INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
45th session
Agenda item 5

92FUND/EXC.45/8
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RECORD OF DECISIONS OF THE FORTY-FIFTH SESSION OF THE EXECUTIVE COMMITTEE

(held on 15, 16 and 18 June 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.45/1.

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 those 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 fifth session, the 1992 Fund Administrative Council, acting on behalf of the 1992 Fund Assembly, had appointed the delegations of Angola, Cameroon, Papua New Guinea, Spain and Trinidad and Tobago to the Credentials Committee.

2.3 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	Republic of Korea	Uruguay
	Spain	

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.45/2/1 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	Gabon	Norway
Angola	Germany	Panama
Argentina	Ghana	Papua New Guinea
Bahamas	Greece	Poland
Belgium	Ireland	Portugal
Bulgaria	Japan	Russian Federation
Cambodia	Kenya	Singapore
Cameroon	Malaysia	South Africa
Denmark	Malta	Turkey
Ecuador	Marshall Islands	Vanuatu
Fiji	Netherlands	Venezuela
Finland	Nigeria	

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

Bolivia	Islamic Republic of Iran	Ukraine
Egypt	Saudi Arabia	
Guatemala	Syrian Arab Republic	

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

International non-governmental organisations

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

3 Incidents involving the 1992 Fund

3.1 *Prestige*

3.1.1 The Executive Committee took note of the information regarding the *Prestige* incident as set out in document 92FUND/EXC.45/3.

CLAIMS FOR COMPENSATION IN SPAIN

3.1.2 It was noted that as at 15 May 2009 the Claims Handling Office in La Coruña had received 844 claims totalling €1 020.7 million (£894.2 million), which included 14 claims from the Spanish Government totalling €968.5 million (£848.5 million).

3.1.3 It was also noted that 787 (94.82%) 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 (£461 991)[<1>] had been made, mainly at 30% of the assessed amount.

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

3.1.4 It was further noted that the 1992 Fund's experts had finalised the provisional assessment of the claims submitted by the Spanish Government and that the Director would write, in the very near future, to the Spanish Government providing a detailed explanation of the assessment and offering to discuss the assessment details in a meeting with the Government. It was also noted that it was the Director's intention to provide the Executive Committee with a detailed explanation of the assessment at its October 2009 session.

CLAIMS FOR COMPENSATION IN FRANCE

3.1.5 It was noted that as at 15 May 2009, 482 claims totalling €109.7 million (£96.1 million) had been received by the Claims Handling Office in Lorient, including a claim for €67.5 million (£59.1 million) submitted by the French Government.

3.1.6 It was also noted that 454 claims had been assessed for €50 million (£43.8 million) and that interim payments totalling €5.3 million (£4.6 million) had been made at 30% of the assessed amounts.

3.1.7 It was further noted that the 1992 Fund's experts had also finalised the provisional assessment of the claim submitted by the French Government and that the Director would write, in the very near future, to the French Government providing a detailed explanation of the assessment and offering to discuss the assessment details in a meeting with the Government. It was also noted that it was the Director's intention to provide the Committee with a detailed explanation of the assessment at its October 2009 session.

LEGAL PROCEEDINGS IN SPAIN

Investigations into the cause of the incident

3.1.8 It was 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 also 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.

3.1.9 It was noted that in March 2009 the Criminal Court in Corcubión had issued a decision declaring the instruction phase of the case concluded. It was also noted that in the decision the Court exonerated from prosecution the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain. It was further noted that the Court had decided to continue the proceedings against the Master, Chief Officer and Chief Engineer of the *Prestige*.

3.1.10 It was noted that some of the parties to the criminal proceedings had appealed against this decision, pleading that the Appeal Court should overturn the decision of the Corcubión Court not to prosecute the civil servant mentioned above. It was noted that the French Government had also appealed, pleading that some employees of the American Bureau of Shipping (ABS), the classification society that certified the *Prestige*, should be incriminated and that proceedings should be initiated against them as well.

Claims in court

3.1.11 It was noted that some 3 896 claims had been lodged in the legal proceedings before the Criminal Court in Corcubión (Spain) and 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 recalled 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

3.1.12 It was noted that 232 claimants, including the French Government, had brought legal actions against the shipowner, the London Club and the 1992 Fund in 16 courts in France, requesting compensation totalling some €111 million (£97.2 million). It was, however, noted that 39 of these claimants had withdrawn their actions and that actions by 193 claimants remained pending in court, claiming compensation totalling €92.6 million (£81.1 million).

3.1.13 The Committee took note of a judgement rendered in late March 2009 by the Civil Court in Bordeaux, where the Court had agreed with the Fund's assessment.

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

LEGAL PROCEEDINGS IN THE UNITED STATES

3.1.15 It was recalled that the Spanish State had taken legal action against ABS before the Federal Court of First Instance in New York requesting compensation for all damage caused by the incident, estimated to exceed US$1 000 million (£636.3 million). It was also 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.

3.1.16 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 Civil Liability Convention (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.

