INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS

Agenda item: 9	IOPC/APR16/**9/1**	
Original: ENGLISH	27 April 2016	
1992 Fund Administrative Council	**92AC15/92AES20**	●
1992 Fund Executive Committee	**92EC66**	●
Supplementary Fund Assembly	**SA12**	●

RECORD OF DECISIONS OF THE APRIL 2016 SESSIONS OF THE IOPC FUNDS' GOVERNING BODIES

(held from 25 to 27 April 2016)

Governing Body (session)		**Chairman**	**Vice-Chairmen**
1992 Fund	Administrative Council **(92AC15/ 92AES20)**	Mr Gaute Sivertsen (Norway)	Professor Tomotaka Fujita (Japan) Mr Samuel Roger Minkeng (Cameroon)
	Executive Committee **(92EC66)**	Ms Stacey Fraser (New Zealand)	Mr Daniel Kjellgren (Sweden)
Supplementary Fund	Assembly **(SA12)**	Mr Sung-Bum Kim (Republic of Korea)	Mrs Birgit Sølling Olsen (Denmark) Mr Mustafa Azman (Turkey)

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Opening of the sessions

0.1 Before proceeding with the official opening of the sessions, the 1992 Fund Assembly Chairman expressed his sincere condolences and sympathies, on behalf of all the IOPC Funds' community, to the Governments of the Republic of Ecuador and Japan, on the loss of life and injuries as a result of the recent earthquakes in both countries. He added that the thoughts of the IOPC Funds were with all those who suffered as a result of these devastating natural disasters.

0.2 During the course of the day's discussions, delegations took the opportunity to individually add their condolences to Ecuador and Japan for the loss of life and devastation caused by the recent earthquakes.

0.3 The 1992 Fund Assembly Chairman also expressed great sadness at having to inform the governing bodies of the death of Mr Johan Van Steen, who was Counsellor General at the Directorate General for Maritime Transport in Belgium. Mr Van Steen was killed on his way to work during the terrorist attacks in Brussels on 22 March 2016. He had participated in a number of meetings of the IMO Legal Committee and had also represented Belgium as a member of the HNS Focus Group that was established in 2008 to prepare the text of the 2010 HNS Protocol. Despite not being a regular delegate to IOPC Funds meetings, Mr Van Steen had remained an active supporter of the HNS Convention and was currently working on a method to organise the verification of reports on HNS contributing cargo for Belgium. He will be greatly missed.

0.4 Several delegations who had known Mr Van Steen personally expressed their deep sorrow upon learning of his passing.

0.5 The delegation of Belgium expressed its sincere gratitude for the condolences, compassion and sympathies of the governing bodies, the Secretariat and all the delegations and confirmed that these messages of affection would be passed back to Brussels, to Mr Van Steen's partner, family and colleagues.

1992 Fund Administrative Council

0.6 The Chairman of the 1992 Fund Assembly attempted to open the 20th extraordinary session of the Assembly at 9.30am and 9.45am but the Assembly failed to achieve a quorum on both occasions. Only the following 47 Member States of the 1992 Fund were present at that time:

Algeria	Italy	Papua New Guinea
Australia	Japan	Philippines
Bahamas	Liberia	Poland
Cameroon	Madagascar	Portugal
Canada	Malaysia	Republic of Korea
China[<1>]	Malta	Russian Federation
Colombia	Marshall Islands	Singapore
Côte d'Ivoire	Mexico	Spain
Cyprus	Monaco	Sri Lanka
Denmark	Morocco	Sweden
Finland	Mozambique	Trinidad and Tobago
France	Netherlands	Turkey
Germany	New Zealand	United Kingdom
Ghana	Nigeria	Uruguay
Greece	Norway	Venezuela (Bolivarian Republic of)
Islamic Republic of Iran	Panama	

0.7 Since the quorum required 58 States to be present and no quorum was achieved, the Chairman concluded that, in accordance with Resolution N°7, the items of the Assembly's agenda would be dealt

[<1>] The 1992 Fund Convention applies to the Hong Kong Special Administrative Region only.

with by the 15th session of the 1992 Fund Administrative Council, acting on behalf of the 1992 Fund Assembly[2].

0.8 It was recalled that, at its 1st session in May 2003, the 1992 Fund Administrative Council had decided that the Chairman of the 1992 Fund Assembly should *ex officio* be the Chairman of the Administrative Council (document 92FUND/AC.1/A/ES.7/7, paragraph 2).

Supplementary Fund Assembly

0.9 The Supplementary Fund Assembly Chairman opened the 12th session of the Assembly.

1992 Fund Executive Committee

0.10 The 1992 Fund Executive Committee Chairman opened the 66th session of the Executive Committee.

0.11 The Member States present at the sessions are listed in Annex I, as are the non-Member States, intergovernmental organisations and international non-governmental organisations which were represented as observers.

1 Procedural Matters

1.1	**Adoption of the Agenda** **Document IOPC/APR16/1/1**	**92AC**	**92EC**	**SA**

The 1992 Fund Administrative Council, the 1992 Fund Executive Committee and Supplementary Fund Assembly adopted the agenda contained in document IOPC/APR16/1/1.

1.2	**Examination of credentials—Establishment of the Credentials Committee** **Document IOPC/APR16/1/2**	**92AC**	**92EC**	**SA**
	Examination of credentials—Report of the Credentials Committee **Document IOPC/APR16/1/2/1**	**92AC**	**92EC**	**SA**

1.2.1 The governing bodies took note of the information contained in document IOPC/APR16/1/2.

1.2.2 The governing bodies recalled that at its March 2005 session, the 1992 Fund Assembly had 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. It was also recalled that the Credentials Committee established by the 1992 Fund Assembly should also examine the credentials in respect of the 1992 Fund Executive Committee, provided the session of the Executive Committee was held in conjunction with a session of the Assembly.

The governing bodies also recalled that, at their October 2008 sessions, the 1992 Fund Assembly and the Supplementary Fund Assembly had decided that the Credentials Committee established by the 1992 Fund Assembly should also examine the credentials of delegations of Member States of the Supplementary Fund (see documents 92FUND/A.13/25, paragraph 7.9 and SUPPFUND/A.4/21, paragraph 7.11).

[2] From this point forward, references to the '15th session of the 1992 Fund Administrative Council' should be taken to read '15th session of the 1992 Fund Administrative Council, acting on behalf of the 20th extraordinary session of the 1992 Fund Assembly'.

