INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
44th session
Agenda item 5

92FUND/EXC.44/10
27 March 2009
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RECORD OF DECISIONS OF THE FORTY-FOURTH SESSION OF THE EXECUTIVE COMMITTEE

(held from 25 to 27 March 2009)

Chairman: Mr Daniel Kjellgren (Sweden)

Vice-Chairman: Mr Patrick Tso Chi-hung (China (Hong Kong Special Administrative Region))

Opening of the session

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 92FUND/EXC.44/1.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

Canada	Italy	Sweden
China (Hong Kong Special Administrative Region)	Liberia	Trinidad and Tobago
Cyprus	Philippines	United Kingdom
France	Qatar	Uruguay
India	Republic of Korea	
	Spain	

2.2 After having examined the credentials of the delegations of the members of the Executive Committee, the Credentials Committee reported in document 92FUND/EXC.44/2/1 that all the above-mentioned members of the Executive Committee had submitted credentials which were in order.

2.3 The following Member States were represented as observers:

Algeria	Gabon	Mexico
Angola	Germany	Mozambique
Argentina	Ghana	Netherlands
Australia	Greece	Norway
Bahamas	Grenada	Panama
Belgium	Hungary	Poland
Bulgaria	Ireland	Portugal
Cameroon	Japan	Russian Federation
Denmark	Kenya	Singapore
Fiji	Malaysia	Turkey
Finland	Marshall Islands	Venezuela

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

Bolivia	Islamic Republic of Iran	Syrian Arab Republic
Ecuador	Saudi Arabia	Ukraine

2.5 The following international non-governmental organisations were represented as observers:

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

3 Incidents involving the 1992 Fund

3.1 *Erika*

3.1.1 The Executive Committee took note of the developments regarding the *Erika* incident as set out in document 92FUND/EXC.44/3.

CLAIMS SITUATION

3.1.2 The Committee noted that, as at 12 February 2009, 7 131 claims for compensation had been submitted for a total of €388.9 million (£349.6 million), that 99.7% of these claims had been assessed and that compensation payments totalling €129.7 million (£95.2 million) had been made in respect of 5 938 claims.

CRIMINAL PROCEEDINGS

3.1.3 It was noted that the Criminal Court in Paris had delivered a judgement in January 2008, holding the following four parties criminally liable: the representative of the registered owner (Tevere Shipping), the President of the management company (Panship Management and Services Srl), the classification society (Registro Italiano Navale (RINA)) and Total SA. It was also noted 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 compensation for 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.

3.1.4 It was recalled that, when this matter had been reported to the Committee at its March 2008 session, the Director had stated 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 recalled that at the June 2008 session of the Committee, the Director had stated that it would be difficult at that 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.

3.1.5 The Committee noted that a hearing was expected to take place during five weeks as from 5 October 2009.

Debate

3.1.6 One delegation stated that it was worrying that the Criminal Court in Paris had awarded substantial amounts of compensation, apparently ignoring the channelling provisions contained in Article III.4 of the 1992 Civil Liability Convention (CLC). That delegation stressed, in its view, the importance that, once a final judgement had been rendered in these proceedings, the Secretariat should analyse the implications the judgement might have for the international compensation regime. That delegation expressed its concern that there was an increasing trend in a number of countries where criminal courts were awarding compensation for pollution damage without full regard for the provisions established in the 1992 Civil Liability and Fund Conventions.

3.1.7 The Director explained that the Secretariat was following the developments through the 1992 Fund's French lawyer and that, once a final judgement had been rendered, the Secretariat would consider its implications for the international compensation regime. The Director pointed out that the possibility of a recourse action would, as always, be part of the Secretariat's considerations.

3.1.8 The Committee noted the intervention by the 1992 Fund's French lawyer who recalled that the criminal judgement was subject to appeal, that therefore it was too early to draw any conclusions and that, in his view, the Criminal Judge had been very careful to make sure that the judgement did not contravene the provisions of the Conventions. It was noted that when making Total liable for the damage caused by the incident, the Judge had taken into account that this particular company within the Total group was not the charterer of the *Erika* and therefore not protected by Article III.4 of the 1992 CLC. It was also noted that, in the Fund's French lawyer's view, one of the points which the Criminal Court of Appeal would consider was whether the parties made liable for the damage caused by the incident were protected by the 1992 CLC.

LEGAL PROCEEDINGS INVOLVING THE 1992 FUND

3.1.9 It was recalled 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 and that the courts had rendered judgements in respect of a number of the other claims. It was noted that 28 actions by some 46 claimants were still pending and that the total amount claimed in the pending actions, excluding the claims by Total, was some €25 million (£22.5 million).

COURT JUDGEMENTS IN RESPECT OF CLAIMS AGAINST THE 1992 FUND

3.1.10 The Committee took note of two judgements issued by the Court of Appeal in Paris, in respect of claims by an oyster grower and by a company engaged in aerial advertising, and a judgement by the Court of Appeal in Rennes in respect of a tourist train operator, all of which were favourable to the Fund. It was particularly noted that in the judgement in respect of the aerial advertiser, the Court of Appeal in Paris had acknowledged that it was justified to make a distinction between claimants that dealt directly with tourists and were therefore directly affected by a reduction in the number of tourists, and claimants that sold goods or provided services to other companies in the tourism sector

but not directly to tourists. It was further noted that this would avoid the situation whereby the victims more affected by the pollution, mainly claimants in the fisheries sector, received a reduced compensation for their losses to the benefit of claimants whose claims had a more remote link with the resource affected by the pollution.