3.1.17 It was recalled that in March 2009 the Court of Appeal had invited the Federal Government of the United States to participate in the oral argument and file an *amicus curiae* brief. The Committee noted that the United States Department of Justice had declined the Court's invitation to comment on the interpretation of the 1992 CLC, as the United States was not a Party to the Convention, and had commented only on the issue of whether the 1992 CLC could deprive a District Court of subject matter jurisdiction over the claim by Spain against ABS. It was noted that the Department of Justice had stated that the 1992 CLC, to which the United States was not a signatory, could not divest a United States court of its jurisdiction conferred by a United States statute but that the District Court Judge would be free to consider the 1992 CLC in the context of whether to decline to exercise its jurisdiction over the case.

3.1.18 It was noted that the appeal hearing had been held in March 2009. It was also noted that both Spain and ABS had agreed that the basis for the District Court Judge's dismissal of the claim by the Spanish State, that is, that the 1992 CLC ousted the United States District Court from jurisdiction over the case, was wrong. It was noted, however, that whereas Spain had argued that this error required a reversal of the District Court's dismissal of its action, ABS had argued that the Court of Appeal could affirm the dismissal on other grounds, finding that the District Court Judge had exercised her discretion to decline jurisdiction, either on the basis of extending comity to the jurisdictional provisions of the 1992 CLC or on the basis of *forum non conveniens*.

3.1.19 The Committee noted that the Court of Appeal had rendered its decision shortly before the Committee's June 2009 session. It was noted that the Court had reversed both the dismissal of Spain's case and the dismissal of ABS's counterclaims, which the District Court had held did not fall under an exception to the Foreign Sovereign Immunities Act. It was noted that the Court of Appeal had given the District Court some fairly explicit guidance as to the issues which needed to be

addressed. It was also noted that the Secretariat would examine the text of the Court of Appeal's decision and inform the Committee in more detail at its October 2009 session.

3.2 *Solar 1*

3.2.1 The Executive Committee took note of the information regarding the *Solar 1* incident as set out in document 92FUND/EXC.45/4.

CLAIMS FOR COMPENSATION

3.2.2 The Committee took note of the claims situation as reported in section 6 of document 92FUND/EXC.45/4. It was noted that some 32 447 claims had been received and that payments totalling PHP 955 million (£12.8million) had been made in respect of 26 209 claims, mainly in the fisheries sector.

3.2.3 It was also noted that work continued in the assessment and payment of claims for the costs of shoreline clean up, property damage and economic losses, mainly in the mariculture and tourism sectors.

Debate

3.2.4 One delegation asked a question relating to the provisional assessment and payment of a claim made by the Philippine Coast Guard. The Secretariat pointed out that such provisional payments were routinely made as part of a process of multi-stage compensation, whereby claims are partially compensated through interim payments, pending the submission of further information required to answer queries raised by the Secretariat during the assessment of these claims. The Secretariat explained that this was done in order to allow rapid compensation even where claims required further clarification in order to be fully assessed.

3.2.5 That delegation further enquired as to why a number of payments for assessed claims in the capture fisheries sector had not been made. The Secretariat explained that in some cases the payments had not been collected by the claimant and that the cheques had expired, despite considerable effort to re-contact these claimants.

THE 1992 CONVENTIONS AND STOPIA 2006

3.2.6 It was recalled that the incident was the first involving a vessel entered in the Small Tanker Oil 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 (£19.5 million). The Committee noted that the 1992 Fund was receiving regular reimbursements from the Shipowner's Club.

3.2.7 The Committee also noted that it remained difficult to predict whether the amount of compensation payable in respect of this incident would exceed the STOPIA 2006 limit of 20 million SDR (£19.5 million).

TIME BAR

3.2.8 The Committee recalled that in some past incidents the Fund had made an effort to minimise the chance of claimants not being aware of the impending time bar. It was noted that the Secretariat intended to discuss this matter with the Philippine authorities to find the best approach in this particular case.

Debate

3.2.9 One delegation emphasised that, in keeping with the Fund's past practice, all efforts should be made to avoid genuine claimants not being compensated. The Secretariat confirmed that intention and reiterated in particular that the time bar issue was being considered and would be discussed with the Philippine delegation.

3.3 *Volgoneft 139*

3.3.1 The Executive Committee took note of the information regarding the *Volgoneft 139* incident as set out in documents 92FUND/EXC.45/5 and 92FUND/EXC.45/5/Add.1, submitted by the Director, and 92FUND/EXC.45/5/1, submitted by the Russian Federation.

LIMITATION PROCEEDINGS AND 'INSURANCE GAP'

3.3.2 The Committee took note of the court judgements contained in document 92FUND/EXC.45/5/Add.1, submitted by the Director as requested by one delegation at the 44th session of the Executive Committee in March 2009, and of the information contained in section 7 of document 92FUND/EXC.45/5.

3.3.3 The Committee recalled that the *Volgoneft 139* was owned by JSC Volgotanker which, since the incident, had been declared bankrupt by the Commercial Court in Moscow. It was also recalled that the shipowner was insured by Ingosstrakh. It was further recalled that the insurance cover was limited to 3 million SDR (£3 million), well below the minimum limit under the 1992 CLC of 4.51 million SDR (£4.6 million), and that there was therefore an 'insurance gap' of some 1.5 million SDR (£1.6 million).

