



INCIDENTS INVOLVING THE 1992 FUND

VOLGONEFT 139

Note by the Director

Objective of document:

To inform the Executive Committee of the latest developments regarding this incident.

Summary of the incident so far:

On 11 November 2007 the Russian registered tanker *Volgoneft 139* broke in two in the Strait of Kerch linking the Sea of Azov and the Black Sea between the Russian Federation and Ukraine. It is believed that between 1 200 and 2 000 tonnes of fuel oil were spilt at the time of the incident.

Some 50 kilometres of shoreline both in the Russian Federation and in Ukraine were affected by the oil. Shoreline clean up in the Russian Federation was reported to have been undertaken by the Russian military.

The ship was owned by JSC Volgotanker which has since been declared bankrupt by the Commercial Court in Moscow. The shipowner was insured for protection and indemnity liability by Ingosstrakh (Russian Federation). It appears that the insurance cover is limited to 3 million SDR (£2.6 million)^{<1>} which is well below the minimum limit under the 1992 Civil Liability Convention of 4.51 million SDR (£3.9 million). There is therefore an 'insurance gap' of some 1.5 million SDR (£1.3 million).

The insurer does not belong to the International Group of P&I Clubs and therefore the Small Tanker Owners Pollution Indemnification Agreement (STOPIA) 2006 does not apply.

In February 2008 the Arbitration Court of Saint Petersburg and Leningrad Region issued a ruling declaring that the limitation fund had been constituted by means of a letter of guarantee for 3 million SDR (£2.6 million).

The insurer has pleaded before the Arbitration Court of Saint Petersburg and Leningrad Region the defence that the spill resulted from a natural phenomenon of an exceptional, inevitable and irresistible character and that the shipowner and his insurer are therefore not liable for the pollution damage caused by the spill. If this defence were to be successful, the 1992 Fund would be liable to pay compensation to victims of the spill from the outset.

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In this document conversion of currencies has been made on the basis of the exchange rate as at 16 September 2008 (1 SDR = £0.8706, US\$ 1 = £0.5617 and £1 = RUB 45.48).

The Russian Central and Regional Governments have presented claims totalling RUB 8 446.2 million (£185.7 million) although, except for one claim, no documentation has been submitted. A claim for RUB 4 million (£88 000) has been presented to the Arbitration Court in Saint Petersburg and Leningrad Region by the Kerch Merchant Port in Ukraine. This claim would have to compete with other claims against the limitation fund established by the shipowner in the Arbitration Court of Saint Petersburg and Leningrad Region.

The total amount available for compensation under the 1992 Civil Liability and Fund Conventions is 203 million SDR (£176.7 million). The total amount claimed so far exceeds this amount.

In May 2008 meetings took place in Moscow in the Ministry of Transport with a team of 1992 Fund's representatives and experts where further claims were submitted.

Recent developments: In June 2008 a team of 1992 Fund's representatives and experts travelled to Moscow, Krasnodar and Novorossiysk to visit the area affected by the spill and hold discussions with the Ministry of Transport, the regional authorities and other claimants. During the visit valuable information was provided.

In September 2008 the Court of Cassation of Saint Petersburg and Leningrad Region rendered a judgement confirming the ruling by the Arbitration Court declaring that the limitation fund had been constituted in the amount of 3 million SDR (£2.6 million). The Fund has appealed against this judgement before the Supreme Court in Moscow.

If the Supreme Court were to confirm the decision by the Court of Cassation the decision would no longer be subject to ordinary forms of review in the Russian Federation and, under the 1992 Fund Convention, would be enforceable on the 1992 Fund (Article 8, 1992 Fund Convention).

The Fund's experts are examining the documentation provided and have carried out an interim assessment of the claim submitted by a clean up contractor.

The Fund's experts are also examining the evidence available on the cause of the spill and have provisionally concluded that the storm of 11 November 2007 was not exceptional but irresistible in respect of the *Volgoneft 139* because the conditions associated with the storm were in excess of the vessel's design criteria. However, they have also concluded that it was not inevitable, in that the vessel should not have been exposed to the storm in the way she was as a result of failures by individuals concerned for the vessel and the system in general.

A further visit to Moscow, Krasnodar and Novorossiysk has been scheduled for September 2008.