1992 Fund Administrative Council Decision

1.2.3 In accordance with Rule 10 of its Rules of Procedure, the 1992 Fund Administrative Council appointed the delegations of Algeria, Colombia, Marshall Islands, Nigeria and Sri Lanka as members of the Credentials Committee.

1992 Fund Executive Committee and Supplementary Fund Assembly

1.2.4 The 1992 Fund Executive Committee and the Supplementary Fund Assembly took note of the appointment of the Credentials Committee by the 1992 Fund Administrative Council.

Debate

1.2.5 After having examined the credentials of the delegations of the 1992 Fund Member States, including States which were members of the 1992 Fund Executive Committee and the Supplementary Fund, the Credentials Committee reported in document IOPC/APR16/1/2/1 that credentials had been received from 55 Member States and that all were in order. It was noted that credentials had not yet been submitted by Qatar, but that the Committee expected that this would be rectified by the respective delegation shortly after the session.

1.2.6 The governing bodies expressed their sincere gratitude to the members of the Credentials Committee for their work during the April 2016 sessions.

2 Overview

2.1	**Report of the Director**	**92AC**	**92EC**	**SA**

2.1.1 The Director referred to issues which were particularly likely to require significant discussion and guidance from Member States as well as to items of interest which were not the subject of specific agenda items or documents.

Compensation matters

2.1.2 The Director referred in particular to the *Prestige* incident (Spain, November 2002), which had been the subject of a judgment rendered by the Spanish Supreme Court in January 2016. He pointed out that the judgment, which had followed the Court's consideration of the appeals submitted against the November 2013 judgment of the Criminal Court in La Coruña, was available on the IOPC Funds' website in all three of the Funds' official languages. In the judgment, the Court had found the master to be criminally liable for damages to the environment, with civil liability. The judgment had also confirmed the acquittal of the chief engineer of the *Prestige* and of the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain. The Director pointed out that the implications of the judgment would be considered in further detail under the relevant agenda item, but that in the documents submitted on the subject to the current session of the 1992 Fund Executive Committee, both the IOPC Funds and the International Group of P&I Associations (International Group) expressed particular concern that the judgment had found that the insurer of the vessel, the London Steamship Owners' Mutual Insurance Association Ltd (London Club), was not entitled to limit its liability. The Director reported that, in his view, the Court's decision in that regard was in breach of Article V(11) of the 1992 Civil Liability Convention (1992 CLC). The Director further noted that the judgment also contradicted the Conventions by recognising inadmissible damages such as moral damages, although it was not clear whether those damages could be enforced against the 1992 Fund since the judgment stated that the 1992 Fund's liability would be limited in accordance with the 1992 Fund Convention.

2.1.3 In respect of the *Hebei Spirit* incident (Republic of Korea, December 2007), the Director noted that, as at March 2016, 93% of the claims had been resolved by judgments, mediation or had been withdrawn and the Korean Courts had awarded a total of KRW 362 billion (£208 million). The latest figures were to be presented under agenda item 3. The Director reported that, as instructed by the 1992

Fund Executive Committee in October 2015, he had held discussions with the Republic of Korea to explore the terms of a possible settlement to allow the 1992 Fund to pay the Korean Government the full compensation available under the 1992 Fund Convention. He reported however, that more time was needed to reach an agreement and that he hoped to be able to present a draft agreement to the Executive Committee at its October 2016 session. He also reported that, taking into consideration the safeguards provided by the Korean Government, and still preserving a sufficient safety margin in case the amounts awarded for the remaining claims were larger than the amounts awarded by the Limitation Court, it would be possible to increase the level of payments from 50% to 60% of the established claims.

2.1.4 With respect to the *Alfa I* incident (Greece, March 2012), the Director reported that the Secretariat had informed the insurer of the Executive Committee's October 2015 decision, to authorise him to agree a settlement of €12 million, on condition that the insurer paid the limitation amount due (4.51 million SDR or approximately €5.65 million). He reported, however, the insurer had indicated that it was not willing to pay the limitation amount, but was only willing to pay €4 million. The Director expressed that in his view, it was regrettable that the insurer was not willing to pay its full share of the CLC limit and not comply with its legal obligations. He pointed out that if no settlement occurred, the victims of the spill would not be promptly compensated, as was intended by the Executive Committee when it authorised the Director to settle this claim. The Director also reported that the main contractor had recently indicated that, in order to avoid further long delays and expensive legal costs, it would be prepared to continue with the settlement of €12 million, provided that the Fund would pay it in full. The Director noted that there were a number of advantages to such an approach which would be discussed in more detail under agenda item 3.

2.1.5 With respect to the *Plate Princess* incident (a former 1971 Fund incident), the Director recalled that on 2 September 2015, the Puerto Miranda Union had applied to the Court of Appeal for permission to appeal the July 2015 judgment by the English High Court in respect of this incident and that in September 2015 the 1992 Fund had filed a statement of reasons why permission to appeal should be refused. He reported that, on 9 February 2016, the Court of Appeal had refused the Puerto Miranda Union's request for permission to appeal as, in its view, there was no real prospect of success since the reasons given by the Judge in the July 2015 judgment were right. The Director noted, however, that the Puerto Miranda Union had taken advantage of the right to apply to the Court of Appeal for an oral hearing to reconsider the Judge's refusal to grant permission to appeal and that in early March 2016 the Court of Appeal had advised that the hearing would take place on 26 October 2016.

2.1.6 The Director reported that various guidance documents or guidelines relating to compensation matters were being presented to the government bodies for approval at these sessions. He noted, in particular, that, at its October 2015 session, the 1992 Fund Administrative Council had decided to accept the recommendations of the seventh intersessional Working Group regarding the illustrative list of vessels falling clearly within or outside the definition of 'ship' under Article I(1) of the 1992 CLC, and which formed the first part of the hybrid approach. He further noted that the Administrative Council had also decided to adopt the concept of the maritime transport chain, as an interpretive tool to address those situations or 'grey areas' on a case-by-case basis, where it was not clear whether a vessel fell within the definition of 'ship', and which forms the second part of the hybrid approach. In accordance with the instructions of the 1992 Fund Administrative Council, the Secretariat had produced a succinct guidance document reflecting the conclusions of the Working Group for consideration at this session

2.1.7 The Director noted that the following documents had also been submitted to the current sessions for consideration:

- a revised draft guidance document to assist Member States in the management of fisheries closures and restrictions following an oil spill;
- draft guidelines to assist claimants with the submission of claims for environmental damage;
- a new text for the Claims Manual reflecting the governing bodies' decision at their October 2015 sessions that the IOPC Funds may pay compensation for claims for VAT by central governments if a State's national law allowed for the inclusion of VAT in the State's claim for compensation, and use criteria based on the principles of the law of damages to be applied in cases where the national law was not clear in respect of compensation for VAT by central governments; and

- an additional guidance document to assist Member States when verifying CLC certificates, taking into consideration the IMO Guidelines for accepting insurance companies, financial security providers and P&I Clubs.

