had reached an agreement with Total SA, whereby Total SA had paid, in full and final settlement, the French State €153.9 million (£121.2 million), ie the amount awarded by the Criminal Court, which took into account the compensation amounts already received from the 1992 Fund. That delegation also stated that, as a result of this payment, the French State had withdrawn all its civil actions, including those against the Fund.

3.1.8 One delegation referred to the concern it had expressed at its March 2008 session that the Criminal Court had awarded compensation for moral and environmental damages in contravention of Article I.6(a) of the 1992 CLC and recalled that the Secretariat had undertaken to study the judgement in detail to examine the implications it might have for the international compensation regime and for the 1992 Fund. That delegation enquired from the Secretariat as to the progress of that study.

3.1.9 The Director responded that it was difficult at this stage to ascertain what implications the judgement would have since it was subject to appeal and that it would be more efficient for the Secretariat to examine the implications once the Court of Appeal had rendered its judgement.

Legal proceedings against the 1992 Fund

3.1.10 The Executive Committee noted that legal actions against the shipowner, his insurer and the 1992 Fund had been taken by 796 claimants, that out-of-court settlements had been reached with a great number of these claimants (450 actions), that the courts had rendered judgements in respect of 134 claims and that 43 actions by some 52 claimants were pending. It was noted that the total amount claimed in the pending actions, excluding the claims by the French State and Total SA, was some €35 million (£27.8 million). It was also noted that seven judgements by the Commercial Court in Lorient, the Commercial Court in Saint-Brieuc and the Commercial Court in Saint Nazaire had been rendered since the March 2008 session of the Executive Committee.

Legal proceedings by the Commune de Mesquer against Total

3.1.11 It was recalled that a legal action had been brought by the Commune de Mesquer against Total before the French Courts, where it had argued that the cargo on board the *Erika* was, under European law, a waste. It was also recalled that the French Supreme Court had referred this question to the European Court of Justice. The Committee noted that in March 2008 the Advocate General had delivered her legal opinion stating *inter alia* that heavy fuel oil must be treated as a waste when it was discharged as a result of an incident and became mixed with water and sediments, but that, in her opinion, this provision of European law was compatible with the provisions of the 1992 Civil Liability and Fund Conventions.

Decision

3.1.12 The Executive Committee noted that the Secretariat would inform the Committee of the judgement by the European Court of Justice once it had been rendered.

3.2 *Slops*

3.2.1 The Executive Committee took note of the developments regarding the *Slops* incident as set out in document 92FUND/EXC.41/4.

Claims for compensation

3.2.2 It was recalled that two companies had submitted claims for costs of clean-up operations and preventive measures totalling €2 323 360 (£1.8 million) and had taken legal action against the Fund. It was noted that another claim for a sum of US$985 000 (£780 000), submitted in August 2007 by a third company, was time-barred.

Applicability of the 1992 Civil Liability Convention and the 1992 Fund Convention

3.2.3 It was recalled that in July 2000 the Executive Committee had considered the question of whether the *Slops* fell within the definition of 'ship' under the 1992 CLC and the 1992 Fund Convention. It was also recalled that the 1992 Fund Assembly had decided in October 1999 that offshore craft, namely floating storage units (FSUs) and floating production, storage and offloading units (FPSOs), should be regarded as ships only when they carried oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operated (document 92FUND/A.4/32, paragraph 24.3).

3.2.4 It was further recalled that in July 2000, the Executive Committee, applying the decision taken by the Assembly in October 1999, had decided that the *Slops* should not be considered a 'ship' for the purpose of the 1992 CLC and 1992 Fund Convention and that therefore these Conventions did not apply to this incident (document 92FUND/EXC.8/8, paragraph 4.3.8).

Legal proceedings against the 1992 Fund

3.2.5 It was recalled that in June 2006 the Supreme Court had held that the Slops should be regarded as a 'ship' as defined in the 1992 Conventions and had referred the case back to the Court of Appeal to examine the merits of the claims.