3.3.4 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 (£3 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 confirming the ruling by the Arbitration Court. It was further recalled that the Fund had appealed against the judgement before the Supreme Court in Moscow and that in December 2008 the Supreme Court had confirmed the decision regarding the limitation fund. The Committee noted that the Court of Appeal, and later the Supreme Court, had based their decisions on the fact that the increase of the shipowner's limit of liability under the 1992 CLC had not been published in the Official Gazette of the Russian Federation and therefore could not be applied by the Russian courts.

3.3.5 The Committee noted that at a hearing in March 2009, the Arbitration Court of Saint Petersburg and Leningrad Region had agreed to postpone its consideration of the merits of the claims until a hearing scheduled for 9 June 2009, but that at that hearing the Court had decided to adjourn its consideration of the case until 8 September 2009.

Debate

3.3.6 One delegation asked for clarification as to whether the issue of the 'insurance gap' was still subject to appeal, since it seemed that a decision had been reached by the Supreme Court. That delegation also expressed its appreciation for the practical solutions suggested by the Secretariat and the Russian delegation regarding the 'insurance gap'.

3.3.7 The Secretariat stated that the decision the 1992 Fund had appealed against had been an interim decision by the Arbitration Court of the Saint Petersburg and Leningrad Region and that the 1992 Fund had appealed because of the importance of the issue of the 'insurance gap'. The Secretariat also stated that if the final decision of the Arbitration Court of the Saint Petersburg and Leningrad Region were to also contravene the 1992 Conventions, the 1992 Fund could, and would

not hesitate to, appeal against such decision. The Secretariat further stated that, although the outcome of such an appeal would be uncertain given the decision of the Supreme Court in respect of the amount of the shipowner's limitation amount, the fact that the amendments to the limits of the 1992 Conventions had now been published in the Russian official Gazette appeared to leave some scope for a different decision by the Russian Courts in future.

3.3.8 One delegation expressed its appreciation for the translations of the Court decisions provided in document 92FUND/EXC.45/5/Add.1, which had enabled that delegation to understand that the Russian courts had decided on legal grounds. That delegation stated that, since the amendments to the 1992 Conventions had not been properly published, it understood why the Russian courts had decided to uphold the legislation that had been published and incorporated into Russian Law. That delegation expressed satisfaction with the fact that the amendments to the 1992 Conventions had now been officially published in the Russian Federation, since this would avoid the recurrence of the problem in future cases.

CAUSE OF THE INCIDENT

3.3.9 It was recalled that the insurer had pleaded before the Arbitration Court of Saint Petersburg and Leningrad Region the defence that the spill had resulted from a natural phenomenon of an exceptional, inevitable and irresistible character, and that the shipowner and 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.

3.3.10 It was recalled that the Fund's experts were examining the available evidence relating to 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 there had been a reasonable opportunity to avoid the vessel being exposed to the storm in the way it was.

Debate

3.3.11 The Russian delegation expressed concerns regarding the information contained in paragraph 8.3 (iv)(a) and (d) of document 92FUND/EXC.45/5. That delegation stated that, contrary to the information provided under (a), the *Volgoneft 139* had the right to navigate in the area at the time of the incident. That delegation also stated that there were no grounds for the information contained in sub-paragraph (d) since there were proper vessel traffic service and traffic control systems in the area at the time of the incident. The Russian delegation invited the Fund's experts to attend the area to examine the systems in place. That delegation asked the Committee to invite the Secretariat to submit more information to support the statements contained in subparagraphs (a) and (d), or to amend those statements, which in its view were not correct.

3.3.12 The Director stated that paragraph 8.3 of document 92FUND/EXC.45/5 was based on the information and advice that the Fund had received from its experts and that this paragraph reflected the view its experts had taken after careful consideration of the information and evidence available. The Director also stated that the Secretariat was generally willing to reconsider issues on the basis of new information coming to light, but that paragraph 8.3, in his view, should only be revised if the Russian authorities provided convincing information for the Fund's experts to reconsider their view, and that it could not be ruled out that ultimately a difference of opinion would remain between the Russian authorities and the Fund.

CLAIMS FOR COMPENSATION

3.3.13 The Committee took note of the information regarding the claims situation as set out in section 9 of document 92FUND/EXC.44/5.

3.3.14 It was noted that claims totalling RUB 8 131.7 million (£164.4 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.

3.3.15 The Committee noted that three claims for costs incurred for clean up and preventive measures totalling RUB 155.5 million (£3.1 million) from a salvage contractor and two local authorities had been provisionally assessed at RUB 71.3 million (£1.4 million), and that the assessment had been communicated to the claimants.

Debate

3.3.16 The Russian delegation requested the Executive Committee to consider the possibility of authorising the Director to make payments since, in particular, the salvage contractor mentioned above had incurred substantial costs in preventive measures. In this context, that delegation requested that the Committee consider the possibility of providing an interim payment by the 1992 Fund to the salvage contractor.