Action to be taken: Information to be noted

1 Summary of incident

Ship	<i>Volgoneft 139</i>
Date of incident	11.11.07
Place of incident	Strait of Kerch, between the Sea of Azov and the Black Sea, Russian Federation and Ukraine
Cause of incident	Breaking
Quantity of oil spilled	Between 1 200 and 2 000 tonnes of fuel oil
Area affected	Taman Peninsula, Tuzla Spit and Chushka Spit, Russian Federation
Flag State of ship	Russian Federation
Gross tonnage (GT)	3 463 GT
P&I insurer	Ingosstrakh
P&I cover	3 million SDR (£2.6 million)
CLC Limit	4.51 million SDR (£3.9 million)
CLC & Fund Limit	203 million SDR (£176.7 million)
STOPIA/TOPIA applicable	No
Claims for compensation so far	Russian Central and Regional Governments and a private contractor: RUB 8 446.2 million (£185.7 million) Kerch Port Authority (Ukraine): RUB 4 million (£88 000)

2 The incident

- 2.1 On 11 November 2007 the Russian-registered tanker *Volgoneft 139* (3 463 GT, built in 1978) broke in two in the Strait of Kerch linking the Sea of Azov and the Black Sea between the Russian Federation and Ukraine. The tanker was at anchor when a heavy storm caused rough seas with heavy swell of up to six metres.
- 2.2 The tanker was loaded with 4 077 tonnes of heavy fuel oil. It is understood that between 1 200 and 2 000 tonnes of fuel oil were spilt. The aft section remained afloat and, using the casualty's own engines, the captain managed to beach it on a nearby sand bank. The crew were then rescued and taken to the nearby port of Kavkaz (Russian Federation). Following removal of 913 tonnes of heavy fuel oil, the aft section was towed to Kavkaz, where it remains for inspection. The fore part remained afloat at anchor for a while and then sank. A month after the incident, the fore part was partially raised and 1 200 tonnes of fuel oil from tanks one and two were recovered. The fore part remains on the seabed.

3 Clean-up operations and response

- 3.1 Some 50 kilometres of shoreline both in the Russian Federation and in Ukraine are understood to have been affected by the oil. A significant part of the shoreline of the Taman Peninsula, the Tuzla Spit, Chushka Spit and the beaches near the village of Ilyich were allegedly affected by the oil (see map at Annex). A joint crisis centre was set up to coordinate the response between the Russian Federation and Ukraine and attempts were made to contain and recover the oil at sea. Shoreline clean up in the Russian Federation is understood to have been undertaken by the Russian military and civil emergency forces under the supervision of the Prime Minister, Mr Viktor Subkov.
- 3.2 During at-sea operations 200 tonnes of heavy fuel oil are reported to have been recovered. The Ukrainian authorities have indicated that an unknown amount of oil sank to the sea bed. However, officials of the Regional Administration of the Krasnodar Region believe this is unlikely. During the shoreline clean up in the Russian Federation some 70 000 tonnes of oily debris with a mixture of soil, sand and sea grass were said to have been recovered.
- 3.3 Heavy bird casualties, in excess of 30 000, were reported and a representative of the Sea Alarm Foundation, an environmental agency based in Belgium, travelled to the Russian Federation in an attempt to assist with wildlife rehabilitation efforts.

4 1992 Civil Liability and Fund Conventions

The Russian Federation is party to the 1992 Civil Liability and Fund Conventions whereas Ukraine is party to the 1992 Civil Liability Convention (1992 CLC) only.

5 The shipowner and its insurer

5.1 The *Volgoneft 139* was owned by JSC Volgotanker. In March 2008, Volgotanker was declared bankrupt by the Commercial Court in Moscow.

5.2 It appears that the *Volgoneft 139* was insured by Ingosstrakh for 3 million SDR (£2.6 million), ie the minimum limit of liability under the 1992 CLC prior to November 2003. The minimum limit under the 1992 CLC (after November 2003) is however 4 510 000 SDR (£3.9 million). There is therefore an 'insurance gap' of some 1.5 million SDR (£1.3 million).

5.3 The *Volgoneft 139* was not insured by a P&I Club belonging to the International Group of P&I Clubs and therefore was not covered by the Small Tanker Owners Pollution Indemnification Agreement (STOPIA) 2006.