3.2.6 The Committee noted that in February 2008 the Court of Appeal had rendered its judgement confirming the judgement of the Court of first instance, which had awarded the claimants the claimed amount, ie €2 323 360 (£1.8 million) plus legal interests and costs. It was also noted that since the judgement by the Court of Appeal was final (ie enforceable against the 1992 Fund under Article 8 of the 1992 Fund Convention) and the owner of the *Slops* did not have any assets to pay in accordance with the judgement, the 1992 Fund was making the necessary arrangements through its Greek lawyer to pay the amounts awarded.

Possible recourse action against the Greek State

3.2.7 The Committee noted that the *Slops* was registered in Greece, a Contracting State to the 1992 Conventions. It was also noted that the *Slops* was laden with some 5 000m³ of oily water, of which 1 000-2 500m³ was believed to be oil and that, therefore, according to the highest estimation, the *Slops* was, at the time of the incident, carrying more than 2 000 tonnes of oil. It was noted that in any event, although Article VII.1 required that the ship was insured at any time when it was actually carrying more than 2 000 tonnes of oil in bulk as cargo, the capacity of the ship should also be taken into account, since in practice a ship would be insured to cover its capacity to carry rather than to cover what it was actually carrying at any given moment. It was noted that since the *Slops*, with 10 815 GT, was capable of carrying up to some 5 800 tonnes of oil as cargo, the fact that at least half the contents were reportedly water would not necessarily have a bearing on the obligation to carry insurance and that it could therefore be argued that the *Slops* should have carried insurance for oil pollution liability in accordance with the 1992 CLC.

3.2.8 It was also noted that the Director had considered that it followed from Article VII of the 1992 CLC that the Greek authorities should have ensured that the *Slops* carried insurance as required under that Convention but that the Greek authorities had permitted the *Slops* to trade without a certificate of insurance in contravention of Article VII.10. It was further noted that, for that reason, the Director was of the opinion that the Greek State was in breach of its obligations under the 1992 CLC.

3.2.9 It was noted that the total amount claimed as a result of this incident, ie €2 323 360 (£1.8 million) and US$985 000 (£780 000), was well below the estimated limit of the *Slops* under Article V of the Civil Liability Convention, ie some 8.2 million SDR (£6.8 million). It was also noted, however, that it appeared that the owner was financially incapable of meeting his obligations and that, as a result, the 1992 Fund would have to pay compensation which would have otherwise been covered by the *Slops*' insurer and would therefore suffer a loss.

3.2.10 It was noted that in view of the above, the Director recommended that the Executive Committee instruct him to examine further the possibility of bringing a recourse action against the Greek State to recover the sums that the 1992 Fund would have to pay in compensation as a result of this incident and to take all necessary steps to protect the interests of the Fund in the meantime.

Debate

3.2.11 The Greek delegation recalled that at the Executive Committee session in October 2007, it had stated that at the time of the *Slops* incident in 2000 there was no requirement imposed under Greek law for floating storage facilities to have compulsory insurance. That delegation added, however, that under Greek legislation which entered into force in 2001, any coastal oil tanker which was actually carrying less than 2 000 tonnes of persistent oil as cargo, as well as any Greek-registered FSUs, permanent or not, within Greek territorial waters, irrespective of the quantity of persistent oil stored in bulk on board, was required to maintain adequate insurance or other financial guarantee for oil pollution damage.

3.2.12 The Greek delegation also recalled that it had stated 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 Greek State had no legitimate interest in intervening in such legal proceedings. That delegation recalled that, in its view, 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 on the parties involved in such proceedings, namely the 1992 Fund and the two anti-pollution companies but not on the Greek Government since it was not a party to these proceedings. It further recalled that it had underlined that, by virtue of Article 6 of the 1992 Fund Convention, no action could be brought after six years from the date of the incident which had caused the damage.

3.2.13 The Greek delegation stated again the points made in October 2007, summarised in paragraphs 3.2.11 and 3.2.12 above and added that, on the basis of those arguments, it believed that the Greek authorities were not in breach of their obligations under the 1992 CLC and that, therefore, there were no solid grounds for bringing a recourse action against the Greek State.

