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OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
42nd session
Agenda item 6

92FUND/EXC.42/14
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RECORD OF DECISIONS OF THE FORTY-SECOND SESSION OF THE EXECUTIVE COMMITTEE

(held from 13 to 17 October 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.42/1.

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 13th session the 1992 Fund Assembly had appointed the delegations of Cameroon, Panama, Portugal, Qatar and the 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	
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.42/2/1 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
Angola
Argentina
Belgium
Bulgaria
Cameroon
Canada
China (Hong Kong Special Administrative Region)
Cyprus
Dominican Republic
Estonia
Finland
France
Ghana
Greece
Ireland
Kenya
Latvia
Liberia
Malta
Marshall Islands
Mexico
Monaco
Morocco
New Zealand
Nigeria
Norway
Oman
Panama
Philippines
Poland
Portugal
Russian Federation
Spain
Sweden
Trinidad and Tobago
Turkey
Uruguay
Vanuatu

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

Ecuador
Saudi Arabia
Syrian Arab Republic
Ukraine

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

Intergovernmental organisations:

Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea (REMPEC)
International Oil Pollution Compensation Fund 1971 (1971 Fund)
International Oil Pollution Compensation Supplementary Fund (Supplementary Fund)

International non-governmental organisations:

Comité Maritime International (CMI)
International Association of Classification Societies Ltd (IACS)
International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)
International Group of P&I Clubs
International Tanker Owners Pollution Federation Ltd (ITOPF)

3 Incidents involving the 1992 Fund

3.1 Overview

The Executive Committee took note of document 92FUND/EXC.42/3, which contained summaries of the situation in respect of all ten incidents dealt with by the 1992 Fund since the Committee's 38th session, held in October 2007.

3.2 *Erika*

3.2.1 The Executive Committee took note of the developments regarding the *Erika* incident as set out in document 92FUND/EXC.42/4.

CLAIMS SITUATION

3.2.2 It was noted that as at 24 September 2008, 7 130 claims for compensation had been submitted for a total of €211 million (£167 million), and that 99.7% of these claims had been assessed. It was also noted that compensation payments totalling €129.7 million (£102.7 million) had been made in respect of 5 934 claims.

CRIMINAL PROCEEDINGS

3.2.3 It was recalled that the Criminal Court in Paris had delivered a judgement in January 2008, holding the following four parties criminally liable: the representative of the shipowner (Tevere Shipping), the President of the management company (Panship Management and Services Srl), the classification society (Registro Italiano Navale (RINA)) and Total SA. It was also recalled that, regarding civil liabilities, the judgement had made the four parties jointly and severally liable for the damage caused by the incident and had awarded claimants in the proceedings economic losses, damage to the image of several regions and municipalities, moral damages and damages to the environment. It was also recalled that the four parties held criminally liable and a number of civil parties had appealed against the judgement.

3.2.4 It was noted that the Secretariat would have to 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. It was also noted that it would be difficult at this stage to ascertain what implications the judgement would have since it was subject to appeal and the Secretariat could only usefully examine the implications once the Court of Appeal had rendered its judgement.

Debate

3.2.5 One delegation stated that it recognised that it would not be efficient to analyse the judgement by the Criminal Court at this stage since it was subject to appeal, but that it was looking forward to having an analysis by the Secretariat of the Court of Appeal's judgement, once it had been issued.

LEGAL PROCEEDINGS INVOLVING THE FUND

3.2.6 It was 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 (377 actions) and that the courts had rendered judgements in respect of 140 claims. It was also noted that thirty-seven actions by some 46 claimants were pending and that the total amount claimed in the pending actions, excluding the claims by Total SA, was some €25.5 million (£20.2 million).

COURT JUDGEMENTS

3.2.7 The Committee took note of the six court judgements rendered since the last session of the Executive Committee in June 2008, as summarised in section 6 of document 92FUND/EXC.42/4. It was noted that the judgements were all favourable to the Fund and that, even if in some cases the courts had made the statement that they were not bound by the Fund's criteria for admissibility of claims, the courts had considered that judges may use those criteria as a reference. It was further noted that in some of the judgements the courts had expressly used the Fund's criteria.

3.2.8 The Committee noted that the Commercial Court in Lorient had rendered a judgement which had coincided with the views taken by the 1992 Fund. The Committee also noted that the Court of Appeal in Rennes had rendered four judgements confirming the views taken by the 1992 Fund and that the Court of Cassation had also rendered one judgement confirming the views taken by the 1992 Fund in respect of a claim by an insurer as a result of the cancellation of a millennium party.

LEGAL PROCEEDINGS BY THE COMMUNE DE MESQUER AGAINST TOTAL

3.2.9 It was recalled 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, under European law, a waste. It was also recalled that the French Supreme Court had referred this question to the European Court of Justice (ECJ).

3.2.10 The Committee noted that the ECJ had delivered its judgement on 24 June 2008.

3.2.11 It was noted that on the first question of whether the fuel oil transported as cargo on board the *Erika* was in fact a waste under European law, the ECJ had concluded that this substance did not constitute a waste within the meaning of Directive 75/442 on waste[<1>] (paragraph 7.3.2 of document 92FUND/EXC.42/4).

3.2.12 It was noted, however, that on the second question of whether a cargo of fuel oil that accidentally escaped from a ship would, once it had been mixed with seawater and sediments, become a waste under European law, the ECJ had concluded that these substances must be considered as waste within the meaning of the Directive (paragraph 7.3.3 of document 92FUND/EXC.42/4).

3.2.13 The Committee took note of the summary contained in paragraphs 7.3.4-7.3.9 of document 92FUND/EXC.42/4 of the ECJ's answer to the third question, namely whether, in the event of the sinking of an oil tanker, the producer of the heavy fuel oil spilled at sea and/or the seller of the fuel and charterer of the ship carrying the fuel may be required to bear the cost of disposing of the waste thus generated, even though the substance spilled at sea was transported by a third party, in this case a carrier by sea.

3.2.14 It was noted that the ECJ had recalled that the European Community was not bound by the 1992 Civil Liability and Fund Conventions, since the European Community had not ratified the Conventions, and also that the Directive on waste did not contain a provision expressly stating that that Directive did not apply to an incident or activity in respect of which liability or compensation fell within the scope of the 1992 Civil Liability and Fund Conventions.

3.2.15 It was noted that, in the ECJ's view, the national court may regard the seller of those hydrocarbons and charterer of the ship carrying them as a producer of that waste within the meaning of the Directive on waste, and thereby as a 'previous holder' for the purposes of applying that directive, if that court reached the conclusion that the seller-charterer had contributed to the risk that the pollution caused by the shipwreck would occur, in particular if he had failed to take measures to prevent such an incident, such as measures concerning the choice of ship.

3.2.16 It was also noted that the ECJ had stated that the Directive on waste did not preclude the Member States from laying down, pursuant to their relevant international commitments, such as the 1992 Civil Liability and Fund Conventions, that the shipowner and the charterer could be liable for the damage caused by the discharge of hydrocarbons at sea only up to maximum amounts. Neither did it preclude either a compensation fund such as the IOPC Funds, with resources limited to a maximum amount for each incident, from assuming liability, pursuant to those international commitments, in place of the 'holders' within the meaning of the Directive on waste, for the cost of disposal of the waste resulting from hydrocarbons accidentally spilled at sea.