3.3.17 The Secretariat replied that, since the shipowner's insurer had deposited a limitation fund with the Court, the salvage contractor should be paid from that limitation fund, as under the 1992 Conventions, the liability of the 1992 Fund in principle only arose once the shipowner's limitation fund had been exhausted.

3.3.18 The Russian delegation expressed its concern that it would be difficult to recover costs from the insurers, since they were relying on a defence of 'force majeure'.

METODIKA CLAIM

3.3.19 It was recalled that at a meeting in May 2008 the Russian authorities had informed the 1992 Fund that the Federal service on the supervision in the sphere of the use of the nature (Rosprirodnadzor) had submitted a claim for environmental damage for some RUB 6 048.1 million (£122.3 million) and that this claim was based on the quantity of oil spilled, multiplied by an amount of Roubles per ton ('Metodika'). 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 actually undertaken by Rosprirodnadzor to combat oil pollution and to restore the environment to determine if and to what extent they qualified for compensation under the Conventions.

Debate

3.3.20 One delegation, whilst expressing its appreciation for the progress that seemed to have been made to resolve the issue of the 'Metodika' claim by the combined efforts of the Secretariat and the Russian authorities, stated that it considered it important for the message to be reiterated to all Member States of the 1992 Fund, that calculation of damage under the 1992 Conventions is to be made on the basis of actual costs and expenses and that an abstract quantification calculated in accordance with a theoretical model is in contravention of Article I.6 of the 1992 CLC.

RECENT DEVELOPMENTS

3.3.21 It was noted that a meeting had taken place in April 2009 between the Fund's Secretariat, its experts and Russian representatives. It was noted that the Russian representatives had shown optimism that

the Russian Courts were very likely to reject the 'Metodika' claim and had stated that, in accordance with 'Metodika' regulations, the authorities had the choice between submitting a claim on the basis of a formula or on the basis of the actual expenditure incurred in clean-up operations. It was also noted that the Russian representatives had suggested that the Fund might also wish to submit this argument before the Arbitration Court in Saint Petersburg and Leningrad Region.

3.3.22 It was noted that the Russian representatives had also stated that the Minister of Transport of the Russian Federation had written to his counterpart in the Ministry of Natural Resources suggesting that Rosprirodnadzor should resubmit its claim on the basis of actual expenditure which would not contravene the 1992 Civil Liability and Fund Conventions.

3.3.23 It was noted that the issue of the 'insurance gap' of 1.5 million SDR (£1.5 million) had also been discussed at that meeting and that the Secretariat had stated that in assessing the claims submitted by local and federal authorities, it had been noted that clean-up costs of RUB 48 741 300 (£985 355) appeared to have been paid directly from Russian Federal funds and that these costs had so far not been claimed from the Fund or in court. It was also noted that the Secretariat had suggested that if costs like this, for a total amount equivalent to the 'insurance gap', and provided they were assessed by the Fund's experts as admissible for that amount, were not claimed by the Federal Government but offset against the 'insurance gap', the problem could be resolved. It was noted that the Russian representatives had been receptive to the idea and had said that they understood that the Ministry of Finance would not claim for these costs and that it was worth exploring this possibility.

3.3.24 It was also noted that the Fund's Secretariat had been informed that the Minister of Transport of the Russian Federation had written to the Vice-Prime Minister, bringing to his attention the problems arising from this case. It was noted that the Director had also written to the Vice-Prime Minister of the Russian Federation, expressing the Fund's concerns.

DOCUMENT PRESENTED BY THE RUSSIAN DELEGATION

3.3.25 The Committee took note of the information regarding the *Volgoneft 139* incident as set out in document 92FUND/EXC.45/5/1 submitted by the Russian Federation.

3.3.26 It was noted that the claim submitted by Rosprirodnadzor had been calculated on the basis of a legal Act by the Ministry of the Environment of the Russian Federation which had official status in the Russian Federation and was a part of national legislation. It was also noted that although Rosprirodnadzor was a governmental institution, it was independent in its activities and that therefore neither the Government nor the Ministry of Transport had direct power to instruct Rosprirodnadzor.

3.3.27 It was also noted that the Ministry of Transport of the Russian Federation, acting as coordinator of the incident on behalf of the Government, had forwarded a formal request to the Russian Government with the proposal to invite Rosprirodnadzor to reconsider its claim. It was also noted that the Russian Government had initiated investigations and possible amendments of the related legal Act of the Ministry of the Environment to ensure full compliance with the international provisions.

3.3.28 It was noted that the Krasnodar Regional Government and the Ministry of Emergency of the Russian Federation had applied to the Federal Government of Russia with a request for compensation for their participation in the oil spill response and clean-up operations and that the Federal Government had paid a total amount of about RUB 45 million (£910 000) in compensation. It was also noted that those payments were not included in any claim currently being considered by the Court.

3.3.29 It was also noted that all required clean-up operations had been completed and that about 80 000 tonnes of oily waste had been collected. It was further noted that the treatment of that waste was still under consideration and that the Krasnodar Regional Government had requested the national reserve fund to provide financial support for the work.