3.2.14 Several delegations expressed doubts as to whether a recourse action was justified in this particular case. These delegations recalled that the Executive Committee had decided in July 2000 that the *Slops* was not a 'ship' under the 1992 Civil Liability and Fund Conventions and that, therefore, those Conventions did not apply to this incident. Those delegations stated that, given the earlier decision adopted by the Committee, it would not be consistent for the 1992 Fund to pursue a recourse action against the Greek State on the grounds that the *Slops* was a 'ship'. It was pointed out that in this case the decision as to whether to take a recourse action against the Greek State had policy implications in that the Committee would have to review its decision regarding the definition of 'ship'.

3.2.15 Some delegations pointed out that at the time of the incident the Greek State could not be blamed for not requiring the *Slops* to carry insurance.

3.2.16 A number of delegations stated that they had not been in agreement with the interpretation of the definition of 'ship' adopted by the Assembly in October 1999, that they welcomed the decision by the Greek Supreme Court and that the definition of 'ship' in the Conventions should be reconsidered to include FSUs not on a voyage.

3.2.17 One delegation referred in particular to 1992 Fund Assembly Resolution Nº8, adopted in 2003, on the interpretation and application of the 1992 Civil Liability and Fund Conventions that considered that the courts of the States Parties to the 1992 Conventions should take into account the decisions by the governing bodies of the 1992 Fund and the 1971 Fund relating to the interpretation and application of these Conventions. That delegation stated that the 1992 Fund Executive Committee was a governing body of the 1992 Fund but that both the Court of first instance and the Supreme Court in Greece had not taken into account the decision adopted by the Executive Committee.

3.2.18 Most delegations agreed that the Secretariat should further examine the matter before taking a decision as to whether the 1992 Fund should bring a recourse action in this case.

Decision

3.2.19 The Executive Committee instructed the Director to further examine this matter, taking into account all the policy implications, in particular the earlier decisions by the 1992 Fund Governing Bodies regarding the definition of 'ship', and to report to the Committee at its next meeting in October 2008.

3.3 *Prestige*

3.3.1 The Executive Committee took note of the developments regarding the *Prestige* incident as set out in document 92FUND/EXC.41/5, submitted by the Director, and document 92FUND/EXC.41/5/1, submitted by Spain.

Claims situation

3.3.2 The Executive Committee took note of the latest claims situation as follows:

Spain

3.3.3 The Committee noted that as at 9 May 2008 claims totalling €1 018.8 million (£807.8 million) had been received by the Claims Handling Office in La Coruña (Spain), including 14 claims from the Spanish Government totalling €968.5 million (£767.9 million). It was also noted that the process of assessing claims in Spain continued.

3.3.4 The Committee also noted the information provided by the Spanish delegation in its presentation of document 92FUND/EXC.41/5/1. That delegation stated that the Spanish Government continued to cooperate with the 1992 Fund's experts in the examination and analysis of the substantial documentation submitted in support of its claims and that further meetings between the 1992 Fund's experts and representatives of the Spanish Government had taken place which had helped to make progress in the assessment of the claims. That delegation further stated that the Spanish Government had submitted almost all its claims arising from the *Prestige* incident and that the only outstanding item was the costs for the treatment of oily residues since the treatment process had not been completed.

3.3.5 The Spanish delegation also stated that the Spanish Government had sent a letter to the Director showing the amount of European funds received by Spain and clearly identifying the ministerial departments and the headings to which each amount of European funding had been allocated.

France

3.3.6 The Committee noted that as at 9 May 2008 claims totalling €109.7 million (£87 million) had been received by the Claims Handling Office in France. It was also noted that the process of assessing claims in France continued.

Portugal

3.3.7 It was recalled that the Portuguese Government had submitted claims for €4.3 million (£3.4 million) in respect of clean up and preventive measures in Portugal, that the claims had been fully assessed and that the Portuguese Government had accepted this assessment.

Court actions

Spain

3.3.8 The Committee took note of the situation regarding court actions initiated in Spain.

France

3.3.9 The Committee took note of the situation regarding court actions initiated in France.

3.3.10 It was noted that the Court of first instance in Mont-de-Marsan had rendered a judgement in March 2008 in an action lodged by a company making reservations in bed and breakfasts and where the Court had agreed with the Fund's assessment.

3.3.11 It was also noted that the Civil Court of Rochefort-sur-Mer had rendered a judgement in May 2008 in respect of an action brought by two oyster farmers' associations and an association for the defence of professionals of the sea and where the Court had agreed with the Fund's assessment.