[<1>] Directive 75/442/EEC of 15 July 1975 on waste, as amended by Commission Decision 96/350/EC of 24 May 1996.

3.2.17 It was, however, noted that the ECJ had also stated that if the cost of disposing of the waste produced by an accidental spillage of hydrocarbons at sea was not borne by the 1992 Fund and, in accordance with the limitations and/or exemptions of liability laid down, the national law of a Member State, including the law derived from international agreements, prevented that cost from being borne by the shipowner and/or the charterer, even though they were regarded as 'holders' within the meaning of the Directive on waste, in order to ensure that the Directive is correctly transposed, such a national law would have to make provision for that cost to be borne by the producer of the product from which the waste came. It was also noted that the Court had further stated that, in accordance with the 'polluter pays' principle, such a producer could not be liable to bear that cost unless he had contributed by his conduct to the risk that the pollution caused by the shipwreck would occur.

3.2.18 The Committee noted that the Director, after studying the judgement by the ECJ and discussing it with the 1992 Fund's French lawyer, had considered that, although it might be too early to reach a conclusion on the possible consequences that the judgement by the ECJ could have for the 1992 Civil Liability and Fund Conventions, the judgement appeared to have taken into account all the relevant international commitments of the EU Member States, including the 1992 Civil Liability and Fund Conventions and that therefore it would appear that the judgement would not affect the applicability of these Conventions.

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.42/5.

3.3.2 It was recalled that at its July 2000 session the Executive Committee had decided that the *Slops* should not be considered a 'ship' for the purpose of the 1992 Civil Liability and Fund Conventions and that these Conventions did not apply to this incident.

3.3.3 It was also 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.

3.3.4 It was recalled that after lengthy court proceedings, the Greek Supreme Court had ultimately 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. It was also recalled that in February 2008 the Court of Appeal had rendered its judgement confirming the judgement of the Court of First Instance, which awarded the claimants the claimed amount, ie €2 323 360 (£1.8 million) plus legal interests and costs.

3.3.5 The Committee noted that in July 2008 the 1992 Fund had paid €4 022 099 (£3.2 million) to the claimants as principal, legal interests and costs in accordance with the judgement by the Court of Appeal.

POSSIBLE RECOURSE ACTION AGAINST THE GREEK STATE

3.3.6 It was recalled that in June 2008 the Executive Committee had instructed the Director to further examine a possible recourse action by the 1992 Fund against the Greek State, taking into account all the policy implications, in particular the earlier decisions by the 1992 Fund's governing bodies regarding the definition of 'ship'. The Committee noted that the Director had obtained a further legal opinion from the 1992 Fund's Greek lawyer (cf document 92FUND/EXC.42/5, Annex), concluding that, in accordance with Greek law, the 1992 Fund would be entitled to bring a recourse action against the Greek State for the amounts paid to claimants.

3.3.7 The Committee took note of the Director's analysis of the issue of a possible recourse action against the Greek State, taking into account the further legal advice obtained from the 1992 Fund's Greek lawyer and the Fund's policy in respect of recourse actions and the definition of 'ship'.

***The first approach**: To consider decisive the applicability of the 1992 Conventions to the Slops under Greek law as determined by a final court decision, in spite of the established policy of the 1992 Fund regarding the definition of 'ship'*

3.3.8 The Committee recalled that the Fund's policy in respect of recourse actions, laid down in April 1995 by the Executive Committee of the 1971 Fund in connection with the *Rio Orinoco* incident, was as follows:

> 'The policy of the Fund is to take recourse action whenever appropriate and, in each case, consider whether it would be possible to recover any amounts paid to victims from the shipowner or from other parties on the basis of the applicable national law. If matters of principle are involved, the question of costs should not be the decisive factor for the Fund when considering whether to take legal action. The Fund's decision should be made on a case by case basis, in the light of the prospect of success within the legal system in question' (document FUND/EXC.42/11, paragraph 3.1.4).

3.3.9 It was noted that the Director considered that the Greek Supreme Court had decided the legal situation at the time of the incident, namely that the *Slops* was a 'ship' as defined in the 1992 Conventions as implemented in Greek law and that the Greek delegation itself, at the 8th session of the Executive Committee held in July 2000, had expressed the view that there were reasons to consider the *Slops* a 'ship' under the 1992 Conventions (document 92FUND/EXC.8/8, paragraph 4.3.7).

3.3.10 It was noted that in the Director's opinion it could therefore be maintained that the Greek State should not have permitted the *Slops* to trade unless a certificate under the 1992 Civil Liability Convention (1992 CLC) had been issued (Article VII.10), that the *Slops* in reality was operating without such a certificate at the time of the incident and that, as a consequence, the 1992 Fund had been forced to pay an amount of compensation which otherwise would have been paid by the shipowner's insurer.

3.3.11 The Committee also noted that the legal opinion from the 1992 Fund's Greek lawyer concluded that the omission on the part of the Greek State to comply with the provisions of the 1992 CLC, combined with the subsequent consequential financial damage it had caused to the 1992 Fund, constituted a tort under Greek law, which attached a liability to the Greek State and that as a consequence of that, in accordance with Greek law, the 1992 Fund was entitled to bring a recourse action.

3.3.12 It was noted that for the reasons set out above (paragraphs 3.3.8-3.3.11) the Director took the view that, should the first approach, as outlined above, be followed, and should he apply the Fund's policy in respect of recourse action, taking into account the legal opinion from the Fund's Greek lawyer, the 1992 Fund should take recourse action against the Greek State, unless such action should be considered not 'appropriate'.

***The second approach**: To consider decisive the desirability of adhering to the Fund's policy in respect of the definition of 'ship' in spite of a final legal decision to the contrary in the Member State involved*

3.3.13 It was noted that, in the Director's view, under the 1992 Fund's policy in respect of the definition of 'ship', the *Slops* did not qualify as a 'ship' at the time of the incident and that therefore the Executive Committee had taken the right decision regarding the application of the 1992 Conventions to the *Slops* incident and that, in accordance with this policy, there was no reason related to the international regime for the Greek State to ensure that the *Slops* had a certificate of insurance at the time of the incident.

3.3.14 The Committee noted that for the reason set out above, the Director was of the opinion that, should the second approach be followed, and should the desirability of adhering to the Fund's policy in respect of the definition of 'ship' be chosen as the appropriate approach to this issue, it would be

contrary to the policy of the Fund to take recourse action, since the Greek State appeared to have acted in accordance with that policy.

Proposal for an integrated solution: interpretation of the Fund's policy regarding recourse action

3.3.15 It was noted that, having studied the situation and taken into account the earlier decisions by the governing bodies regarding the definition of 'ship' as well as the views expressed by Member States at the previous sessions of the Executive Committee, the Director had proposed that the policy of the 1992 Fund regarding taking recourse action, as laid down in April 1995 by the Executive Committee of the 1971 Fund in connection with the *Rio Orinoco* incident, be maintained, but with the interpretation that it should not normally be considered 'appropriate' to take recourse action against a Member State where its actions have, in all relevant respects, been in accordance with an established policy of the 1992 Fund.

3.3.16 It was also noted that if the Executive Committee were to adopt such an interpretation of the policy regarding recourse action, it would be for the Executive Committee to decide whether the application of the policy to the *Slops* case would lead to the conclusion that the 1992 Fund should take recourse action against the Greek State, but that it was the Director's view that, on the basis of that interpretation, the 1992 Fund should not take recourse action against the Greek State.