3.3.30 Regarding the issue of the 'insurance gap', the Russian delegation stated that, according to the internal investigation, in spite of the fact that the Russian Constitution stipulated that international agreements entered into by Russia take precedence over national law, in the case of conflict, the Russian Courts had decided to apply the text as published.

3.3.31 It was noted that, in view of the possibility that similar difficulties could arise in future incidents, the Ministry of Transport of the Russian Federation had initiated all necessary national procedures to make the latest amendments to the 1992 Conventions fully effective in the Russian Federation. It was noted that additionally all the certificates issued to Russian-flagged vessels had been verified and that it had been confirmed that all discrepancies found had been corrected.

3.3.32 It was also noted that, on a governmental level, measures to avoid future discrepancies or misunderstandings in the interpretation of international and national provisions in the maritime field had been implemented.

3.3.33 The Committee noted that, in the view of the Russian Federation, to solve the issue of the 'insurance gap' in the case of the *Volgoneft 139*, consideration could be given to use the payments from the national reserve fund to the claimants mentioned above, in order to offset the 'insurance gap'.

Debate

3.3.34 Several delegations expressed their appreciation of the developments in this case since the 44th session of the Executive Committee, in particular the positive approach of co-operation between the Russian authorities and the Secretariat, which in their view differed from the initial position of isolation on the part of the Russian authorities.

3.3.35 The Chairman, in his summing up, stated that the case had progressed since March 2009, but that there were still many issues to resolve before the Executive Committee could be ready to authorise the Director to make payment of claims, and that the Director had not asked for such authorisation. The Chairman noted with satisfaction that the Russian delegation and the Secretariat were working together towards resolving the outstanding issues.

3.4 *Hebei Spirit*

3.4.1 The Executive Committee took note of the information regarding the *Hebei Spirit* incident as set out in documents 92FUND/EXC.45/6 and 92FUND/EXC.45/6/Add.1, submitted by the Director and documents 92FUND/EXC.45/6/1 and 92FUND/EXC.45/6/2, submitted by the Republic of Korea.

CLAIMS FOR COMPENSATION

3.4.2 It was noted that, as of 15 June 2009, 5 146 claims totalling KRW 584 974 million (£284 million) had been registered in the *Hebei Spirit* Centre. It was also noted that 637 claims had been assessed at a total of KRW 65 204 million (£31.7 million), that 708 claims had been rejected and that the Skuld P&I Club (Assuranceföreningen Skuld (Gjensidig) (Club)) had made payments to 173 claimants totalling KRW 47 095 million (£23 million). It was further noted that the remaining claims were being assessed or additional information had been requested from the claimants. The Committee noted that further claims were expected.

3.4.3 The Committee noted that as at 1 June 2009, 20 361 claims totalling KRW 270 545 million (£134 million) had been submitted for losses allegedly suffered by subsistence and artisanal fishermen, consisting, for the vast majority, of hand gatherers, but also of women divers and boat fishermen, but that these claims were still being registered in the *Hebei Spirit* Centre.

3.4.4 It was noted that, in addition, 125 885 claims had been submitted in the limitation proceedings initiated by the owner of the *Hebei Spirit* in the Limitation Court in Seoul, mainly by hand gatherers

and other subsistence fishermen, and that it was expected that these claims would also be submitted to the Club and the Fund in the near future.

ASSESSMENT OF CLAIMS IN FISHERIES SECTOR

3.4.5 It was recalled that the Fund's policy, established by the 1971 Fund Executive Committee at its 60th session in February 1999 and confirmed by the 1992 Fund Executive Committee at its 2nd session in February 1999, was to not accept claims from fishermen who carried out their activities in breach of licensing requirements laid down in, or based on, national legislation. It was recalled, however, that the Committee had considered that some flexibility should be exercised in respect of such claims and that the scope for such flexibility would have to be considered further (cf document 92FUND/EXC.2/10, paragraphs 5.3-5.4).

3.4.6 It was noted therefore that the Director intended to reject, in principle, claims submitted by fishermen not in possession of a valid license or permit where such license or permit was legally required.

3.4.7 It was noted that in view of the expected number of claims to be received in the fisheries sector, and since it was expected that the vast majority of these claimants would be hand gatherers, who would not be able to provide sufficient evidence that they were actually active at the time of the incident and/or to prove their losses, the Fund and the Club had asked the Government of the Republic of Korea for assistance in determining who were genuine hand gatherers so as to render the assessment as efficient as possible.

3.4.8 It was noted that the Director had considered the approach suggested by the Korean Government as outlined in paragraphs 1.5.4 – 1.5.6 of document 92FUND/EXC.45/6/Add.1 as a suitable method in principle to ensure that the assessment of these claims was carried out in an efficient way. It was further noted that, as at 1 June 2009, the experts engaged by the Club and the Fund had interviewed a first group of over 30 400 subsistence fishermen, including more than 26 000 hand gatherers. The Committee noted that the assessment of the second group of claims would be carried out in accordance with the Fund's Guidelines for the assessment of claims in the subsistence and artisanal fisheries sector. It was also noted that the claims by fishermen belonging to the third group would be rejected, unless they could prove that they had incurred a loss as a result of the contamination.