Debate

3.3.12 One delegation thanked the Secretariat for the work carried out in relation to this incident and in particular expressed its satisfaction with the successful results for the 1992 Fund in the two court cases mentioned in paragraphs 3.3.10 and 3.3.11 above.

United States

3.3.13 The Committee took note of the information regarding the court action brought by the Spanish State against the American Bureau of Shipping (ABS), the classification society that had certified the *Prestige*.

3.3.14 It was recalled that the New York Court had rendered a judgement dismissing the claim by the Spanish State on the grounds of lack of jurisdiction. It was also recalled that the Spanish State had appealed against the judgement and had requested the 1992 Fund to file an *amicus curiae* brief before the New York Court of Appeal. It was further recalled that in March 2008 the Executive Committee had decided that the Fund should not file an *amicus curiae* brief.

3.3.15 The Executive Committee noted the information provided by the Spanish delegation that two environmental organisations had filed an *amicus curiae* brief in support of the appeal of the Spanish State against the decision of the New York Court.

3.4 *Solar 1*

3.4.1 The Executive Committee took note of the developments regarding the *Solar 1* incident as set out in document 92FUND/EXC.41/6.

Claims for compensation

3.4.2 It was noted that, as at 12 May 2008, 32 308 claims had been received and that payments totalling PHP919 620 405 (£11.1 million) had been made in respect of 23 500 claims, mainly in the fisheries sector.

3.4.3 It was noted that work continued on the assessment of claims for the costs of shoreline clean up, in particular in respect of the claim submitted by Petron Corporation and of claims in the fishery and mariculture sectors.

3.5 *Shosei Maru*

3.5.1 The Executive Committee took note of the developments regarding the *Shosei Maru* incident as set out in document 92FUND/EXC.41/7.

Claims for compensation

3.5.2 It was noted that all the claims submitted with regard to this incident had been assessed jointly by the 1992 Fund and the Japan P&I Club at a total amount of ¥899 693 953 (£4 450 908) and that these claims had been paid by the Japan P&I Club. It was also noted that no further claims were expected.

Applicability of the 1992 Conventions and STOPIA 2006

3.5.3 It was noted that the total cost of all claims paid by the Japan P&I Club exceeded the limitation amount of ¥738 629 760 (£3.7 million) applicable to the *Shosei Maru*, and that, since the ship had not been entered into the Small Tanker Owner's Pollution Indemnification Agreement (STOPIA) 2006, the 1992 Fund would be liable to pay the difference between the limitation amount and the total amount paid in compensation, ie ¥161 064 193 (£800 000).

Legal proceedings

3.5.4 It was noted that the owner of the *Shosei Maru* had established a limitation fund in the Takamatsu District Court on 31 March 2008 in accordance with the 1992 Civil Liability Convention and that the 1992 Fund had filed an application for intervention in the limitation proceedings. The Committee also noted that on 4 June 2008 the Japan P&I Club had submitted their claims for pollution damage and survey fees to the limitation fund and that the first creditors' meeting was scheduled for 18 July 2008.

3.5.5 The Committee further noted that claims for a total of ¥1 349 120 495 (£6.7 million) had been filed against the limitation fund established by the owner of the *Trust Busan* in the Okayama District Court by the owner of the *Shosei Maru*, the 1992 Fund and Sompo Japan Insurance Inc., the underwriters of the cargo onboard the *Shosei Maru* at the time of the incident. It was also noted that the first creditors' meeting had been held on 22 April 2008 and that a second meeting would be held on 24 October 2008.

Debate

3.5.6 One delegation asked the International Group of P&I Clubs to provide the Committee with updated information regarding the number of tankers entered in STOPIA 2006. The observer delegation of the International Group informed the Committee that of the 602 Japanese coastal tankers not reinsured through the international pooling arrangements, 328 had been entered in STOPIA 2006 at the beginning of the 2008 policy year. The observer delegation further stated that the number of such vessels had significantly increased in comparison with the numbers reported in August 2007, due to the campaign carried out by the Japan P&I Club during the policy year 2007.

3.5.7 The Committee noted that the International Group would submit updated information about the number of tankers entered in STOPIA 2006 at the next meeting in October 2008.