Debate

3.1.11 One delegation expressed its satisfaction that the French courts had taken into account the Fund's criteria for admissibility of claims, even though in some cases the judges had stated that those criteria were not binding for the national courts.

LEGAL PROCEEDINGS BY THE COMMUNE DE MESQUER AGAINST TOTAL

3.1.12 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) which had delivered its ruling in June 2008.

3.1.13 It was noted that the French Supreme Court had rendered its decision in December 2008, following the advice delivered by the ECJ. It was noted that the Supreme Court had concluded that fuel oil once spilled and mixed with sea water and sediments became a 'waste' under European law, that the seller of that fuel oil and charterer of the ship carrying it could be regarded as a 'producer' and as a 'previous holder' of that waste, if it was established that the seller/charterer contributed to the risk that the pollution caused by the shipwreck would occur, and that under certain circumstances also the producer of the product from which the 'waste' came could be required to bear the cost of disposal if it was established that he had contributed to the risk of pollution. It was also noted that the Supreme Court had transferred the case to the Court of Appeal in Bordeaux for a decision on whether or not Total had contributed, by its conduct, to the risk that the pollution caused by the *Erika* incident would occur.

Debate

3.1.14 One delegation stated that the Secretariat should analyse the extent to which these decisions were compatible with the Conventions and that it looked forward to a report by the Director on the subject.

3.1.15 Another delegation stated that the decisions by the ECJ and the French Supreme Court, considering that the fuel on board the *Erika* which accidentally escaped from the ship could become a 'waste' once it had been mixed with seawater and sediment, were worrying since they could set an international precedent by which the oil industry could also be responsible for the consequences of oil spills when the 1992 Civil Liability and Fund Conventions already established the principle of strict liability of the shipowner.

3.1.16 The Committee took note of an intervention by the 1992 Fund's French lawyer, who mentioned that the ECJ and the French Supreme Court decisions were international precedents only applicable within the European context.

3.2 *Prestige*

3.2.1 The Executive Committee took note of the information regarding the *Prestige* incident set out in document 92FUND/EXC.44/4.

CLAIMS FOR COMPENSATION IN SPAIN

3.2.2 It was noted that as at 11 February 2009 the Claims Handling Office in La Coruña had received 844 claims totalling €1 020.7 million (£917.5 million), including 14 claims from the Spanish

Government totalling €968.5 million (£870.6 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 (£3.5 million) and that interim payments totalling €527 327 (£474 000)[<1>] had been made in respect of 173 of the assessed claims. It was also noted that of the remaining claims three were pending clarification, 168 were awaiting a response from the claimant, 53 were awaiting further documentation, 413 (totalling €29.9 million (£26.9 million)) had been rejected and 19 had been withdrawn by the claimants.

3.2.3 It was recalled that the claim submitted by the Spanish Government for costs relating to the removal of the oil from the wreck, initially for €109.2 million (£98.2 million), had been reduced to €24.2 million (£21.8 million) to take account of funding obtained from another source. It was also recalled that at its February 2006 session the Executive Committee had decided that some of the costs incurred in 2003, prior to the removal of the oil from the wreck, in respect of sealing the oil leaking from the wreck and various surveys and studies that had a bearing on the assessment of the pollution risk posed, were admissible in principle, but that the claim for costs incurred in 2004 relating to the removal of oil from the wreck was inadmissible (cf Annual Report 2006, pages 111-114). It was noted that following the Executive Committee's decision, the claim had been assessed at €9 487 996.83 (£8.5 million).

3.2.4 It was noted that the 1992 Fund's experts were examining the remaining claims by the Spanish Government.

CLAIMS FOR COMPENSATION IN FRANCE

3.2.5 It was noted that as at 11 February 2009, 482 claims totalling €109.7 million (£98.6 million) had been received by the Claims Handling Office in Lorient. It was noted that 452 claims (94%) had been assessed for €49.9 million (£44.9 million) and that interim payments totalling €5 million (£4.5 million) had been made at 30% of the assessed amounts in respect of 336 claims and that the remaining claims awaited a response from the claimants or were being re-examined following the claimants' disagreement with the assessed amount. It was further noted that 54 claims totalling €3.7 million (£3.3 million) had been rejected because the claimants had not demonstrated that a loss had been suffered due to the incident.

Debate

3.2.6 The French delegation pointed out that the amount paid in compensation in France seemed relatively low and requested a clarification from the Secretariat as to how the claims had been processed.

3.2.7 The Secretariat explained that the reasons for the relatively low paid amounts in respect of claims in France was due to the fact that the level of payments had been set at only 30% of the amounts assessed by the 1992 Fund and that the biggest claim was that of the French Government, which was standing last in the queue.

LEGAL PROCEEDINGS IN SPAIN

Investigations into the cause of the incident

3.2.8 The Committee recalled that shortly after the incident the Criminal Court in Corcubión (Spain) had started an investigation into the cause of the incident to determine whether any criminal liability could arise from the events. It was recalled that the Court was investigating the role of the Master, Chief Officer and Chief Engineer of the *Prestige* and of a civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain.

[<1>] Compensation payments made by the Spanish Government to claimants have been deducted when calculating the interim payments.

3.2.9 It was noted that in March 2009 the Criminal Court in Corcubión had decided to exonerate from liability the Civil Servant who had been involved in the decision not to allow the ship into a place of refuge in Spain and to continue the proceedings against the Master, Chief Officer and Chief Engineer of the *Prestige*.