2.1.8 With respect to interim payments, the Director recalled that, in order to make progress on this complex and difficult issue, the governing bodies had decided at their October 2015 sessions to establish a Consultation Group to work with the Director and the International Group. He noted that the Consultation Group had met twice since it had been set up and that its progress report had been submitted to the governing bodies for information. The Director noted that the Consultation Group had made good progress with this complicated subject and that this had been possible through positive cooperation with the International Group and with advice from the Chairmen of the governing bodies and the Consultation Group's legal experts. He also noted that the discussions would continue and that it was anticipated that the Consultation Group would provide the governing bodies with a recommendation at their October 2016 sessions.

2.1.9 The Director reported that the Secretariat had started discussions with the European Maritime Safety Agency (EMSA) with regard to their fleet of response vessels available to European Union States and the possibility of an agreement by which the hire rates for those vessels could be approved as acceptable rates by the IOPC Funds, thus facilitating the assessment process for those claims. The Secretariat had also been engaging with EMSA, in close cooperation with the P&I Clubs and ITOPF, to discuss the possibility of a Memorandum of Understanding (MoU) between EMSA, the IOPC Funds and the International Group agreeing on acceptable rates for the use of EMSA vessels and pollution response equipment. He stated that if an agreement was reached, he would make a proposal for consideration by the Assembly in October 2016.

2.1.10 The Director recalled that, as stated at the October 2015 sessions of the governing bodies, a 10-year review of the Small Tanker Oil Pollution Indemnification Agreement, 2006 (STOPIA 2006) and the Tanker Oil Pollution Indemnification Agreement, 2006 (TOPIA 2006) would take place in 2016. He reported that the review had begun with the International Group and Oil Companies International Marine Forum (OCIMF) with the aim of establishing the approximate proportions in which the overall cost of claims under the 1992 CLC and/or the 1992 Fund Convention and/or the Supplementary Fund Protocol had been borne respectively by shipowners and by oil receivers in the period since 20 February 2006. He also reported that the review would consider the efficiency, operation and performance of these Agreements. The Director reported that he would be presenting a report on the review to the governing bodies at their October 2016 sessions.

Treaty matters

2.1.11 The Director noted that, since the October 2015 sessions, the 1992 Fund had continued to support the HNS Correspondence Group, established by the Legal Committee of IMO by providing input to the recently-published brochure: 'The HNS Convention—Why it is needed' and noted that the publication was available on the IOPC Funds' website. The Secretariat was now providing assistance to the Correspondence Group with the development of a presentation covering theoretical incident scenarios.

2.1.12 The Director also reported that on 10 December 2015, the Council of the European Union had adopted two Council Decisions authorising EU Member States to ratify or accede to the 2010 HNS Convention, if possible within four years of entry into force of these decisions. The Director reported that he and the Head of External Relations and Conference had attended a meeting of the European Council on 2 December 2015, providing presentations on both the legal framework of the Convention and the reporting obligations.

Financial policies and procedures

2.1.13 It was noted that the Audit Body had drafted two Resolutions. These Resolutions had been developed in response to the October 2014 decision of the governing bodies, that the existing policy on outstanding oil reports adopted in October 2008 (as contained in circular 92FUND/Circ.63) be maintained in principle and that a similar policy should apply in cases of outstanding contributions.

The first draft Resolution relates to the 1992 Fund and covers outstanding oil reports and outstanding contributions, and the second relates to the Supplementary Fund and covers outstanding contributions only. These draft Resolutions were submitted to the governing bodies for consideration and approval at the current sessions.

Secretariat and administrative matters

2.1.14 With respect to the relocation of the IOPC Funds' Secretariat, the Director informed the governing bodies that on 15 February 2016, the terms of an underlease between IMO and the IOPC Funds had been agreed and the underlease had been signed by the Secretary-General of IMO and the Director of the IOPC Funds. He noted that it had entered into force on 1 March 2016 and would expire on 25 October 2032. He also reported that notice had been served on the current landlord of Portland House, terminating the lease on 24 August 2016 and that it was anticipated that the move from Portland House to the IMO Headquarters building would take place the week of 18 July 2016 with the Secretariat in operation from its new location from Monday 25 July 2016.

2.1.15 The Director noted that Mrs Jill Martinez, Administrative Officer, Office of the Director, would be retiring at the end of April 2016. He noted that she had joined the Funds' Secretariat in January 2001 and would be greatly missed. He thanked Mrs Martinez for her contribution to the work of the IOPC Funds. He also reported that Ms Maria Basilico (Argentina/Netherlands) had been appointed as Executive Assistant, Office of the Director and had started work on 1 April 2016.

External relations

2.1.16 With respect to external relations activities, the Director drew the attention of delegations to the next IOPC Funds' Short Course which would take place from 27 June to 1 July 2016 in London. The Director reported that, by the deadline of 15 April 2016, nominations had been submitted by 10 Member States and that it was anticipated that a selection decision would be taken shortly.

2.1.17 The Director also recalled that the Annual Report for 2015 had been published last month and that a new general brochure had been developed and would be published shortly.

2.1.18 The Director reported that the Secretariat had continued its efforts since October 2015 to engage with Member States and non-Member States between meetings, to run workshops, give presentations, assist with implementation issues and generally increase awareness of the international liability and compensation regime. He noted that the Secretariat had participated in the following events:

- Workshop for Myanmar on liability and compensation Conventions (held at IMO Headquarters)
- EMSA Training Seminar, Lisbon, Portugal
- Bi-annual GI-WACAF Conference, Accra, Ghana
- East Asian Seas Congress 2015, Danang,Viet Nam
- PAJ Oil Spill Symposium, Tokyo, Japan
- Training session on claims and compensation, Accra, Ghana (as part of a training course on preparedness and response to marine pollution organised by the World Maritime University in the framework of the MARENDA (Marine Environment and Data Exchange) project)
- National Workshop on the CLC and Fund Conventions, Managua, Nicaragua
- Lecture to International Maritime Law Institute (IMLI), Malta
- Workshop on the HNS Convention (Montreal, Canada)

2.1.19 The Director also noted that the Secretariat would be participating in Spillcon 2016 in Perth, Australia, in May 2016 where he would be making a presentation on recent developments in the international liability and compensation regime, including progress towards ratification of the HNS Convention as well as chairing a session, and where the IOPC Funds would have an exhibition stand. He noted that, after Spillcon, the Secretariat would be travelling on to New Zealand to attend as observers of a national spill exercise being run by Maritime New Zealand in Wellington.