3.6 *Volgoneft 139*

3.6.1 The Executive Committee took note of the information regarding the *Volgoneft 139* incident as set out in document 92FUND/EXC.41/8.

The shipowner and its insurer

3.6.2 It was noted that the ship was owned by JSC Volgotanker, which has since been declared bankrupt by the Commercial Court in Moscow, and that the shipowner was insured for protection and indemnity liability by Ingosstrakh (Russian Federation). It was also noted that the insurance cover was limited to US$5 million (£2.5 million), well below the minimum limit under the 1992 CLC of 4.51 million SDR (£3.7 million) and that there was therefore an 'insurance gap' of some 1.5 million SDR (£1.2 million).

Debate

3.6.3 A number of delegations which took the floor stated their concern that there was an 'insurance gap' of some 1.5 million SDR (£1.2 million) and asked whether the Russian delegation could provide the 1992 Fund with an explanation as to which party would be responsible for this payment. One delegation asked whether the Russian authorities had issued a certificate of insurance for the *Volgoneft 139* as required by the 1992 CLC.

3.6.4 The point was also made that the *Volgoneft 139* was insured by Ingosstrakh which was neither a P&I Club nor a party to the pooling arrangements of the International Group of P&I Clubs and, for that reason, was not covered by STOPIA 2006.

3.6.5 The Russian delegation stated that, under Russian law, the harbour master of the ship's port of registry was the authority responsible for issuing CLC certificates and that the Astrakhan harbour master had issued the *Volgoneft 139* with a CLC certificate on the basis of the insurance policy issued by Ingosstrakh. That delegation also stated that Ingosstrakh had informed the Astrakhan harbour master that the *Volgoneft 139* had CLC insurance cover with it but that the limits of insurance cover were not specified and that, for this reason, the Russian Federation did not breach the provisions of the 1992 CLC and therefore should not pay for the 'insurance gap'. That delegation pointed out that the Arbitration Court of Saint Petersburg and Leningrad Region would resolve the 'insurance gap' issue in its judgement.

Decision

3.6.6 The Executive Committee requested the Russian delegation to provide more information in respect of the 'insurance gap' issue before the October 2008 session.

Meetings between the Russian authorities and the Secretariat

3.6.7 It was noted that in April 2008 a meeting had taken place in London between representatives of the Russian Government, one of the Russian claimants, the shipowner and the Secretariat and that at the meeting it had been agreed that the 1992 Fund's representatives and experts should visit Moscow to discuss the claims arising from the incident. It was also noted that in May 2008 meetings had taken place in Moscow in the Ministry of Transport where further claims had been submitted and that during the meetings it had been agreed that the 1992 Fund's representatives and experts should also visit the area affected by the spill and hold discussions with the regional authorities. It was noted that this visit had taken place in June 2008 and that the Fund's representatives had had the opportunity to visit the area affected by the spill and hold discussions with the authorities. It was noted that the Russian authorities had agreed to present detailed documentation in support of their claims.

Debate

3.6.8 A number of delegations urged the Russian delegation to provide the Secretariat with a detailed analysis of the issues involved in this case.

Claims for compensation

3.6.9 It was noted that the Russian Central and Regional Governments had presented claims amounting to RUB 8 432 million (£180 million) although, except for one claim, no documentation had been submitted. It was also noted that one of the claims submitted by the Russian Central Government was for environmental damage, quantified on the basis of a formula which was in contravention of Article I.6 of the 1992 CLC. It was further noted that a claim for RUB 4 million (£88 000) had been presented to the Arbitration Court in Saint Petersburg by the Kerch Merchant Port in Ukraine and that this claim would have to compete with other claims against the limitation fund established by the shipowner in the Arbitration Court of Saint Petersburg.

3.6.10 It was further noted that the total amount claimed so far exceeded the amount available for compensation under the 1992 Civil Liability and Fund Conventions, ie 203 million SDR (£166.8 million).