3.2.10 It was also noted that it was likely that some of the parties to the criminal proceedings would appeal against this decision.

Claims in court

3.2.11 It was noted that some 3 780 claims had been lodged in the legal proceedings before the Criminal Court in Corcubión and that 608 of those claims involved persons who had submitted claims directly to the 1992 Fund through the Claims Handling Office in La Coruña. It was noted that details of the claims made in some of these court actions had been provided by the Court and were being examined by the experts engaged by the 1992 Fund. It was further noted that the Spanish Government had itself taken legal action in the Criminal Court in Corcubión as well as on behalf of regional and local authorities and 1 878 other claimants or groups of claimants.

LEGAL PROCEEDINGS IN FRANCE

3.2.12 It was noted that 232 claimants, including the French Government, had taken legal action against the shipowner, the London Steamship Owners' Mutual Insurance Association (London Club) and the 1992 Fund in 16 courts in France, requesting compensation totalling some €131 million (£117.8 million), including €67.7 million (£60.9 million) claimed by the Government. It was, however, noted that 199 claimants remained with actions pending in courts, requesting compensation totalling €93.4 million (£84 million).

3.2.13 It was further noted that some 140 French claimants, including various communes, had joined the legal proceedings in Corcubión, Spain.

Debate

3.2.14 One delegation pointed out that since legal proceedings in relation to the *Prestige* incident had been initiated in a Spanish Court, the fact that legal actions in relation to the same incident had also been brought in French courts appeared to contravene the provisions in Article IX.3 of the 1992 CLC which provided that:

> 'After the fund has been constituted in accordance with Article V the Courts of the State in which the fund is constituted shall be exclusively competent to determine all matters relating to the apportionment and distribution of the fund.'

3.2.15 The Secretariat explained that the Court in Corcubión had not yet reached a decision on whether the shipowner would be entitled to limit his liability and that therefore the limitation fund had not yet been established. It was also explained that so far the judgements in France had been in favour of the Fund and that therefore the issue of the distribution of the limitation amount had not yet arisen.

LEGAL PROCEEDINGS IN THE UNITED STATES

3.2.16 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.

3.2.17 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. It was also recalled that the Spanish State had appealed against the New York Court's decision.

3.2.18 The Committee noted that in March 2009 the Court of Appeal had granted a motion allowing the Natural Resources Defense Council to file an *amicus curiae* brief. It was noted that the Court of Appeal had also invited the United States, by either the Department of Justice or the Department of State, to participate in the oral argument and file an *amicus curiae* brief addressing the following questions:

- Whether the 1992 CLC applies to Spain's action against ABS;
- Whether ABS, as a Classification Society, falls within the scope of the CLC provision that exempts from liability 'the pilot or any other person who, without being a member of the vessel's crew, performs services for the ship'; and
- Whether the 1992 CLC requires that the Spanish State claim against ABS be adjudicated in a 1992 CLC-Contracting State.

3.2.19 The Committee further noted that a hearing at the Court of Appeal had taken place on 25 March 2009.

3.3 *Solar 1*

3.3.1 The Executive Committee took note of the information regarding the *Solar 1* incident as set out in document 92FUND/EXC.44/5.

CLAIMS FOR COMPENSATION

3.3.2 The Committee took note of the claims situation as reported in section 6 of document 92FUND/EXC.44/5. It was noted that some 32 359 claims had been received and that payments totalling PHP 954 million (£14.1 million) had been made in respect of 26 343 claims, mainly in the fisheries sector.

3.3.3 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

3.3.4 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 Civil Liability Convention to 20 million SDR (£20.8 million). The Committee noted that the 1992 Fund was receiving regular reimbursements from the Shipowners' Mutual Protection and Indemnity Association (Luxembourg) (Shipowners' Club).

3.3.5 The Committee noted that, although it would seem unlikely, it was difficult to predict at this stage whether the amount of compensation payable in respect of this incident would exceed the STOPIA 2006 limit of 20 million SDR (£20.8 million) and lead to the 1992 Fund being called upon to pay compensation.

3.4 *Volgoneft 139*

3.4.1 The Executive Committee took note of the information regarding the *Volgoneft 139* incident as set out in documents 92FUND/EXC.44/6 submitted by the Director and 92FUND/EXC.44/6/1 submitted by the Russian Federation.

CLAIMS FOR COMPENSATION

3.4.2 The Committee took note of the information regarding the claims situation as set out in section 9 of document 92FUND/EXC.44/6.

3.4.3 It was noted that claims totalling RUB 8 193.9 million (£162.3 million) had been submitted as a result of the incident and that the Fund's experts were examining the documentation provided in support of the various claims.

LIMITATION PROCEEDINGS AND 'INSURANCE GAP'

3.4.4 The Committee recalled that the ship was owned by JSC Volgotanker which had since been declared bankrupt by the Commercial Court in Moscow. It was also recalled that the shipowner was insured by Ingosstrakh (Russian Federation). It was further recalled that the insurance cover was limited to 3 million SDR (£2.9 million), well below the minimum limit under the 1992 CLC of 4.51 million SDR (£4.3 million) and that there was therefore an 'insurance gap' of some 1.5 million SDR (£1.4 million).