2.1.20 The Director reported that an informal lunch meeting for the UK-based representatives of States from the Latin American and Caribbean regions had been held in December 2015 and a further informal lunch meeting for representatives of the Middle East and surrounding regions had taken place in March 2016. He also mentioned that the next informal lunch meeting would take place in June 2016 for representatives of States from the African region.

3 Incidents involving the IOPC Funds

3.1	**Incidents involving the IOPC Funds** **Document IOPC/APR16/3/1**		**92EC**	**SA**

The 1992 Fund Executive Committee and the Supplementary Fund Assembly took note of document IOPC/APR16/3/1, which contained information on documents for the April 2016 meetings relating to incidents involving the IOPC Funds.

3.2	**Incidents involving the IOPC Funds—1992 Fund: *Prestige*** **Documents IOPC/APR16/3/2 and IOPC/APR16/3/2/1**		**92EC**	

3.2.1 The 1992 Fund Executive Committee took note of the information contained in documents IOPC/APR16/3/2 submitted by the Secretariat and IOPC/APR16/3/2/1 submitted by the International Group of P&I Associations, concerning the *Prestige* incident.

DOCUMENT IOPC/APR16/3/2, SUBMITTED BY THE SECRETARIAT

3.2.2 It was recalled that the compensation amount available for the *Prestige* incident under the Conventions was €171.5 million but that some €121 million in compensation had already been paid to victims of the spill. It was also recalled that €27.7 million of compensation was left from the 1992 Fund and that €22.8 million was available from the amount deposited in the Criminal Court in Corcubión by the London Club.

Criminal proceedings in Spain

CIVIL CLAIMS IN THE CRIMINAL PROCEEDINGS

3.2.3 The Executive Committee recalled that under Spanish law, civil claims could be submitted in the criminal proceedings as the Criminal Court had to decide not only on criminal liability, but also on civil liability derived from the criminal action.

JUDGMENT OF THE AUDIENCIA PROVINCIAL (CRIMINAL COURT)

3.2.4 The Executive Committee recalled that the Audiencia Provincial in La Coruña had, in a judgment rendered on 13 November 2013, found that the master, the chief engineer of the *Prestige* and the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain, were not criminally liable for damages to the environment. It was recalled that the judgment, therefore, had not awarded any compensation to claimants.

JUDGMENT OF THE SUPREME COURT

3.2.5 The Executive Committee noted that in January 2016, after consideration of the appeals submitted against the judgment of the Criminal Court, the Spanish Supreme Court had rendered its judgment setting aside the judgment of the Criminal Court.

Criminal liability

3.2.6 The Executive Committee noted that the master had been found guilty of a crime against the environment. The Committee also noted that the judgment confirmed the acquittal of the chief

engineer of the *Prestige* and of the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain.

3.2.7 It was noted that the master had been given a two-year prison sentence, but that given the time already served, it was very unlikely he would have to serve any of it.

Civil liability

3.2.8 The Executive Committee recalled that under Spanish criminal law a person with criminal liability also has civil liability for any damage caused by the criminal act.

Civil liability of the master

3.2.9 It was noted that, in relation to the civil liability, the Court had found the master liable for damages which would be quantified later in subsequent proceedings.

3.2.10 The Executive Committee noted that, after recognising the channelling of liability under the 1992 CLC, the Court had considered, however, that the master could not benefit from the protection under Article III(4) of the 1992 CLC because the damage was a consequence of the master's recklessness, with the knowledge that the damage could occur.

Liability of the shipowner

3.2.11 The Executive Committee also noted that in the judgment, the Court had held that the shipowner had subsidiary civil liability.

3.2.12 It was further noted that the Court had considered that the shipowner had acted recklessly and with knowledge that damage would probably result and that therefore, applying Article V(2) of the 1992 CLC, the shipowner could not benefit from the limitation of liability established in the Convention.

Liability of the insurer

3.2.13 The Committee noted that the judgment had also found that the insurer, the London P&I Club, had direct civil liability, up to the limit of the insurance policy of US$1 000 million. It was noted that the Court had applied domestic law (criminal law, law of insurance and law of maritime transport) to decide that the insurer should pay compensation up to the limit of cover provided by the insurance policy.

Liability of the 1992 Fund

3.2.14 The Executive Committee noted that the judgment recognised that the 1992 Fund had strict liability and that this was limited according to the 1992 Fund Convention.

Damages

3.2.15 It was noted that the judgment established that the quantification of the damages would be made at a later stage in separate legal proceedings in the Criminal Court and that the quantification would be based on the evidence submitted by all the parties, including experts' reports.

3.2.16 The Executive Committee noted that, when considering the damage caused by the incident, the judgment, while accepting the strict and limited liability of the 1992 Fund in accordance with the 1992 Fund Convention, had suggested that compensation for damages not exactly contemplated in the Convention would not necessarily be excluded. It was noted that the Court had also mentioned that when the quantification of the damages would be carried out, the aim of which is full reparation for the damages caused, the Court would not be constrained by the criteria contained in the IOPC Funds' Claims Manual, although these criteria might be taken into consideration as guidance by the Court when deciding on the corresponding compensation.

Moral damage

3.2.17 The Executive Committee noted that, in the judgment, the Court had recognised the possibility of moral damage and had decided that in those cases where moral damage had been claimed, the amount awarded could not exceed 30% of the assessed material damages.

APPEAL BY THE MASTER

3.2.18 The Executive Committee noted that the master had submitted a motion for dismissal of the Supreme Court judgment, arguing that the judgment breached his fundamental rights of defence and his right to a trial with all the guaranties.

3.2.19 It was noted, however, that the Supreme Court had rejected the master's motion. It was further noted that the master had expressed the intention to appeal to the Constitutional Court.