Limitation proceedings

3.6.11 It was noted that in February 2008 the Arbitration Court in Saint Petersburg and Leningrad Region had issued a ruling declaring that the limitation fund had been constituted by means of an Ingosstrakh letter of guarantee for 3 million SDR (£2.5 million). It was also noted that the 1992 Fund had appealed against that decision and that, at a hearing in April 2008, the 1992 Fund had presented pleadings to the Court of Appeal arguing *inter alia* that the current limit of the shipowner's liability under the 1992 CLC was 4.51 million SDR (£3.7 million) and that, as under the Russian

constitution international conventions to which the Russian Federation was party took precedence over Russian internal law, the Arbitration Court's ruling establishing the shipowner's limitation fund should be revised.

3.6.12 It was also noted that in May 2008 the Court of Appeal had rendered a decision confirming the ruling by the Arbitration Court of Saint Petersburg and Leningrad Region establishing the shipowner's limitation fund in the RUB equivalent to 3 million SDR.

Natural phenomenon of an exceptional, inevitable and irresistible character

3.6.13 It was noted that Ingosstrakh had invoked before the Arbitration Court of Saint Petersburg and Leningrad Region the defence that the spill had resulted from a natural phenomenon of an exceptional, inevitable and irresistible character and that the shipowner and Ingosstrakh were not liable for the pollution damage caused by the spill. It was noted that if this defence were to be successful, the 1992 Fund would be liable to pay compensation to victims of the spill from the outset.

Debate

3.6.14 Some delegations stated that they would like to receive more information from the Russian delegation in respect of the incident. One delegation requested the Secretariat to indicate in future documents the area impacted by the spill on a map of the region and made the point that the damage caused by three other vessels loaded with sulphur, which also sank in the same area, would not be liable for compensation under the 1992 Conventions.

3.6.15 All the delegations which took the floor pointed out that the claim for environmental damage, quantified on the basis of an abstract formula, was in contravention of the provisions of the 1992 Conventions and against the criteria for admissibility of claims adopted by the governing bodies of the 1992 Fund.

3.6.16 In response to a question by one delegation, the Director confirmed that all outstanding oil reports for the Russian Federation had recently been received.

Declaration by the Russian delegation

3.6.17 The Russian delegation expressed its gratitude to the Secretariat for the presentation of document 92FUND/EXC.41/8 and to delegations for the interventions made in respect of the *Volgoneft 139* incident. That delegation expressed surprise that most of the interventions had merely referred to issues already discussed at the Executive Committee's previous session held in March 2008. That delegation stressed that there had been new developments in the incident and that it would like the discussions at the next session of the Committee to concentrate on the new developments which had taken place in respect of this incident, and particularly on the legal, administrative and claims-related issues, rather than returning to the fact that the 1992 Fund had not been invited to visit the affected area from the outset which had already been discussed.

3.6.18 The Russian delegation stated that, like many other countries, the Russian Federation had its own domestic procedures regulating foreign assistance in respect of domestic issues, that these procedures could be rather slow but that it should be noted that there had already been positive results as regards cooperation with the 1992 Fund for the benefit of all parties involved.

3.6.19 That delegation also stated that, thanks to the 1992 Fund, the Russian authorities were well aware of some outstanding issues such as the 'insurance gap' and the use of the 'Methodika' formula to calculate environmental damage, and that they were working to find practical solutions to these issues on the basis of the 1992 Civil Liability and Fund Conventions, other relevant international instruments and Russian domestic legislation. That delegation stated, however, that most of these issues were of a legal nature and that therefore a final decision would have to be made by a competent court in accordance with the 1992 Conventions.

3.6.20 The Russian delegation further stated that the Russian Government was not directly involved in the court proceedings and that therefore it was difficult for it to comment on the arguments raised by individual claimants in support of their claims but that since the 1992 Fund was involved in the legal proceedings it had all the information required in that regard.

3.6.21 That delegation emphasised that it was their firm desire to continue to cooperate with the 1992 Fund in full compliance with the international obligations of the Russian Federation.

Decision

3.6.22 The Executive Committee urged the Russian delegation to provide more information on the various issues arising from the incident and to work constructively with the Secretariat to resolve these issues.

3.6.23 The Executive Committee authorised the Director to make settlements of claims arising from this incident to the extent that they did not give rise to questions of principle not previous decided by the Committee.