3.4.5 It was 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 (£2.9 million). It was also recalled that in May 2008 the Court of Appeal had confirmed the ruling by the Arbitration Court and that in September 2008 the Court of Cassation of Saint Petersburg and Leningrad Region had rendered a judgement dismissing the 1992 Fund's appeal against the decision of the Court of Appeal and confirming that the limitation fund should be in the amount of 3 million SDR (£2.9 million). It was further recalled that the Fund had appealed against this judgement before the Supreme Court in Moscow.

3.4.6 It was noted that at a hearing in December 2008 before the Arbitration Court of Saint Petersburg and Leningrad Region, the 1992 Fund had again requested the Court to allow the Fund's experts additional time to examine the claims and enter into discussions with the claimants and that the Court had, in an interim decision, agreed to postpone its consideration of the merits of the claims until a hearing fixed for the end of March 2009. It was also noted that at the same hearing the Fund had submitted pleadings asking the Arbitration Court to reconsider its earlier decision on the shipowner's limitation fund on the grounds that the amendments to the limits of the 1992 Civil Liability and Fund Conventions had by then been officially published and that the Court would decide on this point at the next hearing in March 2009.

3.4.7 The Committee noted that in December 2008 the Supreme Court had confirmed the decision by the Court of Cassation regarding the CLC limitation fund. It was noted that the Fund would now have to wait for the consideration by the Arbitration Court in Saint Petersburg and Leningrad Region of the Fund's request to reconsider its earlier decision, which would take place in March 2009.

Debate

3.4.8 Many delegations reiterated their deep concern and disappointment with the fact, in their view, that the Russian Government had failed to correctly implement the Conventions and that there was still no solution to this question, which had already been raised at previous meetings.

3.4.9 One delegation recalled that in the past the Director had been instructed to write to all Member States to enquire whether the Conventions had been fully implemented in their national legal systems and asked what had been the reply by the Russian Government. That delegation also stated

that it would be advisable to have a close look at the text of the Conventions with a view to ensuring that national courts would not take decisions in contravention of the Conventions in the future.

3.4.10 One delegation enquired whether the Secretariat could have the relevant decisions by the Russian Courts translated and made available to the Committee, so that delegations would be in a position to better understand the basis of the decisions taken.

3.4.11 One delegation suggested that if the final decision by the Russian Courts would not resolve the issue of the insurance gap, the amount of the insurance gap should be deducted when paying compensation to the Russian Government in this case, as in the view of that delegation it was the responsibility of the Russian Government to correctly implement the Conventions.

3.4.12 The Russian delegation stated that the issue of the insurance gap was under consideration by the Court and that the Russian Government could not have any influence on the courts, since courts in the Russian Federation were independent bodies.

METHODIKA CLAIM

3.4.13 It was 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 environmental damage for some RUB 6 048.6 million (£119.8 million) and that this claim was based on the quantity of oil spilled, multiplied by an amount of Rubles per ton ('Methodika'). It was also recalled that the Secretariat had informed the Russian authorities that a claim based on an abstract quantification of damages calculated in accordance with a theoretical model was in contravention of Article I.6 of the 1992 CLC and therefore not admissible for compensation, 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.

Debate

3.4.14 Many delegations emphasised that the use of 'Methodika' to calculate environmental damage was not in accordance with the Conventions and conflicted, in particular, with the definition of pollution damage in Article I.6 of the 1992 CLC. It was pointed out that calculation of damages should not be based on abstract models, that in order to assess a claim for environmental damage detailed information about measures actually undertaken was needed and that only substantiated claims were eligible for compensation.

3.4.15 The Russian delegation stated that the claim calculated under the 'Methodika' formula had not been brought by the Ministry of Natural Resources or any other Ministry, but by an Agency responsible for the environment. That delegation stated that the Agency had submitted the claim in Court before carrying out the actual calculation of damages. It was also stated that the Russian Courts were aware that the law which regulates the application of 'Methodika' also allows other methods of calculating damages to the environment, including the costs incurred in clean-up operations. That delegation also stated that the Environmental Agency would submit documentation to the IOPC Funds in support of its claim.

3.4.16 The Russian delegation again stated that the issue of the 'methodika' was under consideration by the Court and that the Russian Government could not have any influence on the courts, since courts in the Russian Federation were independent bodies. One delegation pointed out that the claimant in this case was a Government Agency and that therefore the Government should be in a position to submit to the Courts the claim on the basis of the Conventions. That delegation also asked whether the Russian Government was willing to do so.

CAUSE OF THE INCIDENT

3.4.17 It was recalled that the insurer had 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 were therefore not liable for the pollution damage caused by the spill. It was also recalled that if this defence were to be successful, the 1992 Fund would be liable to pay compensation to victims of the spill from the outset.

3.4.18 It was also noted that the Fund's experts were examining the evidence available on the cause of the spill and had 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. It was recalled, however, that they had also concluded that it was not inevitable, in that the vessel should not have been exposed to the storm in the way it was.

DOCUMENT SUBMITTED BY THE RUSSIAN DELEGATION

3.4.19 It was recalled that at its October 2008 session the Executive Committee had requested that the Russian delegation should submit further information regarding issues such as the cause of the *Volgoneft 139* incident, clean-up operations and a map showing the affected area.

3.4.20 The Committee took note of a booklet contained in the annex to document 92FUND/EXC.44/6/1, submitted by the Russian delegation in accordance with the above request, dedicated to ship accidents that had taken place in the Kerch Strait on 11 November 2007.