Statement by the Greek delegation

3.3.17 The Greek delegation reiterated the position of the Greek State in this case, as expressed in the October 2007 and June 2008 sessions of the Executive Committee. That delegation stated that under the legal framework applicable at the time of the incident, the Greek Authorities could not require a craft used as an oily waste processing facility to be insured according to the provisions of the 1992 CLC. That delegation also stated that in 2001, the year following the incident, new legislation had entered into force in Greece, according to which any coastal oil tanker which was actually carrying less than 2 000 tonnes of persistent oil as cargo, as well as any Greek-registered floating storage facility, permanent or not, were required to maintain adequate insurance or other financial guarantee for oil pollution damage.

3.3.18 The Greek delegation also stated that the Greek authorities had not been called upon to intervene in the legal proceedings which had been initiated by the two anti-pollution companies in 2002 and that the Greek State had no legitimate interest to intervene in such legal proceedings.

3.3.19 The Greek delegation added that, according to the opinion of the Legal Department of the Greek Government, the judgement rendered by the Greek Supreme Court was, according to Article 7.6 of the 1992 Fund Convention, binding for the parties involved in those proceedings, namely the 1992 Fund and the two anti-pollution companies, but not for the Greek Government, since the Government was not a party to these proceedings. That delegation also added that by virtue of Article 6 of the 1992 Fund Convention no action could be brought six years after the date of the incident.

3.3.20 The Greek delegation also added that, in their view, 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.

3.3.21 That delegation further added that since 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, it would not be consistent for the 1992 Fund to bring a recourse action against the Greek State.

Debate

3.3.22 Some delegations stated that in their view there was no need to change the 1992 Fund's policy regarding recourse actions, since in their opinion the current policy implied that no action would be taken against a Contracting State that had respected the various policies established by the Fund. Those delegations considered that since the Greek State had acted in accordance with the 1992 Fund's policy on the definition of 'ship', the Fund should not bring a recourse action against the Greek State.

3.3.23 All delegations that took the floor agreed with the 1992 Fund's policy of taking recourse action whenever possible, however, they also considered that if a State had, in all relevant respects, acted in accordance with the 1992 Fund's policy, it would not be appropriate for the 1992 Fund to bring a recourse action against that State.

Decision

3.3.24 The Executive Committee supported the interpretation of the 1992 Fund's policy regarding recourse action proposed by the Director and decided not to bring a recourse action against the Greek State.

Wider policy consideration: the definition of 'ship'

3.3.25 The Committee noted that in the Director's view, there was potential for unequal treatment as a result of courts in some Member States applying the definition of 'ship' in accordance with the 1992 Fund's policy, whereas in other Member States courts would apply the wider definition of 'ship', as the Greek Supreme Court had done.

3.3.26 It was noted that, in the Director's view, where the 1992 Fund has, in determining its policy in this respect, a choice between a wider and a narrower interpretation of the definition of 'ship', a choice for the narrower interpretation would most likely give rise to a situation whereby in some Member States the Fund's restrictive policy on the definition of 'ship' would be upheld by the courts, denying cover in certain incidents, whereas in other Member States the courts would take the wider view and consider similar incidents covered by the regime. The Committee also noted that since it could be expected that governments of Member States based their requirements regarding insurance, reporting of oil receipts etc, on the 1992 Fund's official policy, such a situation would lead to unequal treatment of claimants as well as unequal treatment of shipowners and oil receivers, depending on the Member State where the damage occurred, where the ship was operating or where the oil was received and that the *Slops* case was an example of this.

3.3.27 It was also noted that adopting the wider interpretation of the definition of 'ship' would, in the Director's view, avoid this situation and put, for insurance, contributions and coverage purposes, shipowners, contributors and claimants in all Member States on a level playing field.

3.3.28 It was noted that for the reasons set out above, the Director suggested that the governing bodies consider whether it would be advisable to revise the policy of the 1992 Fund on the definition of 'ship'.

Debate

3.3.29 A number of delegations stated that the 1992 Fund should not change its policy regarding the definition of 'ship' since that policy had been adopted by the Assembly following a recommendation by the Working Group and that that policy was in their view appropriate. These delegations pointed out that to change the Fund's policy would not guarantee that courts in all Member States would apply the new policy and that it would not be appropriate to change it as a result of an occasional judgement issued by a court in a Contracting State. It was pointed out that for a change in the definition of 'ship' to be taken into account by national courts it would have to be as a modification

of the text of the 1992 Conventions since national courts are only bound by the Conventions themselves.

3.3.30 Most delegations however recalled that, when discussing the definition of 'ship', the 1992 Fund 2nd intersessional Working Group, established by the Assembly at its 3rd session in October 1998, had been split in its views. These delegations stated that the Fund's policy should evolve and that the decision of the Greek Supreme Court was a precedent, which was not in agreement with the 1992 Fund's policy. These delegations added that in their opinion the 1992 Fund should take the decisions of national courts into account.

3.3.31 On balance, the majority of delegations agreed that the Director should examine the matter further and submit a document to the 1992 Fund's Assembly at its October 2009 session and that it would be for the Assembly to take a decision.

Decision

3.3.32 The Executive Committee instructed the Director to further examine the 1992 Fund's policy of the definition of 'ship' and to present a document for consideration by the Assembly at its October 2009 session.

3.4 *Prestige*

3.4.1 The Executive Committee took note of the information regarding the *Prestige* incident set out in document 92FUND/EXC.42/6.

CLAIMS FOR COMPENSATION IN SPAIN

3.4.2 It was noted that as at 20 August 2008 the Claims Handling Office in La Coruña had received 844 claims totalling €1 018.8 million (£812.3 million), including 14 claims from the Spanish Government totalling €968.5 million (£772.2 million). It was also noted that 761 (91.69%) of the claims other than those of the Spanish Government had been assessed for €3.9 million (£3.1 million), that interim payments totalling €521 501 (£416 000)[<2>] had been made in respect of 169 of the assessed claims, mainly at 30% of the assessed amount.

3.4.3 It was recalled that between October 2003 and April 2008 the Spanish Government had submitted a total of 14 claims for an amount of €968.5 million (£772.2 million). The Committee noted that while the 1992 Fund's experts were still examining some of these claims, payments totalling €113.9 million (£78.1 million) had been made to the Spanish Government.

CLAIMS FOR COMPENSATION IN FRANCE

3.4.4 It was noted that by 20 August 2008, 481 claims totalling €109.6 million (£87.4 million) had been received by the Claims Handling Office in Lorient, of which 446 claims (92%) had been assessed for €49.8 million (£39.7 million). It was also noted that interim payments totalling €5 million (£4 million) had been made at 30% of the assessed amounts in respect of 324 claims.

3.4.5 It was recalled that the French Government had submitted a claim for €67.5 million (£53.8 million) in relation to the costs incurred for clean up and preventive measures which had been provisionally assessed at €31.2 million (£24.9 million). It was also recalled that further documentation had later been provided by the French Government and that the Fund's experts were carrying out a detailed further assessment of the claim.

[<2>] Compensation payments made by the Spanish Government to claimants have been deducted when calculating the interim payments.