6 Meetings between the Russian authorities and the Secretariat

6.1 In November and December 2007, the Director and the Head of the Claims Department contacted the Russian Embassy in London and the Ministry of Transport in Moscow offering the help of the 1992 Fund to the Russian authorities to deal with the incident. A number of meetings took place at the 1992 Fund offices where the compensation regime was explained in detail and information was provided to the Russian authorities.

6.2 In April 2008, a meeting took place in London between representatives of the Russian Government, one of the Russian claimants, the shipowner, the Fund Secretariat and the 1992 Funds' experts. Ingosstrakh was invited but did not attend the meeting. At the meeting it was agreed that the claimant and the 1992 Fund would jointly request the Court to grant the parties sufficient time to examine the documentation and to discuss its contents. It was also agreed that the 1992 Fund's representatives and experts should visit Moscow to discuss the claims arising from the incident.

6.3 In May 2008, meetings took place in Moscow at the Ministry of Transport where further claims were submitted. During the meetings the Russian delegation informed the 1992 Fund that, as per order of the Government of the Russian Federation, the Ministry of Transport would be the main speaker on behalf of all Russian Central and Regional Government claimants. The Russian delegation stated that they were preparing the supporting documentation required which would be presented to the 1992 Fund, with translations in English, in the near future. The 'insurance gap' issue was discussed at the meeting. The Russian delegation stated that they understood the problem and that, with goodwill from all the parties, a solution would be found. It was pointed out that, under Russian law, international agreements take precedence over national law and that the Russian authorities would examine who should pay for the 'insurance gap' (Ingosstrakh or the Russian Government). It was mentioned that the Russian authorities intended to submit a document to the 1992 Fund with their legal analysis. It was 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.

6.4 In June 2008 a team of 1992 Fund's representatives and experts travelled to Moscow, Krasnodar and Novorossiysk to hold discussions with the central and regional authorities and another claimant, and to visit the area affected by the spill. During the visit meetings took place with representatives of the Ministry of Transport, Ministry of Natural Resources (Rosprirodnadsor), Krasnodar Regional Administration and a clean up contractor based in Novorossiysk. A field trip also took place to the port of Kavkaz where the Fund's representatives and experts visited the aft part of the *Volgoneft 139* tied up at a berth outside the main port and the fore part which lies submerged in the Strait of Kerch. It was observed that some seven months after the incident sheen was still coming out from the fore part of the wreck. During the visit valuable information in respect of the cause of the incident was provided and additional information in respect of other claims was requested. It was agreed that the Fund's

representatives and experts would visit the Russian Federation again to hold further meetings with the national and regional authorities in the near future. This visit has been scheduled for September 2008.

7 Claims for compensation

7.1 The claims situation as at 19 September 2008 is summarised in the table below:

Category	Claimant	Claim RUB	Claim £	Current situation
Clean up	Contractor	RUB 73.5 million	£1.6 million	Interim assessment completed.
Environmental damage	Ministry of Natural Resources	RUB 6 048.6 million	£133 million	No supporting documentation submitted. Claim calculated on the basis of 'Methodika'.
Clean up	Ministry of Emergencies	RUB 4 million	£88 000	No supporting documentation submitted.
Clean up	Regional Government	RUB 100.5 million	£2.2 million	No supporting documentation submitted.
Clean up	Regional Government	RUB 400 million	£8.8 million	No supporting documentation submitted.
Reinstatement measures	Regional Government	RUB 1 819.6 million	£40 million	No supporting documentation submitted.
Total		RUB 8 446.2 million	£185.7 million	

7.2 The Russian Central and Regional Governments have presented claims totalling RUB 8 446.2 million (£185.7 million). These claims relate to the costs of clean up and preventive measures and the costs of reinstatement of the marine environment.

7.3 In January 2008 the 1992 Fund received a claim for compensation from a Russian clean-up contractor for the amount of RUB 73.5 million (£1.6 million) for the cost of clean-up operations, discharging oil from the aft part of the tanker, towage of the aft part to Kavkaz (Russian Federation) and removal of the oil from the sunken fore part. Following an examination of the documentation submitted, the 1992 Fund has approved an interim assessment of this claim in the amount of RUB 30 million (£660 000). The difference between the claimed and assessed amounts is largely accounted for by the apparent duplication of a number of items claimed, and the fact that the salvage operations had a dual purpose (salvage and preventative measures).