DOCUMENT IOPC/APR16/3/2/1 SUBMITTED BY THE INTERNATIONAL GROUP

3.2.20 The Executive Committee noted that, in the International Group's view, the Supreme Court judgment gave rise to concern not only in matters affecting seafarers but also the compensation regime.

3.2.21 It was noted that the International Group agreed with the view, previously stated by the Director, that the Criminal proceedings in Spain had demonstrated that a criminal court was not the appropriate forum for dealing with compensation for oil pollution and that there was no need for compensation awards to depend on a criminal conviction, given that the 1992 Conventions establish strict liability for pollution damage irrespective of fault. It was further noted that, in the International Group's view, the international liability and compensation regime worked better if civil courts dealt with claims for compensation.

3.2.22 The Executive Committee also noted that the implications of the judgment for insurers and for the proper functioning of the compensation regime were a concern. It was noted that in the *Prestige* case itself, the judgment against the London Club should not be enforceable in the UK as the English High Court had previously ruled, in proceedings in which both Spain and France participated, that any claim against the Club outside the 1992 CLC could be made only in accordance with the Club's rules, which provide for arbitration in London and are subject to the 'pay to be paid' principle. It was noted, however, that the judgment of the Spanish Supreme Court could nevertheless be a precedent which could seriously undermine the compensation regime if followed in future.

3.2.23 It was further noted that an application had been made by the master to the Supreme Court for a reconsideration of its decision, on the grounds that the Court had exceeded its powers by undertaking a wide-ranging re-evaluation of the facts of the case; by substituting its own view of the facts for the trial court's assessment of the evidence; and by reversing the master's acquittal without re-hearing his evidence. It was also noted that, depending on the outcome of this application, further appeal proceedings might be brought before the Spanish Constitutional Court and, if necessary thereafter, before the European Court of Human Rights (under the fair trial and other provisions of the European Convention on Human Rights).

Debate

Statement by the International Group of P&I Associations

3.2.24 The observer delegation of International Group of P&I Associations made the following statement.

> 'Reference is made to the International Group's submission in document IOPC/APR16/3/2/1 on the recent judgment of the Spanish Supreme Court in the *Prestige* case; a number of aspects of which have given rise to significant concerns on the part of the Group.

We do not wish to repeat the background to this case and the previous trial court judgment that has already been covered by the Secretariat in their introduction, but simply to say on that front that with the benefit of evidence heard over a nine month period, the trial court judgment held in the criminal proceedings that the master and other defendants were not criminally liable for damages to the environment and, on that basis, the Court could not award any compensation to claimants.

However, the Spanish Supreme Court, following a very short hearing, has now held that the master was guilty of the crime of reckless damage to the environment; that the owner incurs subsidiary civil liability as a result; that the owner is deprived of the right to limit liability under the 1992 CLC and that the London Club is directly liable not only under the 1992 CLC but also under other laws up to US$1 billion irrespective of the Rules of the Association.

This judgment represents a substantial deviation from how the Conventions are intended to operate and gives rise to significant concerns to industry on many fronts; a number of which are outside of the scope of this particular forum.

That said, we would wish to highlight the following points:

1) As delegates will be aware, this delegation in particular has had concerns in recent years with regard to the workings of the Convention system, including with regard to judgments handed down from national courts. This judgment significantly adds to the wider industry concerns for the future viability of the compensation system as a whole and the pressures faced by insurers and their reinsurers as a result, and this is something that will be taken on board in the Group's ongoing review of this judgment and the possible implications arising from it.

2) The conviction of Captain Mangouras appears to set a precedent for imposing criminal liability on seafarers in circumstances where they have simply been doing their job, albeit the arrest of seafarers in the immediate aftermath of pollution cases is not new and has been a troubling aspect of such cases for some time now, perhaps most publicly in the *Hebei Spirit* case and possibly of most concern in circumstances such as the *Prestige* itself where the handling of the case by the State Authorities is itself very much an issue. While not necessarily a matter for this body, it would be remiss if we did not make clear our concerns with regard to the treatment of the master who the trial Court and expert witnesses had already agreed to 'be completely professional'. Industry will be concerned with the adverse impact that this judgment will have on the morale of seafarers and the recruitment of young people into the seafaring profession, not least at a time when that profession is already faced with significant pressures. This is something that we may wish to revert on in other forums.

3) With regard to enforcement of the judgment in the UK, we would just highlight the point made in paragraph 4.11 of document IOPC/APR16/3/2/1 that the English High Court has already ruled that any claim against the London Club outside of the 1992 CLC could only be made in accordance with the Club's rules, which provide for arbitration in London and are therefore subject to the 'pay to be paid' principle.

The Group is still evaluating the potential impact of this judgment and we may wish to revert at a later stage once full consideration has been given to all of the potential implications. Appeal proceedings are now anticipated, so it is likely that this case will remain on the agenda of this body in any event but, suffice to say, the judgment of the Spanish Supreme Court sets a very troubling precedent for the reasons mentioned in this intervention and as contained in the International Group's document.'

Statement by the Spanish delegation (original Spanish)

3.2.25 The delegation of Spain made the following statement.

'Spain wishes to make a few comments on the documents presented.

Preliminary questions

Firstly, the Spanish delegation wishes to emphasise that the judgment of the Spanish Supreme Court does not contradict any of the positions maintained by the IOPC Funds in this judicial proceeding. The judgment does not impose on the IOPC Fund any greater liability than that recognised by the IOPC Fund itself.

Attention is drawn to the fact that, in its document, the Secretariat introduces subjective interpretative opinions of the judgment of the Supreme Court of a Member State, which could compromise the impartiality with which the Fund must accept such judicial decisions under the Convention itself.

Thus, the Spanish delegation, fully respecting the separation of powers inherent in a state governed by the rule of law, is compelled to comment on the description of the content of the judgment or the judgmental opinions contained in the two documents that have been distributed. The documents seem to be based on incomplete information or an incorrect understanding of the judgment.

On the status of the proceedings, it should be clarified that the motion for dismissal of the judgment filed by Captain Mangouras was refused by a decision of the Supreme Court of 11 April. There still remains the possibility of appealing to the Constitutional Court.

The proceedings in La Coruña to fix the limitation amount has not yet begun. All the parties, including the P&I Club, can appear in those proceedings.

General clarifications concerning the Note by the Secretariat

The Supreme Court judgment has not changed the facts declared proven which remain unaltered. Not only did the P&I Club not attend the trial or oral hearings (paragraph 5.10), but it did not attend as a party to the judicial proceedings. Neither did it appoint a representative in the judicial proceedings in Spain.