LEGAL PROCEEDINGS IN SPAIN

3.4.6 It was noted that some 3 790 claims had been lodged in the legal proceedings before the Criminal Court in Corcubión (Spain) and that 636 of these claims involved persons who had submitted claims directly to the 1992 Fund through the Claims Handling Office in La Coruña. It was also noted that the Court had provided details of the claims made, which were being examined by the experts engaged by the 1992 Fund. It was further noted that the 1992 Fund had assessed 102 of the claims submitted in Court, out of which two had been settled and paid for an amount of €2 140 (£1 700).

3.4.7 It was also noted that 1 968 of these claims had been paid by the Spanish Government under the Royal Decrees referred to in section 4 of document 92FUND/EXC.42/6, or by the 1992 Fund through the Claims Handling Office in La Coruña. It was also noted 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.

LEGAL PROCEEDINGS IN FRANCE

3.4.8 It was noted that 234 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 (£104.4 million).

3.4.9 It was also noted that 412 French claimants, including various communes, had joined the legal proceedings in Corcubión, Spain.

LEGAL PROCEEDINGS IN THE UNITED STATES

3.4.10 It was recalled that the Spanish State had taken legal action against American Bureau of Shipping (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 (£538 million). It was recalled that the Spanish State had maintained, *inter alia*, that ABS had been negligent in the inspection of the *Prestige* and had failed to detect corrosion, permanent deformation, defective materials and fatigue in the vessel and had been negligent in granting classification.

3.4.11 It was recalled that in January 2008 the New York Court had accepted ABS's argument that ABS fell into the category of 'any other person who performs services for the ship' under Article III.4(b) of the 1992 CLC, that the Court had also ruled that, under Article IX.1 of the 1992 CLC, Spain could only make claims against ABS in its own courts and that the Court had therefore granted ABS's motion for summary judgement, dismissing the Spanish State's claim.

3.4.12 It was noted that the Spanish State had appealed against the New York Court's decision, arguing that since the United States was not a party to the 1992 CLC, ABS, as a United States national, had no standing to assert rights under the 1992 CLC in a court of the United States, and that Article IX.1 of the 1992 CLC applied only to claims under the 1992 CLC compensation regime and not to Spain's claims against ABS, which were governed by other law. It was noted that the Spanish State had also argued that ABS's location in the United States and the presence of key witnesses and documents there legitimised Spain's choice of forum and that since the United States had not ratified the 1992 CLC, its courts had no obligation to apply the 1992 CLC. It was further noted that in its appeal Spain had renewed its argument that Clause III(4) only applied to persons who provided services to the vessel on the 'incident voyage' and not to persons such as ABS, who provided services many months earlier, and had supported its argument relying upon the decision by the Criminal Court in Paris in respect of the *Erika* incident (cf document 92FUND/EXC.40/4, section 5).

3.5 *Al Jaziah 1*

3.5.1 The Executive Committee took note of the information contained in document 92FUND/EXC.42/7 (cf document 71FUND/AC.23/11/1) concerning the *Al Jaziah 1* incident.

RECOURSE ACTION

3.5.2 It was recalled that the governing bodies had decided in October 2002 that the 1971 and 1992 Funds should take recourse action against the shipowner on the grounds that the vessel was not seaworthy and that the shipowner was not entitled to limit his liability.

3.5.3 It was also recalled that in January 2003 the Funds had commenced legal action in the Abu Dhabi Court of First Instance against the owner of the *Al Jaziah 1*, requesting that the defendant should pay Dhs 6.4 million (£870 000) to the Funds, the amount to be distributed equally between the 1971 Fund and the 1992 Fund.

3.5.4 The Committee noted that in a judgement rendered in March 2008 the Abu Dhabi Court of First Instance had decided that the shipowner should pay the Funds the amount of Dhs 6.4 million (£870 000) and that this amount should be distributed equally between the 1971 and 1992 Funds.

3.5.5 It was noted, however, that the IOPC Funds had been informed by its lawyers in the United Arab Emirates that the shipowner had debts of some Dhs 63 million (£9.8 million) including the amount awarded to the 1971 and 1992 Funds. It was also noted that the Funds' lawyers had advised the Funds that in the present circumstances it would be very difficult to recover the amounts awarded by the Court of First Instance.

Decision

3.5.6 The Executive Committee instructed the Director to approach the shipowner to discuss a settlement, taking into account his financial situation.

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.42/8.

3.6.2 It was recalled that the Philippines registered tanker *Solar 1* had sunk in 630 metres of water, some ten nautical miles south of Guimaras Island, Republic of the Philippines, and that the oil had had a significant impact on fisheries, aquaculture and tourism businesses, leading to considerable financial hardship for some individuals, especially fisherfolk.

CLAIMS FOR COMPENSATION

3.6.3 The Committee took note of the claims situation as reported in section 6 of document 92FUND/EXC.42/8. It was noted that some 32 355 claims had been received and that payments totalling PHP 946 million (£11.3 million) had been made in respect of 23 512 claims, mainly in the fisheries sector.

3.6.4 It was also noted that work continued in the assessment of claims for the costs of shoreline clean up, in particular in respect of the claims submitted by Petron Corporation, and of claims for economic losses in the mariculture and tourism sectors.

THE 1992 CONVENTIONS AND STOPIA 2006

3.6.5 It was recalled that the incident was the first involving a vessel entered in the Small Tanker Owners Pollution Indemnification Agreement (STOPIA) 2006 under which the shipowner/insurer had voluntarily agreed to increase the limitation amount applicable to the vessel under the 1992 CLC to 20 million SDR (£17.4 million). The Committee noted that the 1992 Fund was receiving regular reimbursements from the Shipowner's Club.

3.6.6 The Committee noted that it was difficult at this stage to predict whether both the amount of compensation payable in respect of this incident would exceed the STOPIA 2006 limit of 20 million SDR (£17.4 million) and whether the 1992 Fund would be called upon to pay compensation in excess of that limit, although it would seem unlikely.

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.42/9.

3.7.2 It was 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) in the Seto Inland Sea in Japan and that about 60 tonnes of heavy fuel oil and bunker diesel oil had escaped into the sea from the *Shosei Maru*.

LIMITATION PROCEEDINGS OF THE *SHOSEI MARU*

3.7.3 It was noted that all claims submitted with regard to this incident had been assessed jointly by the Fund and the Japan P&I Club and had been paid by the Japan P&I Club. It was also noted that the total cost of all claims paid by the Japan P&I Club (£4.7 million) exceeded the limitation amount applicable to the *Shosei Maru*, ie 4.51 million SDR (£4.4 million).

3.7.4 It was also noted that the Takamatsu District Court had commenced the limitation proceedings in respect of the *Shosei Maru* on 1 April 2008. It was noted that the Japan P&I Club had been the only claimant who had brought claims against the limitation fund, and also that its claims had been accepted since no objection had been presented at the creditors' meeting held on 18 July 2008 at the Court.

3.7.5 It was noted that the 1992 Fund had paid to the Japan P&I Club compensation in respect of this incident for the balance between the limitation amount and the total amount provided in compensation, and also the corresponding share of the survey fees. It was also noted that following the payment by the Fund, the owners of the *Shosei Maru* had filed a notice of termination of the limitation proceedings in the Court, and that the Court Order of termination had become definitive and effective on 1 October 2008.