Debate

3.4.9 The majority of the delegations who took the floor stated that it was important that the Fund maintained its policy of not compensating losses suffered by individuals engaged in criminal and illegal acts, and agreed with the Director's position that fishing activities that would be considered under national legislation as criminal or illegal should not be compensated. However, the Korean delegation suggested that some flexibility should be exercised regarding illegal fisheries.

3.4.10 That delegation stated that the third group, referred to in paragraph 1.5.6 of document 92FUND/EXC.45/6/Add.1, should also have their claims assessed in accordance with the general principles set out in the 1992 Fund Claims Manual, but as a lower priority.

Decision

3.4.11 The Executive Committee endorsed the Director's intention to follow the proposed course of action for surveying and assessing claims in the hand gatherer and subsistence fishery sectors as outlined in paragraphs 1.5.4-1.5.6 of document 92FUND/EXC.45/6/Add.1. The Committee also endorsed the Director's position that he intended to reject, in principle, claims submitted by fishermen not in possession of a valid license or permit where such license or permit was legally required.

FISHING AND HARVESTING RESTRICTIONS

3.4.12 It was noted that in the aftermath of the incident, the Korean Government had issued a number of fishing and harvesting restrictions in the areas affected by the spill. It was also noted that the 1992 Fund had requested the Korean Government to provide detailed information as to the basis on which the restrictions had been imposed, maintained and lifted. It was further noted that in October 2008 the Korean Government had provided the 1992 Fund with documentation on the restrictions and that the Club and the 1992 Fund had asked their experts to examine the documentation.

3.4.13 It was noted that in early May 2009 the Korean Government had provided additional information regarding the fishing restrictions and that the Fund had met with representatives of the Korean Government to discuss the contents of the documents provided. It was noted that, at the meeting, the Korean Government had provided a summary in English of the additional information submitted and had explained the procedure followed to monitor and sample, as well as the decision-making procedures followed in maintaining and lifting the restrictions. It was further noted that during the discussion it had been clarified that technical criteria had been only part of the considerations of the Government and that economic and social concerns had also been taken into account when deciding when to lift the restrictions.

3.4.14 The Committee noted that on the basis of the information supplied to date by the Korean Government and the best interpretation of the data provided, the Club's and Fund's experts considered it clear that all of the fisheries should reasonably have been reopened before the actual date of the lifting of the respective fishing restrictions.

3.4.15 It was noted that, based on the information available, it appeared that the fishing restrictions for all types of fishing had been extended beyond the period which could have been considered reasonable based on the results of the testing carried out by the Korean authorities.

3.4.16 The Committee noted that the Director had taken the view that any losses allegedly suffered by fishermen after a point in time where the Korean Government could reasonably have had the opportunity to lift the restrictions on the basis of conclusive scientific information indicating that the level of contamination was back within safe levels, should not be considered due to the contamination caused by the incident, and that therefore the Director intended to reject claims for losses suffered by the fishermen after those dates.

Debate

3.4.17 The delegation of the Republic of Korea requested the Committee to invite the Director not to decide on the reasonableness of the fishing restrictions before bilateral discussions with the Korean Government had been held.

3.4.18 The Director stated that paragraph 2.3.1 of document 92FUND/EXC.45/6/Add.1 was based on the information and advice that the Fund had received from its experts and that this paragraph reflected the view its experts had taken after careful consideration of the information and evidence available. The Director also stated that the Secretariat was generally willing to reconsider issues on the basis of new information coming to light, but that in his view the 1992 Fund's position should only be revised if the Korean authorities provided convincing information for the Fund's experts to reconsider their view and that it could not be ruled out that ultimately a difference of opinion would remain between the Korean authorities and the Fund.

3.4.19 Most delegations expressed the view that discussions should be continued on a bilateral basis between the Korean authorities and the Fund in order to try to reach agreement on the reasonableness of the period of the fishing restrictions.

3.4.20 Some delegations expressed the view that bilateral discussions would be beneficial to find an agreement between the Fund and the Korean Government on reasonable dates for the lifting of the fishing restrictions. However, they stated that it should be recognised that such agreement may not be found and that the Fund's view on the reasonableness of the period of the fishing restrictions may not be the same as that of the Korean Government.

Decision

3.4.21 The Committee endorsed the Director's view that the assessment of claims in the fisheries sector should not necessarily be based on the dates when the restrictions were actually lifted by the Korean authorities, but should be based on conclusive scientific information available to the Fund. The Committee also instructed the Director to continue to have bilateral consultations with the Republic of Korea with a view to resolving the remaining differences of opinion as soon as possible.

LEVEL OF PAYMENTS

3.4.22 It was recalled that in October 2008 and March 2009 the Executive Committee had decided to maintain the level of the Fund's payments at 35% of the established claims.

3.4.23 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 580 000 million and KRW 615 000 million (£288-306 million).

3.4.24 The Committee also noted that, for the reasons explained in paragraph 3.2.3 of document 92FUND/EXC.45/6/Add.1, the additional amount of KRW 270 544 million (£134 million) recently claimed by hand gatherers and similar artisanal and subsistence fisherfolk had not been taken into account for the purpose of estimating the total amount of capture fisheries damage.