In relation to paragraph 7.3 of the Note by the Secretariat, it should be noted that:

Firstly, Captain Mangouras had already been convicted by the Court of La Coruña. This was only for the crime of disobedience.

Secondly, the Supreme Court does not change the facts declared proven by the Court of La Coruña. It simply defines them in legal terms in a different way. The Audiencia Provincial of La Coruña declared certain irregularities proven but did not determine the cause of the sinking and thus did not convict for criminal damage to the environment.

The Supreme Court does not determine the cause of the sinking either. However, it concludes that the irregularities that the Court of La Coruña considered proven constitute criminal damage to the environment. The Supreme Court considers that they fall within the definition of criminal damage to the environment because it is a crime relating to risk and the master created or aggravated that risk.

Under Spanish law, the master's prison sentence will be suspended because it does not exceed two years.

Clarifications on civil liability

Certain clarifications should also be made in relation to the determination of civil liability and its conformity with the 1992 CLC, including paragraphs 7.5 to 7.7 of the Note by the Secretariat.

With respect to the master and the shipowner, to the extent that the judgment finds the existence of recklessness (Article III(4) of the CLC) in the master's conduct, there is strict compliance with the CLC.

Neither does the liability of the P&I Club contradict the CLC. On this point, there has been an incorrect interpretation of the judgment of the Supreme Court, which needs to be clarified.

We begin by recalling what the CLC states in Article VII, paragraph 8, governing the direct action against the ship's insurer:

> '…the defendant may, even if the owner is not entitled to limit his liability according to Article V, paragraph 2, avail himself of the limits of liability prescribed in Article V, paragraph 1. He may further avail himself of the defences (other than the bankruptcy or winding up of the owner) which the owner himself would have been entitled to invoke. Furthermore, the defendant may avail himself of the defence that the pollution damage resulted from the wilful misconduct of the owner himself, but the defendant shall not avail himself of any other defence which he might have been entitled to invoke in proceedings brought by the owner against him. The defendant shall in any event have the right to require the owner to be joined in the proceedings.'

In other words, the 1992 CLC allows the limitation of the insurer's liability (Article V, paragraph 11) but, and this is important, it is the insurer which can avail itself of this means of defence. The limitation of liability is framed in the Convention as a defence which must be invoked in the courts. The text is similar in English.

Spanish law provides as a general principle the direct and unlimited liability of the insurer. It is up to the insurer as defendant to use the limits on liability as a means of defence in the court.

The limitation of liability is a means of defence that can only be invoked by the insurer.

By failing to appear in the legal proceeding, the P&I Club has not asserted this exception of limitation and it cannot be judged *ex officio* by the court. That is what the Supreme Court indicates on page 146 of the judgment.

Paragraph 4.11 of the document by the International Group of P&I Associations refers to 'arbitration' by the London Club. The Club, after constituting the fund in Spain, disappears from its courts and suggests a claim for arbitration as the basis of the contract. It does so before any liability in excess of the fund has been claimed in Spain and without any judgment taking place. Next, without anything having changed, it applies to the court in London for recognition of the arbitration award, causing legal costs to Spain and France which, until then, had not discussed limitation of liability.

The arbitration award recognises the 'pay to be paid' principle but leaves it up to the court to apply the CLC limits. It even warns of the legal risk implied by the Club's failure to attend the Spanish proceeding.

In short, the P&I Club lets slip every opportunity to attend or act in the Spanish courts.

It could even have tried to challenge the Supreme Court judgment but it did not do that either.

It is the P&I Club's procedural strategy that has caused the situation which is now criticised.

With regard to moral damage, the Supreme Court refers their quantification, subject to accreditation, to the Audiencia Provincial of La Coruña

Conclusion

In the light of the foregoing comments, the Note by the Secretariat probably needs to be revised. We believe that the respect of the Supreme Court for the provisions of the international Conventions, which, in these proceedings the P&I Club voluntarily decided not to invoke, has now been clarified.'

Statement by the French delegation (original French)

3.2.26 The delegation of France made the following statement.

'France thanks the Secretariat and the International Group of P&I Associations for their documents concerning the *Prestige* case. We do not, however, support the approach in these two documents which seek to comment on and call into question the judgment of the Spanish Supreme Court.

Today we can only support the Spanish delegation.

Indeed, we wish to recall here that the subject matter is the judgment of the Spanish Supreme Court which was competent to hear this case on which it ruled in complete independence and it is not up to this Assembly to question this judgment.'

Statement by the International Chamber of Shipping (ICS)

3.2.27 The observer delegation of ICS made the following statement.

'The judgment of the Spanish Supreme Court in the *Prestige* case is of huge concern to the shipping industry for the reasons which been outlined by the delegation of the International Group of P&I Clubs and set out in their paper IOPC/APR16/3/2/1 in detail.

While ICS would like to support this excellent paper generally, we particularly endorse the important comments made in relation to the very problematic topics of criminalisation of seafarers and the breach of fundamental provisions in UNCLOS (United Nations Convention on the Law of the Sea).

In addition to that, we also wish to comment on the following:

1. The decision is extremely surprising in that it overturns the lower court's acquittal of the master and confirms he is criminally culpable, but without hearing any new evidence. Furthermore, it is made in the absence of the master and without hearing his evidence as to his knowledge of the condition of the ship. This is, to put it bluntly, astonishing and gives rise to fundamental questions of fair trial.

2. This decision also appears to be highly unusual under normal accepted Spanish legal procedure: The Court seems to understand its difficult position and seeks to justify its decision on the grounds through a somewhat contorted legal analysis that it is based on the application of law to the facts found in the lower court.

3. The decision of the Supreme Court seems entirely unbalanced: it applies two entirely different standards in assessing the blameworthiness of the officers on board the ship and especially the master on the one hand and, on the other hand, the civil servants on shore. The Supreme Court decision is based on an analysis that a seafarer should make a judgment on the condition of a ship beyond that which is confirmed in the relevant ship certificates and class inspections, load-line compliance and confirmations of safe loading at load port. This is objectively impossible. The same standards are not applied to the judgment and decision of the civil servant—whose acquittal is maintained.

These are serious shortcomings in the decision of the highest court in Spain, and we have to ask ourselves how—and why—the court arrived at these findings with their serious consequences for the master without any new evidence being submitted to it.