3.4.21 It was noted that the 1992 Fund's experts were examining the documentation submitted by the Russian delegation.

Debate

3.4.22 The Committee took note of the PowerPoint presentation by the Russian delegation, which was based on document 92FUND/EXC.44/6/1.

3.4.23 The delegation of the Russian Federation pointed out that the purpose of its presentation was merely to provide information and not to influence the Committee's decision.

3.4.24 Several delegations thanked the Russian delegation for the information provided regarding the circumstances surrounding the incident.

3.4.25 One delegation referred to the fact that several other ships had sunk on the day the *Volgoneft 139* incident had occurred and enquired whether the Secretariat had considered whether the pollution at the origin of the claims could have come from a source other than the *Volgoneft 139*.

3.4.26 The Russian delegation stated that the Russian authorities had made investigations, including underwater inspections of the other vessels that had sunk during the storm and that it had been verified that no oil had escaped from those vessels.

3.4.27 One delegation expressed concern about the differences of opinion that appeared to exist between the Russian Federation and the Secretariat regarding the nature of the storm.

3.4.28 One delegation pointed out that even though the storm at the time of the *Volgoneft 139* incident had been severe, in its preliminary opinion it could not be considered a natural phenomenon of an exceptional, inevitable and irresistible character as meant in Article III.2(a) of the 1992 CLC.

3.4.29 One delegation asked whether there were previous cases where the relevant provision of the Convention had been applied and whether any reference material existed to determine when a storm should be considered a natural phenomenon of an exceptional, inevitable and irresistible character.

3.4.30 The Director stated that the Secretariat had not fully explored the possible interpretations and applications of the concept of 'force majeure' but that the Secretariat was for the time being not at all convinced that this was a case of 'force majeure'.

3.4.31 One delegation referred to paragraph (d) of section 8 in document 92FUND/EXC.44/6, which seemed to suggest that a proper system of control and monitoring of vessels in the Kerch Strait anchorage was not in place. That delegation suggested that the Secretariat could explore whether this might enable the Fund to take recourse action or invoke contributory negligence.

3.4.32 The Director clarified that section 8 of document 92FUND/EXC.44/6 had been drafted solely to reflect the advice of technical experts engaged by the Fund and that therefore no legal inferences could be made from that text. He assured the Committee, however, that deciding the possibility of contributory negligence was a standard feature of the operations of the Secretariat.

3.4.33 The same delegation also referred to the fact that the *Volgoneft 139*, at the time of the incident, seemed to have been engaged in an international voyage and enquired whether there might be any international regulations concerning the operations of the ship in the area of the incident that the vessel should have complied with.

3.4.34 The Director stated that the Secretariat would study whether there were any international regulations that could be applicable to this incident.

3.4.35 The Russian delegation pointed out that the text in section 8 of document 92FUND/EXC.44/6 should be corrected since, in their view, the *Volgoneft 139* had the right to sail in the area at the time of the incident. That delegation also stated that, contrary to what that section of the document seemed to suggest, there had been proper systems of control in place in the Kerch Strait area at the time of the incident.

3.4.36 The Russian delegation expressed its appreciation and gratitude to Ukraine for its full cooperation in providing assistance and facilities required for search and rescue and clean-up operations during the incident and afterwards.

STATEMENT BY THE UKRAINIAN OBSERVER DELEGATION

3.4.37 The observer delegation of Ukraine made a statement in respect of certain conclusions contained in document 92FUND/EXC.44/6/1, submitted by the Russian Federation, in particular with regard to comments made on traffic regulation and monitoring of the Ukraine-operated anchorage at the trans-shipment complex in the Kerch Strait, as well as on the adequacy of Ukrainian search and rescue support in the area.

3.4.38 That delegation pointed out that its intervention reflected the results of an investigation into the events which took place in the Kerch Strait in November 2007, conducted by the Investigation Commission established by the Minister for Transport and Communications of Ukraine.

3.4.39 The observer delegation of Ukraine stated that the investigation had established that, on 9 November 2007, the oil tanker *Volgoneft 139* had proceeded from the Sea of Azov to the Kerch Strait, both of which are regulated and monitored by the Russian Traffic Regulation Centre of the Port of Kavkaz, along a recommended route, before being positioned at an anchorage,. That delegation also stated that the ship had remained at anchor in this position inside Russian internal waters until she broke in two and foundered at 03:39 hrs on 11 November 2007. That delegation emphasised that from the time the *Volgoneft 139* had entered the Kerch Strait until its demise, it had remained under the control and surveillance of the competent Russian authorities.

3.4.40 The observer delegation of Ukraine also stated that, according to the investigation, the vessel was lost due to its exposure to wave heights beyond its design limitations and that the investigation had further concluded that the vessel's Master should have been aware of the dangerous conditions since a warning about an approaching cyclone and expected wave heights between two and four metres in

the Strait had already been issued by the Ukrainian Meteorological Centre for the Black and Azov Seas when the *Volgoneft 139* had entered the Kerch Strait on 9 November 2007. That delegation reminded the Committee that the vessel's seaworthiness was limited to wave heights of two metres and that weather warnings were updated regularly both by the Ukrainian Meteorological Centre and the Ukrainian Vessel Traffic Regulation Centre 'Kerch'.

3.4.41 The observer delegation of Ukraine further stated that the investigation had concluded that actions undertaken by various Ukrainian entities had ensured the successful rescue of the crew and avoided a collision of the floating part of the tanker with other vessels in the area. That delegation emphasised that allegations of inadequacy of the Ukrainian Search and Rescue Service in the area were groundless and disproved by the results of the investigation.