3.7 *Hebei Spirit*

3.7.1 The Executive Committee took note of the information regarding the *Hebei Spirit* incident contained in documents 92FUND/EXC.41/9, 92FUND/EXC.41/9/Add.1 and 92FUND/EXC.41/9/Add.2 submitted by the Director, and document 92FUND/EXC.41/9/1 submitted by the Republic of Korea.

Claims for compensation

3.7.2 It was noted that as at 24 June 2008, 176 claims totalling Won 172 billion (£84.5 million) had been submitted and that further claims were expected. It was further noted that of these claims, 63 had been assessed at Won 19 billion (£9.3 million), and that, pursuant to the Cooperation Agreement between the Korean Government and the Assuranceföreningen Skuld (Gjensidig) (Skuld Club), the latter had made payments totalling Won 11.2 billion (£5.5 million) in respect of 42 of these claims.

Legal proceedings

3.7.3 The Committee took note of the information regarding legal proceedings.

Statement by the Republic of Korea

3.7.4 The Committee noted from the information provided by the Korean delegation that the Republic of Korea had paid, or would shortly pay, Won 117.2 billion (£57 million) to residents of the affected areas and that these payments did not constitute payments of compensation for pollution damage that would enable the Government to exercise subrogation rights at a later date. The Committee also noted that, in the view of the Korean delegation, such payments should be deemed to be short-term emergency subsistence aid which was granted to relieve the affected local population from financial hardship following the incident.

3.7.5 It was noted that the Korean Government had passed a Special Act which had entered into force on 15 June 2008 to support the local population suffering damages from the *Hebei Spirit* incident. It was also noted that, in accordance with this Act, the Korean Government was authorised to make payments to claimants based on the assessments made by the 1992 Fund and that, therefore claimants could receive compensation in full for the losses suffered as a result of the incident based on the assessments of claims by the 1992 Fund and the Skuld Club. The Committee noted that, in accordance with this Act, if the 1992 Fund and the Skuld Club paid claimants compensation on a pro-rata basis, the Korean Government would pay the claimants the remaining percentage so that they would be paid 100% of their claims as assessed by the 1992 Fund.

3.7.6 The Committee noted that the Korean delegation had drawn its attention to the possibility that the estimated losses as presented by the Director might have to be revised upwards at the October 2008 session of the Executive Committee.

3.7.7 It was further noted that the Korean Government had decided to 'stand last in the queue' in respect of compensation for clean-up costs and other expenses incurred by the central and local governments. It was also noted that, for the time being, the Korean Government expected that its claims for which it would 'stand last in the queue' would be in the region of Won 55 billion (£27 million), but that this figure was likely to increase as the Government continued to incur costs in order to regenerate the local economy, including works to reinstate the environment and promote consumer spending.

3.7.8 The Committee also noted that in order to implement the provisions of the Special Act, the Korean Government had requested to receive from the 1992 Fund claims-related data in order to, *inter alia*, avoid any duplication of payments.

3.7.9 It was noted that during informal consultations between the Korean Government, the 1992 Fund and the Skuld Club, it had been agreed that information relating to specific claims would be provided by the 1992 Fund to the Korean Government provided that the claimants concerned had given their clear consent to the disclosure of such information and that such disclosure was in accordance with the provisions of Korean law.

Level of payments

3.7.10 It was recalled that at its March 2008 session, the Executive Committee had decided that the conversion of 203 million SDR into Korean Won should be made on the basis of the value of that currency *vis-à-vis* the SDR on the date of the adoption of the Executive Committee's Record of Decisions of its 40th session, ie 13 March 2008 at the rate of 1 SDR = Won 1 584.330. It was also recalled that the conversion on the basis of the rate applicable on that day gave 203 million SDR = Won 321 618 990 000 (£159 million).

3.7.11 It was further recalled that in March 2008 the Executive Committee, in view of the uncertainty as to the total amount of the potential claims, had decided that payments should for the time being be limited to 60% of the amount of the damage actually suffered by each claimant, as assessed by the Fund's experts.

3.7.12 The Committee noted that the most recent estimate by the Fund's experts of the total amount of the losses caused by the spill was between Won 538.5 billion and Won 573.5 billion (£268-285 million).