LIMITATION PROCEEDINGS OF THE *TRUST BUSAN*

3.7.6 It was recalled that the Okayama District Court had commenced the limitation proceedings in respect of the *Trust Busan* on 27 December 2007. It was also recalled that the Director had instructed the 1992 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 that the Fund would have to pay in compensation for this incident.

3.7.7 It was noted that the first creditors' meeting had been held on 22 April 2008, and the second meeting would be held on 24 October 2008.

3.8 *Volgoneft 139*

3.8.1 The Executive Committee took note of the information regarding the *Volgoneft 139* incident as set out in document 92FUND/EXC.42/10.

THE INCIDENT

3.8.2 The Committee noted the statement by the Russian delegation that, as a result of the *Volgoneft 139* incident, clean-up operations had been conducted which involved more than 2 500 persons, mainly volunteers. That delegation stated that the Russian military had intervened in the clean-up operations but that it had played a minor role only.

3.8.3 The Committee also noted that in September 2008 the fore part of the wreck, which had remained on the seabed, had been towed to the nearby port of Kavkaz to prevent further pollution.

1992 CIVIL LIABILITY AND FUND CONVENTIONS

3.8.4 The Committee noted that the Russian Federation was party to the 1992 Civil Liability and Fund Conventions whereas Ukraine had deposited an instrument of ratification to the 1992 CLC with the Secretary-General of IMO on 28 November 2007 and that therefore this Convention would enter into force in Ukraine in November 2008. It was also noted that Ukraine had not acceded to, or ratified the 1992 Fund Convention.

MEETINGS BETWEEN THE RUSSIAN AUTHORITIES AND THE SECRETARIAT

3.8.5 The Executive Committee recalled that in November and December 2007, the Director and the Head of the Claims Department had contacted the Russian Embassy in London and the Ministry of Transport in Moscow offering the help of the 1992 Fund to the Russian authorities in dealing with the incident. It was recalled that a number of meetings had taken place at the 1992 Fund offices where the compensation regime had been explained in detail and information had been provided to the Russian authorities.

3.8.6 The Committee also recalled that in May 2008 meetings had taken place in Moscow in the Ministry of Transport with a team of 1992 Fund's representatives and experts, where claims had been submitted. It was also recalled that in June 2008 a team of 1992 Fund's representatives and experts had travelled to Moscow, Krasnodar and Novorossiysk to visit the area affected by the spill and to hold discussions with the Ministry of Transport, the regional authorities and other claimants and that during the visit valuable information had been provided.

3.8.7 It was noted that a further visit to Moscow, Krasnodar, Novorossiysk and Temryuk had taken place in September 2008. It was noted that during this visit the 1992 Fund's representatives had met with representatives of the Ministry of Transport, the Ministry of Natural Resources, the Krasnodar Regional Government and claimants. The Committee also noted that the Russian authorities had provided assistance to the 1992 Fund's representatives and experts during the three visits to the Russian Federation.

LIMITATION PROCEEDINGS AND 'INSURANCE GAP'

3.8.8 It was recalled 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, whereas the minimum limit under the 1992 CLC (after November 2003) was 4 510 000 SDR (£3.9 million), and that there was therefore an 'insurance gap' of some 1.5 million SDR (£1.3 million). It was also recalled that in February 2008 the Arbitration Court of Saint Petersburg and Leningrad Region had 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) and that the 1992 Fund had appealed against that decision.

3.8.9 It was noted that in September 2008 the Court of Cassation had rendered a decision dismissing the 1992 Fund's appeal, considering 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, it was for Russian Courts to apply the limits of liability as published in the Russian official Gazette. It was also noted that the Fund had appealed against this judgement before the Supreme Court in Moscow, since the Court's decision was in clear contravention of the 1992 CLC as amended with effect from November 2003.

3.8.10 It was noted that, 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).

Debate

3.8.11 Many delegations expressed their deep concern and disappointment with the fact that the Russian Government had not been prepared to acknowledge that it had failed to correctly implement the Conventions. These delegations stated that they would expect the Russian Government to pay the 'insurance gap' since it was the Government, and not the insurance company, who was responsible for the correct implementation of the Conventions. Two delegations suggested that if the Russian Government did not accept its responsibility for the 'insurance gap', the 1992 Fund, who had an overall responsibility to pay compensation to victims of pollution damage caused by oil spill incidents, would have to pay the missing amount and would then have to take a recourse action against the Russian Government. It was also suggested that another solution could be that the 1992 Fund deducted the amount corresponding to the 'insurance gap' from the compensation due to the Russian Government.

CAUSE OF THE INCIDENT

3.8.12 It was recalled that the insurer had 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). It was noted that 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).

3.8.13 It was noted that the Fund's experts were examining the evidence available on the cause of the spill and that their preliminary conclusion was 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. It was noted, however, that they had also concluded that it was not inevitable for the reasons set out in section 9 of document 92FUND/EXC.42/10.

Debate

3.8.14 Most delegations agreed with the Director's preliminary conclusion that the incident was not caused by a natural phenomenon of an exceptional, inevitable and irresistible character and expressed the view that in this case the shipowner should not be exonerated from liability in accordance with Article III.2 (a) of the 1992 CLC.

3.8.15 Some delegations asked whether the 1992 Fund should consider challenging the shipowner's right to limit his liability since the *Volgoneft 139* was in the Kerch Strait in November 2007, in breach of the certificate of class. The Director replied that the Secretariat, when handling incidents, always considered whether the 1992 Fund should challenge the shipowner's right to limit its liability and that this would also be considered in this case.

3.8.16 The Russian delegation stated that it did not agree with the information provided by the Director in paragraph 9.2 (i) of document 92FUND/EXC.42/10 that the storm of 11 November 2007 was not exceptional, since according to official reports the weather conditions in the Kerch Strait that date were absolutely abnormal and had not been encountered in the area for 50 years. The Russian delegation stated that it also disagreed with the information provided in paragraph 9.2 (iv) since the *Volgoneft 139* was not restricted for navigation in the Kerch Strait between November and March. That delegation offered to provide additional information in this respect.

3.8.17 One delegation asked what was meant in the 1992 CLC by 'natural phenomenon of an exceptional, inevitable and irresistible character' and whether, in the interpretation of these words, account would be taken of subjective considerations such as the size of the ship. The Director replied that the

concept of 'natural phenomenon of an exceptional, inevitable and irresistible character' was equivalent to what was called 'force majeure' or 'act of god' in most jurisdictions and that it was meant to be an objective test that would not take into account considerations like the size of a ship.

CLAIMS FOR COMPENSATION

3.8.18 It was noted that the Russian Central and Regional Governments had presented claims totalling RUB 8 446.2 million (£185.7 million).

3.8.19 It was recalled that in January 2008 the 1992 Fund had 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. The Committee noted that, following an examination of the documentation submitted, the 1992 Fund had approved an interim assessment of this claim in the amount of RUB 30 million (£660 000). It was noted that the difference between the claimed and assessed amounts was largely accounted for by the apparent duplication of a number of items claimed and the fact that the salvage operations had had a dual purpose (salvage and preventive measures).

3.8.20 It was noted that the total amount claimed already exceeded the total amount available for compensation under the 1992 Civil Liability and Fund Conventions of 203 million SDR (£176.7 million) and that 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.