3.4.42 The observer delegation of Ukraine stated that, in summary, the investigation concluded that the causes of the *Volgoneft 139* incident had been as follows:

(a) The Master ignored the Classification Society's requirements regarding the conditions and area of navigation and did not take timely and appropriate action to proceed to a safe area after receiving weather warnings;

(b) The Harbour Master of the port of departure in the Russian Federation permitted the river vessel to proceed into a sea region where navigation conditions exceeded its limitations established by the Classification Society;

(c) The shipowner 'JSC Volgotanker' did not ensure safe conditions for the use of the vessel;

(d) There was some ambiguity regarding the definition of the region of navigation identified in the ship's Classification Certificate issued by the Classification Society 'Russian River Register'; and

(e) Severe weather conditions in the region at the time of the incident.

Debate

3.4.43 The Committee thanked the observer delegation of Ukraine for its detailed intervention. Some delegations stated that it would be useful to receive additional information from Ukraine.

3.4.44 One delegation noted with concern that there seemed to be an unfortunate difference of opinion between the two administrations concerned about their precise responsibilities for the vessel at the time of the incident.

CONCLUSIONS OF THE DEBATE

3.4.45 In summing up the discussion the Chairman concluded that although several delegations had expressed their appreciation for the information provided by the Russian delegation at this session, most delegations still had concerns about issues of principle, in particular the 'insurance gap' and the 'Methodika' claim. He also noted that with regard to the cause of the incident there was still a difference of opinion as to whether or not the storm during which the *Volgoneft 139* had sunk could give rise to a 'force majeure' defence under the 1992 CLC. He concluded therefore that the Committee could not decide to authorise the Director to make payments of claims at this stage.

3.5 *Hebei Spirit*

3.5.1 The Executive Committee took note of the information regarding the *Hebei Spirit* incident as set out in documents 92FUND/EXC.44/7 and 92FUND/EXC.44/7/Add.1, submitted by the Director and document 92FUND/EXC.44/7/1, submitted by the Republic of Korea.

CLAIMS FOR COMPENSATION

3.5.2 It was noted that as at 26 March 2009, 3 489 claims totalling KRW 500 300 million (£250 million) had been submitted. It was also noted that 258 claims had been assessed for a total of KRW 47 186 million (£23.6 million), that 503 claims had been rejected and that the remaining claims were being assessed or additional information had been requested from the claimants. It was noted that further claims were expected.

COOPERATION AGREEMENTS

3.5.3 It was recalled that in July 2008 the shipowner, the Assuranceföreningen Skuld (Gjensidig) (Skuld Club) and the Korean Government (Ministry of Land, Transport and Maritime Affairs (MLTM)) had concluded a Second Cooperation Agreement, under which the Club had undertaken to pay claimants 100% of the assessed amounts up to the shipowner's limit of liability under the 1992 CLC, namely 89.77 million SDR (£84.2 million). It was also recalled that in return, the Korean Government had undertaken to pay all claims as assessed by the Club and 1992 Fund in full, as well as all amounts awarded by final judgements under the 1992 CLC and 1992 Fund Convention in excess of the limit so as to ensure that all claimants would receive compensation in full. It was recalled that the Korean Government had further undertaken to deposit the amount already paid out by the Skuld Club to claimants into Court should the Limitation Court order a deposit of the limitation fund.

3.5.4 It was noted that the Skuld Club had begun making payments in accordance with the second Cooperation Agreement and that as of 12 March 2008, the Skuld Club had made payments totalling KRW 31 558 million (£15.6 million) in respect of 93 claims.

LEVEL OF PAYMENTS

3.5.5 It was recalled that the losses arising out of this incident were expected to exceed the limitation amount applicable to the *Hebei Spirit* under the 1992 CLC, ie 89.77 million SDR (£84.2 million). It was also recalled that in March 2008 the Executive Committee, in view of the uncertainty as to the total amount of the admissible claims, had decided that payments should for the time being be limited to 60% of the amount of the damage actually suffered by each claimant, as assessed by the 1992 Fund's experts. It was, however, recalled that in June 2008 the Executive Committee, in view of the increased uncertainty as to the total amount of the admissible claims, had decided to reduce the level of payments to 35% of the established claims and that in October 2008 it had decided to maintain the level of payments at 35% of the established claims.

3.5.6 The Committee noted that the most recent estimate by the Fund's experts of the total amount of the losses caused by the spill was between KRW 567.3 billion and KRW 602.3 billion (£280.03-297.30 million) and that on the basis of this estimate the Director proposed to maintain the level of the 1992 Fund's payments at 35%, to be reviewed at the next session of the Executive Committee.

Decision

3.5.7 The Executive Committee decided, in view of the remaining uncertainties as to the total amount of the admissible claims, 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.

CRIMINAL PROCEEDINGS

3.5.8 It was recalled that on 23 June 2008 the Seosan Branch of the Daejeon District Court (Seosan Court) had delivered a judgement to the effect that (i) the Master of one of the tug boats was sentenced to three years imprisonment and a fine of KRW 2 million (£1 000); (ii) the Master of the other tug boat was sentenced to one year imprisonment; (iii) the owner/operator of the two tug boats, Samsung Heavy Industries (SHI), was fined KRW 30 million (£16 600); (iv) the Master of the crane barge

was found not guilty; and (v) the Master and Chief Officer of the *Hebei Spirit* were also found not guilty. It was also recalled that the Public Prosecutor and the owner of the tug boats had filed an appeal against the judgement.