3.4.25 The Executive Committee, in view of the remaining uncertainties as to the total amount of admissible claims, decided to maintain the level of payments at 35% of the amount of the loss or damage as assessed by the Fund's experts, and that this level of payments should be reviewed at its next session.

LEGAL PROCEEDINGS

3.4.26 The Committee noted that in April 2009, the Korean Supreme Court had overturned the decision by the Court of Appeal, which had held that the Masters of one of the towing tugs and of the crane barge and the Master and Chief Officer of the *Hebei Spirit* were liable for the destruction of the *Hebei Spirit*, and had sent back the case to the Court of Appeal for a retrial. It was noted that the Supreme Court in its judgement had also annulled the Court of Appeal's decision to imprison the crew members of the *Hebei Spirit* but had upheld the decision to imprison the Masters of one of the towing tugs and of the crane barge and confirmed the fines imposed by the Court of Appeal.

3.4.27 The Committee also noted that in June 2009 the Court of Appeal had issued a judgement which had followed the judgement of the Supreme Court and that, as a result, the Master and Chief Officer of the *Hebei Spirit* had been allowed to leave the Republic of Korea.

3.4.28 The delegation of one non-governmental organisation made a statement with regard to the recent developments in the Criminal Court. That delegation expressed its relief and satisfaction that the sentence against the Master and the Chief Officer of the *Hebei Spirit* for destruction of the ship had been annulled and that the two men had been freed and could leave the country after having been forced to stay in the Republic of Korea for over 500 days from the incident. However, that delegation stated its dissatisfaction with the fact that the other charges against the Master and Chief Officer of the *Hebei Spirit* had been confirmed. That delegation informed the Committee that it had submitted a statement to the Supreme Court on the recognised best practice to be followed in cases

of collision, indicating that the Master and Chief Officer of the *Hebei Spirit* had followed such practices, but that their efforts had been ignored in the sentence.

INFORMATION PROVIDED BY THE REPUBLIC OF KOREA

3.4.29 The Committee took note of document 92FUND/EXC.45/6/2, submitted by the Republic of Korea, which provided information on the progress of the clean-up operations and related compensation, the impact of the spill on fishing grounds and the special measures taken by the Korean Government to alleviate the impact of the pollution, and in which the Republic of Korea raised concerns about the current claims handling system that the Fund has in place.

3.4.30 The Committee also noted the video presented by the Korean delegation which provided details of the *Hebei Spirit* incident and commented on the environmental, economical and emotional impact on the areas and persons affected by the spill, even 400 days after the incident.

3.4.31 The Korean delegation expressed its appreciation for the efforts of the Secretariat to find a method to assess losses for small businesses in the tourism sector.

3.4.32 The Korean delegation expressed its concern about the great number of claims, in their view, that had been rejected due to insufficient supporting documentation. That delegation stated that, in its view, 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 would be rejected, including *bona fide* claimants.

3.4.33 With regard to small businesses that had difficulties presenting a sufficient amount of supporting information, the Korean delegation requested the Fund's Member States and the Secretariat to positively consider the various other methods to prove and quantify damage.

POOL OF EXPERTS

3.4.34 The Executive Committee noted that the Fund and the Club have jointly appointed 65 Korean and international experts to survey damages and assess claims.

3.4.35 The Committee also noted the proposal made by the Korean delegation that the Secretariat should form and manage a global pool of claims experts and draw upon this pool whenever necessary, and/or take further steps to complement its plan of action under the regime. The Committee also noted the Korean delegation's suggestion that, at the same time, in the event of a major oil spill incident, the Member States should support the Secretariat and ensure that the hiring of experts and use of budget were executed flexibly for the prompt and systematic settlement of claims.

3.4.36 The Committee noted that the Korean Government strongly hoped that measures would be taken to set up a complementary action plan, utilising a pool of experts, that could be put into operation quickly, and possibly even initially be adapted to the settlement process of the *Hebei Spirit* incident, where various difficulties had arisen in relation to registration of claims and assessment delays.

Debate

3.4.37 Whilst a number of delegations expressed some sympathy for the views of the Korean delegation, the majority of delegations questioned the need for and possibility of setting up a pool of experts for dealing with large incidents. Some delegations pointed out that it might be necessary to explore alternative ways to assess large numbers of similar claims for relatively small amounts rather than to expand the number of experts employed in each incident.

3.4.38 The Director reminded the Committee that the desirability and possibility of setting up a pool of experts had already been discussed in the past in connection with a number of major incidents and that it had been concluded that it was not a viable option.

3.4.39 The Director further made the comparison between the *Erika* incident, for which the Fund had received some 7 000 claims which had been assessed by 50 experts at the height of the incident, and the *Hebei Spirit* incident, where over 120 000 claims are anticipated, and where there are already 65 experts working in the incident, with a further 20 experts expected to be employed in the near future. The Director further made the point that experts cannot be hired in proportion to the number of claims, without risking a situation whereby the cost of assessing claims would be disproportionate to the amounts claimed and assessed.