The end result of the decision according to the Spanish Government is of course that the Court held that in this instance it is entitled to break the limits of liability in the 1992 CLC.

The fact that the attempt to break the right to limit liability has been raised on the basis of no evidence as to the master's culpability is of huge concern. There is no doubt that this claim, if pursued on the basis of this judgment, will bring the system of international liability and compensation under serious pressure as pointed out by the International Group. This is very unfortunate and troubling and the Shipping Industry would like to urge all Member States to do their utmost in order to promote, protect and support a system which has worked very well over the past decades and which should not be sacrificed for their own interests.

We do not say this lightly. There has been a series of cases in recent years where the industry and its representatives, despite operating with all good seamanship, have been treated without regard to the humanitarian cost. We refer to the treatment of the master in the *Hebei Spirit* as one recent case also concerning fair treatment of the seafarer.

Our impression is increasingly that the system which was designed for all the parties, the shipping industry, the oil industry and the States, to work and cooperate to ensure the success of the liability and compensation system is changing. It is a major concern for us that the trend now seems to be also that all the financial pressure is loaded onto the shipping industry. This should be a concern also for the Member States if they want to see the system continue in its present form. We echo the Director's comments in the Secretariat's paper in IOPC/APR16/3/2.

Finally: The whole system is based on co-operation and trust between the industry and States. We have all a responsibility in this respect. However, we now fear that the system is in jeopardy because of decisions made by domestic courts.

As to the intervention made by Spain we would like to remind delegations that the shipowner will be put to more financial burden because of the decision and this should also be problematic for this body as one of its objectives is to protect the whole system.'

Statement by the International Union of Marine Insurers (IUMI)

3.2.28 The observer delegation of IUMI made the following statement.

'The International Union of Marine Insurance, whose members include reinsurers of the International Group of P&I Associations insurance placements, fully endorse document IOPC/APR16/3/2/1 and subsequent comments made by the International Group.

Within the marine pollution liability underwriting community there is a fear that the decision, made by the Spanish Supreme Court, will lead to a complete overhaul of long tail pollution liability insurance claims reserving and may indeed impact capital modelling for this class of business. This may in turn lead to a reduction of the available underwriting capacity in the markets that insure and reinsure pollution clean-up liabilities.'

Statement by the International Tanker Owners Association (INTERTANKO)

3.2.29 The observer delegation of INTERTANKO made the following statement.

'INTERTANKO fully supports the paper presented by the International Group, and the interventions made by ICS and IUMI. We share the concerns expressed about the impact of the judgment on the functioning of the compensation regime and most importantly on our seafarers.

INTERTANKO considers the Spanish Supreme Court's finding that Captain Mangouras was guilty of gross negligence to be fundamentally flawed in its deviation from the factual findings of the La Coruña court. It also contradicts the courageous example Captain Mangouras set in responding to this emergency. Captain Mangouras, now 81 years old, is branded a 'reckless' criminal. Yet his actions were described as 'exemplary' by the vessel's flag State.

INTERTANKO considers this new conviction and harsh sentencing of Captain Mangouras unjustifiable and contrary to the provisions of UNCLOS. It sets a worrying and unfortunate precedent for seafarers that they may find themselves with a criminal record, even a custodial sentence, in circumstances where they have exercised best professional judgment, i.e. they have done nothing wrong.'

Interventions by a number of delegations

3.2.30 One delegation stated that whereas the judgment of the Supreme Court recognised that the 1992 Fund was liable only within the limit provided in the 1992 Fund Convention and the judgment did not place any additional financial burden on the Fund, the liability under the Civil Liability and Fund Conventions as a whole, constitute a coherent system and the shipowner's right to limit its liability is one of the most essential elements which also concerns the Fund. In the view of that delegation the judgment is inconsistent with the provisions in the Civil Liability and Fund Conventions. That delegation stated that it fully agreed with the Director's view on the judgment since the decision wrongly denied the insurer's right to limit its liability. It referred to Article V(11) of the 1992 CLC which clearly states that 'the insurer…shall be entitled to constitute a [limitation] fund…on the same conditions and having the same effect as if it were constituted by the owner'. It was pointed out that the insurer is allowed to constitute a limitation fund 'even if the owner is not entitled to limit his liability'. That delegation also endorsed the Director's view that the decision is problematic since it imposed liability on the owner and insurer for damages which are not admissible under the Convention.

3.2.31 That delegation recognised that there is very little the Fund can do concerning this judgment, and asked the Director to carefully monitor further developments of the case and take appropriate action if necessary. That delegation also expressed concern that courts in Member States were taking decisions inconsistent with the Civil Liability and Fund Conventions and that those deviations disturbed the fair balance among the relevant parties involved in the incidents and could ultimately put the whole system in jeopardy. That delegation added that what the Fund and the Member States can do is limited since courts are an independent body in all countries. That delegation, nevertheless, suggested that Member States could make further efforts to develop a better understanding of the CLC/Fund system in their own jurisdictions.

3.2.32 Several delegations agreed with the views expressed by that delegation.

3.2.33 One delegation suggested that the Fund could send a letter to the Court making clear the Fund's position on Article V(11) of the 1992 CLC.

3.2.34 One delegation stated that after the intervention by the Spanish delegation, it was satisfied that it was not an issue of domestic legislation prevailing over the international Conventions, nor an issue of implementation, but an issue of judicial interpretation of the Conventions in individual cases. That delegation nevertheless expressed concern that even if in this case, according to the Spanish delegation, there was no problem of implementation, there will be cases where the Conventions will not be properly implemented.

3.2.35 Several delegations stressed the importance for the international liability and compensation regime that the Conventions are respected.

3.2.36 One delegation, commenting on the note by the Director and his understanding of the Convention, stressed that the comment made by the delegation was not related to the Spanish proceedings involving the *Prestige* as such. Whilst recognising that the 1992 CLC allowed the shipowner and its insurer to limit their liability, that delegation stated that in both cases some action was required to secure that

right and that failing to take the necessary legal action in accordance with the Convention and the applicable national law, will prejudice this right. That delegation also added that under its national legislation it would not be contrary to the Conventions if the applicable law should deviate from the limits provided in the Conventions if the necessary legal steps to defend the limitation of liability are not taken by those who are entitled to make those claims.