3.5.9 The Committee noted that in December 2008, the Criminal Court of Appeal (Daejeon Court) had rendered its judgement, reducing the sentence against the Masters of the two tug boats and overturning the not-guilty judgements for the Master of the crane barge and the Master and Chief Officer of the *Hebei Spirit*. It was also noted that the owner of the *Hebei Spirit* had also been given a fine of KRW 30 million (£14 800) and that the Master and Chief Officer of the *Hebei Spirit* had been arrested. It was further noted that in January 2009, the Master and Chief Officer of the *Hebei Spirit* had been released on bail, but had not been permitted to leave the Republic of Korea.

CIVIL PROCEEDINGS

Limitation proceedings by the owner of the *Hebei Spirit*

3.5.10 It was noted that in February 2009 the Seosan Branch of the Daejeon District Court (Limitation Court) had rendered an order for the commencement of the limitation proceedings and that according to the Limitation Order, the persons who had claims against the owners of the *Hebei Spirit* should have to register their claims by 8 May 2009, failing which the claimants would forfeit their rights against the limitation fund.

Limitation proceedings by the owner/operator of the two towing tugs and the crane barge

3.5.11 It was noted that in December 2008, SHI had filed a petition requesting the Seoul Central District Court to issue an order granting the right to limit its liability in the amount of 2.2 million SDR.

3.5.12 It was also noted that on 24 March 2009, the Limitation Court had rendered an order for the commencement of the limitation proceedings, had set the limitation fund, inclusive of legal interests, at KRW 5 600 million (£2.8 million) and had stated that claims against the limitation fund would need to be registered by 19 June 2009.

3.5.13 The Committee noted that, in view of the amount set for the limitation fund, a recovery from SHI would be restricted to relatively small amounts.

DOCUMENT SUBMITTED BY THE REPUBLIC OF KOREA

3.5.14 The Committee took note of document 92FUND/EXC.44/7/1 submitted by the Republic of Korea, outlining the status of the clean-up operations, the investigation into the cause of the incident, the effects of the pollution and the special measures taken by the Government.

3.5.15 It was noted that, as regards the cause of the incident, a number of defendants had appealed against the decision made in December 2008 by the Central Maritime Safety Tribunal and that the case was pending in the Supreme Court. It was also noted that it might take several months for the Supreme Court to make a ruling as to the cause of the incident.

3.5.16 It was noted that despite the clean-up efforts, oil was still found near the seabed along the most affected coastline and that tar continued to be uncovered on the seabed of fishing grounds. It was also noted that, although the Fund had recommended natural recovery, the local fishermen feared that it would take decades for the fishing ground environment to recover naturally which would make it difficult to normalise fishing activities. The Korean delegation requested the Fund to reconsider the need for additional artificial/mechanical clean up and, if natural recovery was still deemed more appropriate, that an explanation supported by objective data based on scientific grounds be put together in order to help persuade the local fishermen to understand the decision.

3.5.17 It was also noted that a total of 600 000 man-days had been spent on clean-up work since the onset of the incident and that payment for private clean-up costs remained a most pressing issue for the

affected regions. The Korean delegation requested the Fund to carry out a more efficient and swift assessment process in light of the fact that private contractors, which had actively participated in the clean-up operations now faced financial difficulties and also the fact that a considerable portion of their claims related to rental costs of fishing vessels owned by the affected local residents.

3.5.18 It was noted that some local fishermen had asserted that scallops had died as a result of the oil spill incident and that other types of shellfish had also been affected. It was also noted that they had persistently sought an explanation as to the cause of the recent phenomena. The Korean delegation asked the Fund for its full cooperation in this matter.

3.5.19 It was also noted that, allegedly, the scale of catches in the Taean fishing grounds had drastically decreased since the onset of the incident and that the local fishermen were facing difficulties in maintaining their livelihood and had requested that the Government take action. The Korean delegation requested the Fund's cooperation in examining the cause of catch reduction and asked that this be taken into consideration when assessing the oil pollution damage.

3.5.20 Regarding claims and compensation from the non-fisheries sector it was noted that 83% of the assessed claims had been rejected, which raised deep concern in the Korean Government as to whether proper compensation could be received. It was noted that the claims seemed to have been rejected on the grounds of insufficient objective supporting documents, which was a pre-condition for receiving proper compensation, but that if the current standards continued to be applied without taking into consideration the traditional business transactions and reality of the Republic of Korea, a great number of claims, including those of *bona fide* claimants, would be rejected. The Korean delegation asked the Fund's Member States and the Secretariat to positively consider other methods to prove damage when dealing with small businesses that had difficulty presenting complete sets of supporting documents.

3.5.21 It was noted that on 21 January 2009, the Korean Government had concluded the 'Memorandum of Agreement (MOA) - Procedure to avoid double payments' with the *Hebei Spirit* Centre, the local claims office that acted on behalf of the Skuld Club and the IOPC Funds. It was also noted that the MOA established working procedures to prevent double payments of compensation by the shipowner, including the Skuld Club, and advance payments by the Government.

3.5.22 The Korean delegation, on behalf of the Government of the Republic of Korea, expressed its appreciation for the cooperation demonstrated by the Fund's Secretariat in dealing with the incident.