3.4.40 The Director informed the Committee that the Secretariat intended to submit to the next session of the Assembly a document providing alternative ways to assess large numbers of similar claims for relatively small amounts, which would facilitate prompt and fair assessment of such claims, in particular those with little or no supporting documents, and which would also ensure that the costs of assessing claims would not become disproportionate to the actual amount claimed and assessed.

Decision

3.4.41 The Executive Committee, whilst having some sympathy for the proposal made by the delegation of the Republic of Korea, decided that there was no need at the moment for the establishment of an international pool of experts.

3.4.42 The Committee further invited the Director to prepare, for the next session of the Assembly, a document exploring alternative ways for assessing large numbers of similar claims for relatively small amounts, in a prompt and efficient manner.

RECOURSE ACTION

3.4.43 The Committee took note of document 92FUND/EXC.45/6/1 which presented the views held by the Republic of Korea on the recourse action taken against Samsung Heavy Industries (SHI) by the Director.

3.4.44 It was recalled that the Director had filed a recourse action against SHI in January 2009 in the Ningbo Maritime Court in the People's Republic of China and that the Executive Committee, at its 44th session, had endorsed the decision taken by the Director to commence recourse action against SHI and had decided to continue this recourse action.

3.4.45 The Committee noted that the Korean Government was concerned that the recourse action filed against SHI at the court of Ningbo in the People's Republic of China by the Fund in January 2009 could lead to a potential conflict with the shipowner's liability limitation proceedings under the current international maritime legal system, damaging the limitation system already operating in many parts of the world by filing recourse action in a Chinese Court instead of a Court in the Republic of Korea, which reasonably and duly retained jurisdictional rights.

3.4.46 It was noted that, in the view of the Korean Government, the IOPC Funds as an international organisation needed to respect the international Conventions and the established maritime legal system. It was also noted that in the view of the Korean Government the recourse action taken by the Fund against SHI in the Ningbo Court in the People's Republic of China was not suitable for an international organisation, and that it moreover greatly infringed the jurisdictional right set forth by the 1976 LLMC (Convention on Limitation of Liability to Maritime Claims) and disregarded the internationally recognised limitation of liability regime.

3.4.47 It was further noted that the Korean Government had suggested that the Executive Committee should make a careful investigation into the case so that in present and future cases involving recourse action, the Fund's interests were protected as much as possible and the international limitation framework was respected at the same time.

Debate

3.4.48 A number of delegations expressed the view that the Committee's endorsement of the decision taken by the Director in January 2009 to commence recourse action against SHI was the right one. These delegations noted that the action taken by the Director was in line with the present policy and practice of the 1992 Fund that it should start a recourse action whenever possible in compliance with the applicable international Conventions.

3.4.49 Those delegations also stated however that they did not oppose holding a debate in the Assembly on a possible change of the 1992 Fund's policy on recourse action, but that such debate should be held on the basis of concrete proposals from interested delegations.

3.4.50 Some delegations pointed out that the Fund should balance the need to protect the interests of contributors in its Member States on the one hand and the importance of avoiding situations unfitting of an international organisation on the other. One delegation stated that forum shopping could present issues of principle for an international organisation. Some delegations supported the possibility of holding a debate on a possible change of the 1992 Fund's policy on recourse action on the basis of concrete proposals from interested delegations.

Decision

3.4.51 The Committee decided that if one or more delegations perceived that there was a need for a change in the 1992 Fund's policy in respect of recourse action, any such change should be discussed in a session of the 1992 Fund Assembly, based on a concrete proposal submitted by such delegations.

3.5 *Incident in Argentina*

3.5.1 The Executive Committee took note of the information regarding the incident in Argentina as set out in document 92FUND/EXC.45/7.

3.5.2 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

3.5.3 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 had originated from the *Presidente Arturo Umberto 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 HANDLING

3.5.4 The Committee recalled 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. It was recalled 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.

3.5.5 It was noted that representatives of the shipowner, the West of England Club and the 1992 Fund had met in Buenos Aires with their lawyers and experts in April 2009 and that it had been reconfirmed that the incident would be dealt with as a joint Club/Fund case and that the West of England Club and the Fund would operate as provided in the Memorandum of Understanding (MOU) between the International Group of P&I Clubs and the IOPC Funds.

3.5.6 It was also noted that in April 2009 the experts and representatives of the Fund with the Fund's lawyer had visited the area affected by the spill and that during that visit meetings had taken place with groups of fishermen and local authorities, where the Fund representatives had explained the functioning of the compensation regime. It was also noted that, as a result of the visit, potential claimants had been identified and claim forms had been handed out.

3.5.7 It was further noted that claims were expected for cost of clean-up operations, cost of bird rescue operations, losses in the fisheries and tourism sectors and a claim from a local municipality for aid paid to local fishermen during the time the fisheries had been impacted.

Debate

3.5.8 The Argentine delegation thanked the Secretariat for its efforts in dealing with this case and for the information provided in document 92FUND/EXC.45/7.

4 Any Other Business

No items were raised under this agenda item.

5 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.45/WP.1, was adopted, subject to certain amendments.