3.8.21 It was also noted that a claim for RUB 4 million (£88 000) had been presented to the Arbitration Court in Saint Petersburg and Leningrad Region by the Kerch Merchant Port in Ukraine. It was noted, however, that the 1992 CLC would not enter into force in Ukraine until November 2008 and that therefore claimants in Ukraine were not entitled to receive compensation from the limitation fund established by the shipowner in the Arbitration Court in Saint Petersburg and Leningrad Region.

Debate

3.8.22 The Russian delegation stated that, with regard to the claim from a Russian clean-up contractor (paragraph 3.8.19), the measures taken by the clean-up contractor had had as a primary purpose the prevention of pollution damage, that the vessel was completely lost and that the cargo recovered was a mixture of oil and water and had no residual value.

METHODIKA

3.8.23 The Executive Committee recalled that at a meeting in May 2008 the Russian authorities had informed the 1992 Fund that the Ministry of Natural Resources had submitted a claim for some RUB 6 048.6 million (£133 million) and that this claim was based on an abstract quantification calculated in accordance with a theoretical model ('Methodika'), which was in contravention of Article I.6 of the 1992 CLC.

3.8.24 The Committee noted that the Secretariat had had two meetings with the Ministry of Natural Resources in Moscow where the claim had been discussed. It was also noted that at the meetings the 1992 Fund's representatives had stressed that abstract quantification of damages was not admissible for compensation under the Conventions but that the 1992 Fund was prepared to examine the activities undertaken by the Ministry of Natural Resources to combat oil pollution and to restore the environment to determine if and to what extent they qualified for compensation under the Conventions.

3.8.25 Many delegations expressed deep concern about the use of the 'Methodika' formula. These delegations stated that the 1992 Fund's criteria for admissibility of claims were clear in that only claims for loss or damage actually incurred, or to be incurred, which were substantiated, were admissible under the Conventions and that claims based on an abstract quantification calculated in accordance with a theoretical model were not admissible. It was pointed out that the Russian Government had the obligation to implement the 1992 Civil Liability and Fund Conventions and that apparently the provisions of Russian internal law were in conflict with these Conventions. Some delegations suggested that the Russian Government should amend its internal law in order to comply with its obligations under the Conventions.

STATEMENT BY THE RUSSIAN DELEGATION

3.8.26 The Russian delegation stated that the *Volgoneft 139* incident was the biggest oil spill incident which had ever happened in the Russian Federation and that the Russian Government had made all possible efforts to save lives and to reduce the level of pollution and further damage to the environment.

3.8.27 That delegation stated that the Russian Federation had fulfilled its obligations as a contracting party to the 1992 Civil Liability and Fund Conventions and that the Russian Federation had issued relevant legislation, which included a procedure for the issuing of certificates of insurance to ships in accordance with the 1992 CLC. That delegation also stated that the insurance certificates were issued by the harbour master on the basis of statements (Blue Cards) by insurance companies which provided that the ship was insured for pollution liabilities up to the level required by the 1992 CLC and that this procedure had also been followed for the *Volgoneft 139*. That delegation also stated that Ingosstrakh had issued the Blue Card with the statement of full and proper insurance for the *Volgoneft 139* but that it had later found that the insurance cover was less than that required under the current limits of the 1992 CLC.

3.8.28 The Russian delegation also stated that efforts were being made by the Russian Federation to find a solution to the 'insurance gap' problem. It was pointed out, however, that Ingosstrakh was a private company not under instructions from the Russian Government.

3.8.29 It was stated that, after the *Volgoneft 139* incident, the Russian authorities had checked the certificates of insurance for all oil tankers registered under Russian flag, including those insured by Ingosstrakh, and that all tankers now had insurance cover in accordance with the current 1992 CLC limits.

3.8.30 The Russian delegation informed the Executive Committee that the Russian Government had established a Commission under the leadership of the Ministry of Transport to investigate the incident, and that the official report of the Commission had concluded that the weather conditions on the date of the incident at the Kerch Strait were absolutely abnormal and unexpected for the region and the season and that the weather forecast available had not predicted the winds and waves actually encountered.

3.8.31 The Russian delegation expressed its concern about the perceived slowness of the compensation system in general since, although the Secretariat had fully cooperated with the Russian authorities, the incident had happened almost one year before and the victims had not yet received compensation for the losses suffered.

3.8.32 The Russian delegation stated that, in its view, the Russian Government had provided sufficient information to the Secretariat and added that it was willing to provide whatever additional information the Executive Committee required. That delegation also stated that the Russian Government as such had not submitted a claim and that the different Ministries and companies submitting claims had the responsibility of providing information in support of their claims.

Debate

3.8.33 Many delegations stated that they would like to have more information from the Russian delegation, in particular transparent and convincing explanations regarding issues such as the cause of the incident, clean-up operations and a map showing the affected area. It was their strong view that the 1992 Fund should not start paying claims until the Fund had received much more information regarding the incident.

3.8.34 Several delegations expressed deep concern about the fact that the Conventions appeared not to have been correctly implemented in the Russian Federation and that Russian courts so far seemed to be giving priority to domestic legislation rather than to the country's international obligations. The point was made that one of the weaknesses of the international system was that national courts could decide to apply national law instead of giving priority to international commitments and that the correct implementation of the Conventions into national legislation was the responsibility of Member States.

3.8.35 A number of delegations asked the Director whether the 1992 Fund had taken into account that the damages could have also been caused by sulphur from the other ships which had sank in the area as a result of the storm. It was stressed that the 1992 Fund should only pay compensation for damage caused by oil, not by sulphur. The Director replied that determining the cause of the damage was always part of the investigation by the 1992 Fund when assessing claims for compensation.

3.8.36 One delegation expressed concern about the fact that the 1992 Fund's experts had not been able to visit the Russian Federation immediately after the incident had occurred and that it had only been in June 2008, some seven months after the incident, that the experts had had an opportunity to visit the affected area. That delegation enquired whether that could cause problems with the assessment of claims.

3.8.37 The Director replied that the Secretariat had from the beginning offered its help to the Russian authorities and had provided them with information on the operation of the compensation regime. He stated that at the beginning of the incident there had, however, been no cooperation from the Russian authorities and that valuable time had been lost and that it was always a handicap if experts were not in the affected area from the outset.

3.8.38 In summing up the discussion, the Chairman concluded that the Executive Committee still considered that the information submitted by the Russian authorities was inadequate and that the Committee could not authorise payment of claims until it was satisfied with the information provided. He also pointed out the factual differences between the position of the Secretariat and that of the Russian delegation regarding the weather conditions at the time of the incident and the restrictions for navigation in the Kerch Strait at the time of the incident. The Chairman asked the Russian authorities and the Secretariat to work together to resolve the points of difference.

3.9 *Hebei Spirit*

3.9.1 The Executive Committee took note of the information regarding the *Hebei Spirit* incident as set out in documents 92FUND/EXC.42/11 and 92FUND/EXC.42/11/Add.1, submitted by the Director and 92FUND/EXC.42/11/1, submitted by the Republic of Korea.

3.9.2 It was recalled that on 7 December 2007 the Hong Kong flagged tanker *Hebei Spirit* (146 848 GT) had been struck by the crane barge *Samsung N°1* while at anchor about five miles off Taean on the West Coast of the Republic of Korea and that about 10 900 tonnes of crude oil had escaped into the sea from the *Hebei Spirit*.