Debate

3.5.23 A number of delegations expressed their concern that the great majority of claims expected to be submitted in this incident would be from very small businesses, and suggested that perhaps a more expeditious way to handle claims should be considered for assessing large numbers of small claims.

3.5.24 The Committee noted the Director's comments that, in view of the unprecedented number of claims expected to be submitted in this incident, the Fund was considering alternative ways to assess small claims, but that, in view of the very limited or non-existent evidence submitted, the Fund had to make a decision as to whether to reject the great majority of those claims or to help claimants establish their losses. The Committee further noted the Director's view that the Fund should, whenever possible, choose the second option, but that this would inevitably lead to delays in the assessment process.

3.5.25 The Committee further noted the Director's comment that although the Special Law adopted by the Korean Government was a very commendable effort by the Korean Government to alleviate financial hardship of claimants, it had also added an additional layer of complexity.

RECOURSE ACTION AGAINST SAMSUNG C&T CORPORATION AND SAMSUNG HEAVY INDUSTRIES

3.5.26 The Executive Committee continued its deliberations in a closed session, pursuant to Rule (v) of the Rules of Procedure, in order to consider whether the 1992 Fund should continue its recourse action against Samsung C&T Corporation and SHI in the Court of Ningbo in China. During the closed session, covered by paragraphs 3.5.27 to 3.5.29, only representatives of 1992 Fund Member States were present.

3.5.27 The Committee noted the Director's presentation of the recourse action section of document 92FUND/EXC.44/7 (paragraph 13.3)

Decision

3.5.28 The Committee endorsed the decision taken by the Director in January 2009 to commence recourse action against Samsung C&T Corporation and SHI in the Ningbo Maritime Court in China at the same time as the owner and the insurer of the *Hebei Spirit*. The Committee also decided that the 1992 Fund should continue this recourse action.

3.5.29 In response to a statement by the Korean delegation that a decision on whether to continue the recourse action against Samsung C&T Corporation and SHI in the Ningbo Maritime Court in China should be postponed in order to allow that delegation time to prepare a detailed document to clarify their position on the matter, the Chairman stated that any delegation could in the future table the issue again and submit a document if it so wished.

3.6 Incident in Argentina

3.6.1 The Executive Committee took note of the information regarding the incident in Argentina as set out in document 92FUND/EXC.44/8.

3.6.2 It was recalled that a significant quantity of oil had impacted the shoreline in Caleta Córdova, Chubut Province, Argentina, on 26 December 2007.

LEGAL PROCEEDINGS

3.6.3 It was recalled that an investigation into the cause of the incident had been commenced by the Criminal Court of Comodoro Rivadavia (Argentina) and that the Court had reached a preliminary decision that the spill originated from the *Presidente Umberto Arturo Illia* (*Presidente Illia*), that had been loading oil at a loading buoy off Caleta Córdova. It was also recalled that the shipowner and its insurer (West of England Ship Owners Mutual Insurance Association (Luxemburg) (West of England Club)) had appealed against this decision, maintaining that the *Presidente Illia* had not caused the spill that impacted the coast.

CLAIMS FOR COMPENSATION

3.6.4 It was noted that claims were expected for clean-up costs, losses in the fisheries and tourism sectors and for environmental damage and that the West of England Club had informed the 1992 Fund that they expected the total amount of the claims to be submitted in due course to exceed the limit of liability of the owner of the *Presidente Illia* under the 1992 CLC (24 067 845 SDR (£24.3 million)).

RECENT DEVELOPMENTS

3.6.5 The Committee noted that discussions had been held between the 1992 Fund and the West of England Club and that it had been agreed that the shipowner would pay claims for compensation assessed and approved in accordance with the principles laid down in the 1992 Civil Liability and Fund Conventions.

3.6.6 It was noted that it had also been agreed that, if it was finally established that the oil which impacted the coast did not come from the *Presidente Illia* but from another source, the shipowner and the West of England Club would attempt to recover the amounts of compensation paid from the party responsible for the oil spill and that, if it was proved that the oil spill must have come from a tanker other than the *Presidente Illia*, a so-called 'mystery spill', the shipowner and the West of England Club would recover the amounts of compensation paid from the 1992 Fund.

3.6.7 It was also noted that arrangements had been made for representatives of the West of England Club and the 1992 Fund to meet in Buenos Aires with their lawyers and experts in April 2009.

Debate

3.6.8 The delegation of Argentina thanked the Secretariat for the information presented and stated that it looked forward to welcoming representatives of the Club and the 1992 Fund to Argentina in April.

4 Any other business

Grant of observer status

4.1 The Executive Committee took note of the information contained in document 92FUND/EXC.44/9 and decided to grant observer status to Bolivia on a provisional basis, pending the decision of the Assembly at its next session.

4.2 The delegation of Bolivia expressed its gratitude to the Committee for having granted Bolivia's request for observer status on a provisional basis, and stated that it hoped that the Assembly would confirm this decision at its next session.

Publications

4.3 The Director informed the Executive Committee that the December 2008 editions of the 1992 Fund Claims Manual, the Guidelines for presenting claims in the fisheries, mariculture and fish processing sector and the Technical Guidelines for assessing fisheries sector claims, with special reference to small-scale operations lacking evidence of earnings, were now available in English, French and Spanish. He pointed out that all three publications were available to download from the IOPC Funds' website and that the Claims Manual and the Guidelines for presenting claims in the fisheries, mariculture and fish processing sector were available in printed form.

5 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.44/WP.1, was adopted, subject to certain amendments.