7.4 At the meeting in May 2008 the Russian authorities informed the 1992 Fund that the Ministry of Natural Resources had submitted a claim for some RUB 6 048.6 million (£133 million). This claim is based on an abstract quantification calculated in accordance with a theoretical model (Methodika). The Russian authorities also informed the 1992 Fund that documentation in respect of this claim and all other claims referred to in the table under paragraph 7.1 was being prepared and would be submitted to the Fund in the near future. No further developments have taken place in respect of this claim.

7.5 In May 2008, the Kerch Merchant Port (Ukraine) submitted a claim before the Arbitration Court in Saint Petersburg and Leningrad Region totalling RUB 4 105 561 (£90 000) in respect of damage to property and costs incurred in clean-up operations. This claim relates to damage caused in Ukraine, which is party to the 1992 CLC but not to the 1992 Fund Convention. The 1992 Fund will therefore not have to pay compensation in respect of this claim. It will, however, affect the apportionment of the shipowner's limitation fund, having a minor effect on the total amount available for compensation.

- 7.6 The 1992 Fund has not received any claims in respect of losses in the fisheries sector although it is understood that the State Fisheries Committee is considering whether to submit a claim.

8 Legal proceedings

Claims for compensation

- 8.1 In February 2008 the Fund received a notification from the Arbitration Court of Saint Petersburg and Leningrad Region of proceedings brought by a Russian clean up contractor against the shipowner, the P&I insurer and the 1992 Fund (paragraph 7.3).
- 8.2 In May 2008 the Fund received a further notification from the Arbitration Court of proceedings brought by the Kerch Merchant Port (paragraph 7.5).
- 8.3 The next hearing will take place in October 2008 and the 1992 Fund intends to request the Court to adjourn proceedings, allowing the parties to continue their discussions.

Limitation proceedings

- 8.4 The shipowner commenced limitation proceedings in the Arbitration Court of Saint Petersburg and Leningrad Region.
- 8.5 In February 2008 the Court issued a ruling declaring that the limitation fund had been constituted by means of an Ingosstrakh letter of guarantee for 3 million SDR, equivalent to RUB 116 636 700 (£2.5 million).
- 8.6 At a hearing in April 2008 the 1992 Fund presented pleadings, requesting the Court to allow time for the 1992 Fund to examine the claims and enter into discussions with the claimants. In its pleadings the 1992 Fund argued that the current limit of the shipowner's liability under the 1992 CLC is 4.51 million SDR (£3.9 million) and that, under the Russian constitution, international conventions to which the Russian Federation is party take precedence over Russian internal law and that therefore the Court's ruling establishing the shipowner's limitation fund should be amended.
- 8.7 In May 2008 the Court of Appeal rendered a decision dismissing the 1992 Fund's request and 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.
- 8.8 The 1992 Fund, after having examined the Court's decision, decided to appeal to the Second Appeal Court (Court of Cassation).
- 8.9 In September 2008 the Court of Cassation rendered a decision dismissing the 1992 Fund's appeal. The Court of Cassation in its reasoning considered that since Russian law still provided that the shipowner's limit of liability under the 1992 CLC was, in the case of the *Volgoneft 139*, 3 million SDR, equivalent to RUB 116 636 700 (£2.5 million), it was for Russian Courts to apply the limits of liability as published in the Russian official Gazette.
- 8.10 The 1992 Fund, has appealed against this judgement before the Supreme Court in Moscow.

Natural phenomenon of an exceptional, inevitable and irresistible character

- 8.11 The insurer has submitted a defence in Court arguing that the incident was wholly caused by a natural phenomenon of an exceptional, inevitable and irresistible character and that therefore no liability should be attached to the owner of the *Volgoneft 139* (Article III.2(a) of the 1992 CLC). If this argument were to be accepted by the Court, the shipowner and its insurer would be exonerated from liability and the 1992 Fund would have to pay compensation to the victims of the spill from the outset (Article 4.1(a) of the 1992 Fund Convention).