CLAIMS FOR COMPENSATION

3.9.3 It was recalled that the 1992 Fund and the Assuranceföreningen Skuld (Gjensidig) (Skuld Club) had established a Claims Office (*Hebei Spirit* Centre) in Seoul to assist claimants in the presentation of their claims for compensation. It was also recalled that the 1992 Fund and the Skuld Club had appointed a number of Korean and international experts to assess claims for property damage, clean up costs, fisheries/mariculture damage and tourism damage.

3.9.4 It was noted that as at 13 October 2008, 1 087 claims totalling KRW 246 billion (£115 million) had been submitted and that more claims were expected.

3.9.5 The Committee noted that on the basis of a second Cooperation Agreement between the shipowners, the Skuld Club and the Ministry of Land, Transport and Maritime Affairs (MLTM), the Club had undertaken to pay claimants 100% of their claims as assessed by the Fund and the Club up to the Club's limit and that, in return, the Korean Government had undertaken to compensate in full all claims as assessed by the Fund and the Club as well as all the amounts awarded by the Korean Courts in excess of the Fund's limit to ensure that all claimants would eventually receive full compensation. It was also noted that the second Cooperation Agreement also provided that if the Limitation Court requested the Club to deposit the limitation amount, the Korean Government would be responsible for depositing the amount already paid out by the Club to the claimants, and the Club would deposit the balance between the payments already made and the limitation amount.

3.9.6 It was noted that the Club had begun making payments in accordance with the second Cooperation Agreement and that so far KRW 13 400 million (£5.57 million) had been paid in compensation in respect of 51 claims.

LEVEL OF PAYMENTS

3.9.7 The Executive Committee recalled that in June 2008, in view of the uncertainty as to the total amount of the potential claims, it had decided to set the level of payments at 35% of the established claims. The Committee noted that the most recent estimate by the 1992 Fund's experts of the total amount of the losses caused by the spill was between KRW 566.3 billion and KRW 601.3 billion (£272-289 million) and that on the basis of this information the Director had proposed to maintain the level of the Fund's payments at 35%, to be reviewed at the next session of the Executive Committee.

Decision

3.9.8 The Executive Committee decided to maintain the level of the 1992 Fund's payments at 35% of the amounts assessed by the Club and the Fund, to be reviewed at its next session.

INVESTIGATION INTO THE CAUSE OF THE INCIDENT

3.9.9 It was noted that on 4 September 2008, the Incheon District Maritime Safety Tribunal had rendered its decision with regard to the cause of the incident and that the Tribunal had decided that the Samsung tugs and the *Hebei Spirit* were responsible for the collision. It was noted that the Tribunal had found that the Master and the Duty Officer of the *Hebei Spirit* were also partly liable for the collision between the *Hebei Spirit* and the *Samsung N°1*. It was further noted that a number of defendants, including Samsung Heavy Industries, the Masters of the tug boats and the Master and Duty Officer of the *Hebei Spirit* had appealed against the decision to the Central Maritime Safety Tribunal.

DOCUMENT SUBMITTED BY THE REPUBLIC OF KOREA

3.9.10 The Committee took note of the information provided by the Republic of Korea as presented in document 92FUND/EXC.42/11/1.

3.9.11 The Korean delegation thanked the Secretariat and the Skuld Club for their cooperation during the handling of the incident.

3.9.12 The Korean delegation in its intervention pointed out two clerical errors in the documents submitted by the Director in respect of the second Cooperation Agreement (document 92FUND/EXC.42/11, paragraph 5.4) and the investigation into the cause of the incident carried out by the Incheon District Maritime Safety Tribunal (document 92FUND/EXC.42/11/Add.1, paragraph 1.1) which have been corrected in this Record of Decisions (cf paragraphs 3.9.5 and 3.9.9 respectively).

3.9.13 The Committee noted that the Korean Government, in order to enable speedy compensation payments to the victims, had decided to stand last in the queue in respect of its claims for compensation in the amount of KRW 72 billion (£33.8 million) and that it expected this amount to increase in the future.

3.9.14 The Committee also noted that the Korean Government had provided emergency hardship payments to local residents totalling KRW 117.2 billion (£55 million).

3.9.15 The Committee noted that pursuant to the Special Law (cf section 4 of document 92FUND/EXC.42/11), which entered into force on 15 June 2008, the Korean Government had made advance payments totalling KRW 12.9 billion (£6.1 million), including KRW 9.3 billion (£4.4 million) for local residents based on an interim assessment by the Fund for labour costs incurred from January to February 2008 and KRW 2.5 billion (£1.2 million) for clean-up costs incurred by six private contractors in December 2007. It was also noted that the local governments had paid the local residents who were involved in the clean-up operations KRW 4.47 billion (£2.1 million). It was further noted that in the event that the 1992 Fund's assessment for labour costs incurred after March 2008 took a long time, the Korean Government intended to make advance payments to claimants prior to receiving the assessment of claims from the Club and the Fund.

3.9.16 The Committee also noted that the Korean Government had provided assistance to private clean-up contractors in the form of loans totalling KRW 1.6 billion (£750 000) and that it was also carrying out a public work programme worth KRW 20 billion (£9.4 million) to regenerate the local economy. It was also noted that the Government had offered further financial support to victims such as reductions or exemptions of national pension contributions, medical insurance premiums and income tax.

3.9.17 The Committee noted that in order to avoid double payments of compensation to victims it was essential that the Korean Government, the Club and the Fund Secretariat worked closely together. It was noted that regular meetings were taking place between representatives of the Korean Government and the *Hebei Spirit* Centre and that through such meetings the parties should be able to find reasonable ways to facilitate compensation to victims particularly in the fishing and mariculture sectors.

Debate

Statement by the Representative of Chungnam Province, Republic of Korea

3.9.18 The Committee noted the statement made by a representative of the Chungnam Province, who was part of the Korean delegation. The delegate from the Province thanked the Committee and the Secretariat for their help and cooperation in dealing with the consequences of the *Hebei Spirit* incident. The delegate further informed the Committee of a number of initiatives undertaken by the

local authorities in Chungnam Province for the economic revitalisation of the area, including an international swimming contest in summer 2008 to mark the reopening of the beaches after clean-up operations. The delegate further informed the Committee of a number of initiatives being organised in the area, including a celebration for the volunteers and an International Environmental Forum in Taean to mark the first anniversary of the incident, and a flower show in Spring 2009 to which all delegates were invited.

Intervention by the Indian delegation

3.9.19 The Committee took note of the statement by the Indian delegation that it considered it necessary to ensure that justice is provided to all victims of incidents that may occur in any territory, territorial waters or Exclusive Economic Zone (EEZ) or equivalent area of any Member State.

3.9.20 That delegation stated that, while victims of this oil pollution incident and the shipowner of the *Hebei Spirit* were protected by the provisions of the liability and compensation regime, the innocent Indian crew members of the *Hebei Spirit*, ie the Master and Chief Officer, had been denied permission to leave the Republic of Korea, despite the Incheon Maritime Safety Tribunal having found that they were neither negligent nor liable for the incident.

3.9.21 The Indian delegation appealed to the Korean Authorities to facilitate the early release of the Indian crew of the *Hebei Spirit*, ie the Master and Chief Officer.