3.7.13 It was noted that in view of the new information and the remaining uncertainties as to the total amount of admissible claims the Director considered that it was unfortunately inevitable that the present level of payments of 60% be revised and that, taking into account a safety margin of about 10%, he considered that a level of payments of 40-50% would be prudent. It was further noted that this percentage would be reviewed at the Executive Committee's next session.

3.7.14 The Committee noted that although a decision to reduce the level of payments would be unfortunate, it would not bring as a result an unequal treatment of claimants since the 1992 Fund had not yet made any payments for compensation.

Debate

3.7.15 A number of delegations expressed their satisfaction to the Korean Government for its undertaking to ensure that all claimants received compensation at their assessed amount in the event that the 1992 Fund would not be able to pay in full claims as assessed by the Fund's experts.

3.7.16 Several delegations expressed concern at the increase in the 1992 Fund's exposure regarding this incident. In view of the continuing uncertainties with respect to the level of damages, these

delegations stated a preference for revising the level of payments to the more conservative figure of 40% proposed by the Director.

3.7.17 One delegation, in consideration of the cooperation of the Korean authorities with the Fund and the national reactions to the disaster, suggested an open approach to the Korean request.

3.7.18 Other delegations expressed the view that, considering the recent significant increase in the estimated exposure, a more cautious percentage should be adopted. Those delegations stated that they would prefer a level of payments at 30% in view of the uncertainty as to the total amount of the potential claims.

3.7.19 In his summary of the discussion, the Chairman made the point that the 1992 Fund had the duty under the 1992 Fund Convention to ensure that all claimants were treated equally and that therefore a conservative percentage needed to be agreed upon to avoid the risk of overpayment. He therefore proposed a level of payment at 35% of the claims as assessed by the Fund's experts, to reflect the divergence of opinion in the Executive Committee.

3.7.20 The Korean delegation thanked the Committee for the understanding expressed towards the victims in the Republic of Korea. That delegation stated that the Executive Committee, when considering a revision of the level of payments, should also take into account the fact that the Korean Government had decided that it would 'stand last in the queue' with respect to its claims relating to clean-up costs and other expenses incurred and that a revised level of payments much lower than that adopted in March 2008 would cause negative sentiments among the victims of the incident. In this respect that delegation suggested that the level of payments should, as a minimum, be 40%, as proposed by the Director.

Decisions

3.7.21 The Executive Committee decided that, in view of the uncertainty as to the total amount of the potential claims, and in view of the need to ensure equal treatment for all claimants, any payments made by the 1992 Fund should for the time being be limited to 35% of the amount of the damage actually suffered by the respective claimant as assessed by the Fund's experts. The Executive Committee also decided to review the situation at its next session.

3.8 *Incident in Argentina*

3.8.1 The Executive Committee took note of the information regarding a new pollution incident that took place in Argentina which might involve the 1992 Fund, as set out in document 92FUND/EXC.41/10.

Impact of the spill

3.8.2 It was noted that a significant quantity of oil had impacted the shoreline in Caleta Cordova, Chubut province, Argentina, on 26 December 2007 and that a total of 5.7 kilometres of coastline had been reported to have been affected. It was also noted that clean-up operations on the shoreline had been undertaken by local contractors under the supervision of the provincial government.

Claims for compensation

3.8.3 It was noted that claims were expected for clean-up costs, losses in the fisheries and tourism sectors and for environmental damage.

Legal proceedings

3.8.4 It was noted that several vessels were being investigated as a possible source of the pollution, one of which was the *Presidente Umberto Arturo Illia* (*Presidente Illia*). It was also noted that an inspection of the *Presidente Illia* had revealed a crack in the ballast line whilst passing through the cargo tank.

3.8.5 It was also noted that the owner of the *Presidente Illia* and its insurer contested liability and argued that the oil which impacted the coast must have come from another source. It was also noted that if they were successful with their defence, and it was proved that the spill that impacted the coast had come from a 'ship' as defined in the 1992 Civil Liability and Fund Conventions, the 1992 Fund would have to pay compensation from the outset.

Debate

3.8.6 The Argentinean delegation stated that the Argentinean authorities were taking all necessary measures to ascertain in an objective way the circumstances surrounding the incident.

4 Any Other Business

No items were raised under this agenda item.

5 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.41/WP.1, was adopted, subject to certain amendments.