9 Cause of the incident

- 9.1 The 1992 Fund has appointed a team of experts to examine the weather conditions in the area and the circumstances at the time of the incident to determine the validity of the shipowner's defence. The experts have visited the area where the incident took place and have inspected the aft part of the wreck in the port of Kavkaz.
- 9.2 In summary the preliminary conclusions reached by our experts are:
- (i) The storm of 11 November 2007 was not exceptional. There are records of similar and comparable storms being experienced in the region four times in the past twenty years.
 - (ii) There were timely forecasts of the storm and conditions were accurately predicted.
 - (iii) The storm of 11 November 2007 was irresistible insofar as the *Volgoneft 139* was concerned. The conditions associated with the storm were in excess of the vessel's design criteria. Their analysis shows that the hull would have been overloaded if waves of a length similar to that of the *Volgoneft 139* and in excess of four metres height were encountered.
 - (iv) It was not inevitable that the *Volgoneft 139* would be caught in the storm for the following reasons:
 - (a) According to the certificate of class as modified by a 'condition of class' of 6 July 2007, the vessel was restricted from trading south of the Kerch Straits. This restriction was confirmed in an enquiry report by the Russian authorities that stated that: 'for navigation in the Kerch Strait to the south of the sand bank of Tuzla the season is restricted from April to October inclusive. Thus the tanker was in this area beyond the limits of the period of navigation allowed by the Register.' The casualty would have been avoided if the *Volgoneft 139* had been operating within the limits prescribed in her certificate of class as valid at the material time.
 - (b) Before the vessel reached the exposed area the master received information that made it clear that there would be at least 36 hours before the envisaged ship-to-ship transfer would take place. The master should have acted on this information and returned to a place where shelter could be obtained from the southerly winds which were forecast. Had he done so the casualty would have been avoided.
 - (c) By early afternoon of 10 November, the forecasts were indicating severe weather with winds from the South East. The Kerch Straits provide no shelter to South Easterly winds and therefore to avoid exposure to strong winds and rough seas it was necessary to proceed back to the north immediately.
 - (d) Investigations indicate that the Kerch Straits anchorage is regarded as a commercial port. The port functions with commercial and administrative facilities such as agency and customs and it is administered and monitored by a Vessel Traffic Service and Traffic Control. A proper system of control and monitoring of vessels in the Kerch Straits anchorage should have provided storm warnings and advisory notices or notices of direction for vessels posing a particular risk if exposed to extreme weather, such as river tankers awaiting ship-to-ship transfer operations. A proper system would have provided for such vessels being advised or directed to vacate the southern anchorage and proceed north with priority for transit through the Kerch channel in advance of a storm. A proper system would have closed the anchorage to such vessels approaching from the north when a storm warning was in force. The casualty would have been avoided had the vessel been directed to proceed to the north in advance of the storm.

10 Director's considerations

- 10.1 The Director is pleased to note that the Russian authorities have provided assistance to the 1992 Fund's representatives and experts during the two visits to the Russian Federation. He is also pleased that information and documentation on the claims and the cause of the incident are being provided which allow the Fund's expert to examine the circumstances under which the spill took place. The Director is pleased to note that the Russian authorities have invited the 1992 Fund's representatives and experts to a follow up to visit Moscow and the affected area.
- 10.2 The Director would however, like to bring the following issues to the attention of the Executive Committee:
- The Court of Cassation has rejected the 1992 Fund's appeal and has considered that the shipowner's limit of liability under the 1992 CLC is 3 million SDR and not 4.51 million SDR. This decision is in clear contravention of the 1992 CLC as amended in November 2003.
 - If the Supreme Court were to confirm the decision by the Court of Cassation the decision would no longer be subject to ordinary forms of review in Russia and, under the 1992 Fund Convention, would be enforceable on the 1992 Fund (Article 8, 1992 Fund Convention).
 - The preliminary conclusions reached by the 1992 Fund's experts are that the storm of 11 November 2007 was not exceptional, that it was irresistible insofar as the *Volgoneft 139* was concerned and that it was not inevitable that the *Volgoneft 139* would be caught in the storm.
 - If the Russian Courts were to agree with the preliminary conclusions of the 1992 Fund's experts, the shipowner and Ingosstrakh would not be exonerated from liability for the incident and the Fund would be called to pay compensation only over and above the CLC limit.
 - One of the claims submitted by the Russian Central Government is for environmental damage, and based on an abstract quantification calculated in accordance with a theoretical model (Methodika) which is in contravention of Article I.6 of the 1992 CLC.
 - The claims submitted as a result of the incident already exceed the maximum amount available under the 1992 Conventions. In the event that, at some point in the future, the Executive Committee were to authorise the Director to make payment of claims, it would also have to determine an appropriate level of payment.