Intervention by the delegation of the Republic of Korea

3.9.22 The Committee noted the statement by the Korean delegation that the crew members of the *Hebei Spirit* were not allowed to leave the Republic of Korea pending the outcome of the appeal proceedings. That delegation also stated that the crew members of the *Hebei Spirit* were not detained or in custody but that they were staying in a hotel and had freedom to go anywhere in Korea if they so wished and could meet any people they wanted.

3.9.23 That delegation informed the Committee that the matter of the release of the *Hebei Spirit* crew members was a legal matter which involved serious and sensitive issues with respect to the incident, which had caused major pollution on the west coast of Korea.

3.9.24 The Committee was also informed that the case was being dealt with by an appeal court and that the outcome of the appeal proceedings was expected in November 2008.

3.9.25 The Korean delegation informed the Committee that it would report the position taken by the delegation of India to its Government for its information and with the aim of facilitating the process of returning the crew members to India.

3.10 Incident in Argentina

3.10.1 The Executive Committee took note of the information regarding the incident in Argentina as set out in document 92FUND/EXC.42/12.

3.10.2 It was recalled that a significant quantity of oil had impacted the shoreline in Caleta Córdova, Chubut Province, Argentina, on 26 December 2007 and that a total of 5.7 kilometres of coast had been affected. It was also recalled that clean-up operations on the shoreline had been undertaken by local contractors under the supervision of the provincial government.

LEGAL PROCEEDINGS

3.10.3 The Committee recalled that an investigation into the cause of the incident had been initiated by the Criminal Court of Comodoro Rivadavia (Argentina). It was noted that the *Presidente Umberto Arturo Illia (Presidente Illia)*, that had been loading oil at a loading buoy off Caleta Córdova, had

been detained and that an inspection of the ship by the maritime authorities (Prefectura Naval) had revealed a fault in its ballast system. It was further noted that an inspection in the port of discharge had also revealed that there were residues of crude oil in three ballast tanks.

3.10.4 It was noted that in March 2008 the Criminal Court had rendered a preliminary decision that named the shipowner's representative (superintendente), the Master and several other officers of the *Presidente Illia*, as parties responsible for the incident. It was noted that the Court had considered that whilst the *Presidente Illia* was loading Escalante crude oil on 25 and 26 December 2007 at a loading buoy off Caleta Córdova, an unknown quantity of the oil that was being loaded had entered the ballast system due to a fault in the ballast line, and had subsequently been spilled. It was also noted that the spilt oil had been emulsified with water during the deballasting process.

3.10.5 The Committee noted that the accused parties had appealed against the Court's preliminary decision.

CLAIMS FOR COMPENSATION AND INVOLVEMENT OF THE 1992 FUND

3.10.6 It was noted that the Chubut Province had submitted a request for security for US$50 million (£28 million) to the Criminal Court of Comodoro Rivadavia but that the Court had dismissed the request for security on procedural grounds. It was also noted that a non-quantified claim had been submitted by the Chubut Province against the Master and the owner of the *Presidente Illia* for compensation for the damage caused by the incident, including damage to the environment. It was further noted that the shipowner had submitted points of defence denying his liability for the spill and requesting the Court to bring the 1992 Fund into the proceedings.

3.10.7 The Committee noted that claims were expected for clean-up costs, losses in the fisheries and tourism sectors and for environmental damage.

3.10.8 It was noted that the limit of liability of the owner of the *Presidente Illia* under the 1992 CLC was estimated to be 24 067 845 SDR (£20.8 million) and that it seemed likely that the total admissible damage caused by the spill would be within the shipowner's limit.

3.10.9 It was however noted that the shipowner and his insurer had maintained that the *Presidente Illia* did not cause the spill that impacted the coast and that if they were successful in their defence, and if it was established that the spill came 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

3.10.10 The Argentine delegation confirmed that the *Presidente Illia* had been arrested in the port of discharge. That delegation informed the Committee that an investigation into the cause of the incident by the Criminal Section of the Federal Court in Comodoro Rivadavia had shown that the spill probably did not come from the loading buoy and that it must have come from either the *Presidente Illia* or from another ship. That delegation stated that there were civil claims as a result of this incident that would be dealt with by the Civil Section of the Federal Court.

3.10.11 A number of delegations asked the Director to confirm whether if the spill came from a 'ship' other than the *Presidente Illia*, the 1992 Fund Convention would apply and the 1992 Fund would have to pay compensation from the outset.

3.10.12 The Director stated that the Secretariat would continue to monitor the developments in respect of this incident and that if it was proved that the spill originated from a 'ship' other than the *Presidente Illia* and it could not be established which 'ship' it was, the 1992 Fund would in principle be liable to pay compensation from the outset.

3.11 *Nº7 Kwang Min*

3.11.1 The Executive Committee took note of the information regarding the *Nº7 Kwang Min* incident as set out in document 92FUND/EXC.42/13.

3.11.2 It was recalled that on 24 November 2005 the Korean tanker *Nº7 Kwang Min* (160 GT) had collided with the Korean fishing vessel *Nº1Chil 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.

3.11.3 It was recalled that all claims for compensation arising out of this incident had been settled by the Fund for a total of KRW 1.9 billion (£1.1 million), except for two. It was also recalled that two seaweed culturists had commenced legal action against the owners of the two vessels involved in the incident.

LEGAL PROCEEDINGS

3.11.4 It was recalled that the owner of the *Nº1Chil Yang* had established a limitation fund in accordance with Korean law. It was also 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. It was also recalled that in April 2007 the claims of the 1992 Fund had been registered with the Busan District Court (Limitation Court).

3.11.5 It was recalled that in August 2007, the Limitation Court had delivered its decision in relation to the limitation proceedings but that in September 2007 the two claimants had filed a lawsuit in order to set aside the assessment decision of the Limitation Court.

3.11.6 It was noted that in August 2008 the Busan District Court had upheld the decision of the Limitation Court and had condemned the owners of the two vessels to compensate the claimants in accordance with the assessment decision of the Limitation Court.

3.11.7 The Committee noted that, if the owner of the *Nº7 Kwang Min* were unable to pay compensation to the two claimants, the 1992 Fund would still be liable to pay compensation to these claimants in the amount decided by the Limitation Court.

4 Future sessions

4.1 The Executive Committee decided to hold its 43rd session on 17 October 2008.

4.2 It was decided that the Committee would hold its normal autumn session during the week of 12 October 2009.

4.3 It was noted that tentative arrangements had also been made with the IMO for meetings of the governing bodies during the weeks of 23 March and 15 June 2009. It was noted that at the 1992 Fund Assembly's 13th session its Chairman had pointed out, however, that the March meeting would be short and so would not occupy the whole of that meeting week. The Executive Committee noted that the Secretariat would arrange the meeting dates taking into account the convenience of the many delegates who attend both Fund meetings and IMO's Legal Committee. The Committee noted that the Secretariat would explore with the IMO Secretariat the possibilities of swapping the meeting week with that of Legal Committee (30 March 2009) and that the exact meeting dates would be chosen, in consultation with the relevant Chairmen, at the beginning or end of the chosen week in order to avoid a gap before or after Legal Committee. It was also noted that changing the week of the March meeting might necessitate a change to the date of the June meeting in order to avoid the March and June meetings being too close together.

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.42/WP.1, was adopted, subject to certain amendments.