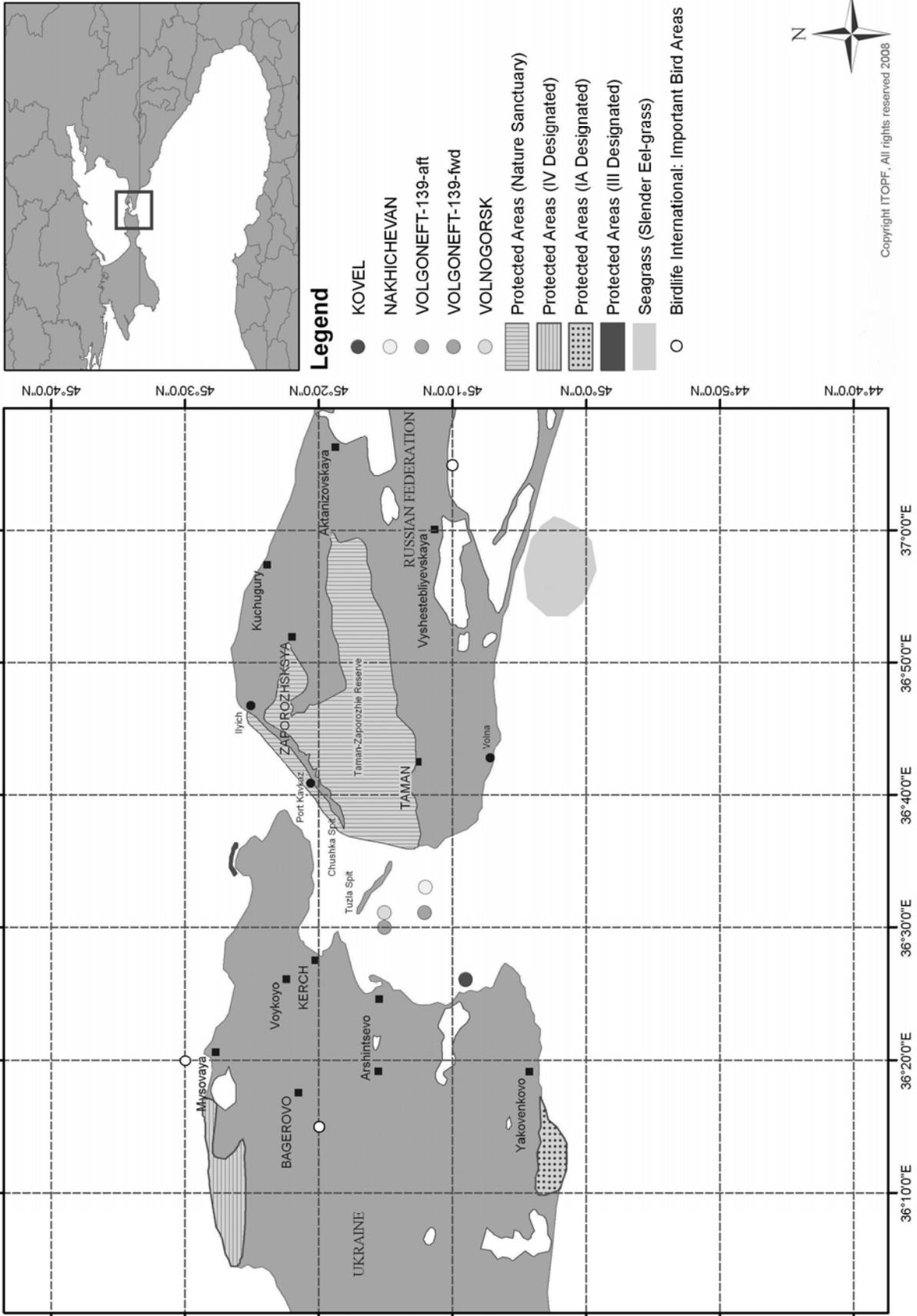
11 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document; and
- (b) to give the Director such instructions in respect of the handling of this incident as it may deem appropriate.

* * *

ANNEX



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