Intervention by the Spanish delegation

3.2.37 The Spanish delegation spoke in response to the proposal by one delegation for the 1992 Fund to submit a letter to the Court stating the Fund's position on the insurer's right to limit and stated that the only open paths left in the proceedings were the master's appeal, and the quantification of the damages. That delegation indicated that the insurer will still have the possibility to participate in the different proceedings for the quantification of the damages. That delegation also emphasised that the Fund had been present in the proceedings and had defended the application of the Conventions.

3.2.38 The Spanish delegation added that the Court had taken into account the Conventions and stated that the insurer's right to limit under Article V(11) of the CLC should be defended in the legal proceedings. That delegation made reference to the statement of one of the delegations informing that under its national legislation the insurer had to defend its right to limit according to the CLC. That delegation stated that the London P&I Club had not complied with this obligation by not participating in the proceedings to defend its right to limit its liability. It also stated that the Conventions can only function if all the parties, including the insurers, cooperate and participate in the proceedings.

Statement by the French delegation (original in French)

3.2.39 The delegation of France made the following statement.

> 'It is not desirable for a decision by the highest judicial authority of a Member State of the Fund to be criticised in this way.
>
> We wish to recall that the Conventions provide that final judicial decisions are binding on the parties and the IOPC Fund provided that the parties have had sufficient time to mount their defence and that they were not obtained fraudulently.
>
> It must be noted, without entering into a debate that we do not want, that the insurer, instead of participating in the proceeding to assert its rights, decided at a very early stage to obstruct it by applying to an arbitration court to block the competence of the Spanish courts and never invoked before the Spanish judge the limitations on liability which it could claim.
>
> We recall, in particular, that under Article 7.6 of the 1992 Fund Convention, the Fund does not have the right to dispute the facts and findings of a judgment when it has been a party to the proceedings and has been in a position to present its arguments during the proceedings.'

3.2.40 The Bahamas delegation, as the flag State, stated that it shared the concerns expressed by several delegations and supported the proposal by one delegation that the 1992 Fund could submit a letter to the Spanish Court, stating its position regarding the right of the insurer to limit its liability. That delegation added that the conclusions of the flag State investigation's concerning the appropriateness of the master's behaviour differed greatly from the conclusions reached by the Spanish Court.

3.2.41 The Director clarified that it was not possible at this stage for the 1992 Fund to write a letter to the Spanish Court as suggested by some delegations, and that the only pending issue now was the quantification of the damages.

3.2.42 The Chairman noted that the delegation of Spain had made a statement indicating its view that the judgment by the Spanish Supreme Court was not inconsistent with the Conventions and to the extent that there were different views that delegation considered that the judgment had been misunderstood. The Chairman also noted that the delegation provided clarification on the nature and reasoning of the

criminal and civil proceedings in the Spanish courts. This was supported by one delegation who emphasised the importance of recognising decisions of national courts. The Chairman however noted that a number of delegations shared the concerns expressed by the Director and the International Group and those delegations emphasised the importance of ensuring the effectiveness of the international regime, mindful that in this case it may be a question of interpretation rather than implementation of the convention. The Chairman concluded the debate by stating that the 1992 Fund Executive Committee was not required to take a decision but was simply required to note the information provided.

3.3	**Incidents involving the IOPC Funds—1992 Fund: *Solar 1* Document IOPC/APR16/3/3**		**92EC**	

3.3.1 The 1992 Fund Executive Committee took note of document IOPC/APR16/3/3 which contained information on the *Solar 1* incident.

3.3.2 The Executive Committee recalled that some 32 466 claims had been received and payments totalling PHP 987 million (£14.3 million) had been made in respect of 26 870 claims mainly in the fisheries sector.

3.3.3 The Executive Committee also recalled that three claims remained outstanding, all of which were subject to legal proceedings in the Philippines.

Legal proceedings by the Philippine Coast Guard (PCG)

3.3.4 In respect of the claim in the amount of PHP 104.8 million (£1.54 million) by the Philippine Coast Guard (PCG), it was noted that the Solicitor General and the PCG had agreed to settle the PCG claim in the amount assessed by the 1992 Fund, and that in February 2016, the PCG, and the 1992 Fund's lawyer had signed the agreement and awaited the signature of the Solicitor General.

3.3.5 It was also noted that thereafter, upon receipt from the Philippine Court of an Order dismissing the PCG claim, the 1992 Fund will make payment of the sum of PHP 104.8 million to the nominated Philippine Government Treasury account, and that subsequently, in accordance with the terms of STOPIA 2006, the shipowner's P&I Club will remit the sum of PHP 104.8 million back to the 1992 Fund, within 14 days of the 1992 Fund making payment.

Legal proceedings by 967 fisherfolk

3.3.6 It was recalled that a civil action was filed in August 2009 by a law firm in Manila that had previously represented a group of fisherfolk from Guimaras Island. The suit pertained to claims from 967 of these fisherfolk totalling PHP 286.4 million (£3.88 million) for property damage as well as economic losses. It was also recalled that the claimants had rejected the 1992 Fund's assessment of a 12-week business interruption, as applied to all similar claims in this area, arguing that fisheries were disrupted for over 22 months without, however, providing any evidence or support. It was further recalled that the 1992 Fund had filed defence pleadings in response to the civil action, noting that under the law of the Philippines, the claimants had to prove their losses but to date, had not done so, and the Judge therefore ordered the case to proceed through to trial.

3.3.7 The Executive Committee noted that after a number of further adjournments, in January 2016, a hearing for the continuation of the cross-examination, re-examination and further cross-examination of the plaintiffs' expert witness from the Department of Environment and Natural Resources took place. The expert witness was presented by the plaintiffs in an attempt to prove that the contamination of the waters of Guimaras from the oil spill, lasted from the spill in 2006 up to May 2011, based on data analysis of the water collected between such dates.

3.3.8 The Executive Committee also noted that following cross-examination of the witness, the 1992 Fund's lawyers had showed the Court that the witness had no personal knowledge of the alleged contamination of the waters of Guimaras from August 2006 to May 2011, and that the authenticity, truthfulness and

accuracy of the data was questionable and inadmissible as evidence. The Executive Committee further noted that the plaintiffs' witness had admitted that the only time she had conducted water analysis on Guimaras was in October 2011, some five years after the oil spill, and that the results of the analysis showed that the waters of Guimaras were not contaminated by oil.

3.3.9 It was noted that a further hearing date had been set for 11 March 2016 for the continuation of the presentation of witnesses, but that it had been adjourned until June 2016.

Legal proceedings by a group of municipal employees

3.3.10 The Executive Committee recalled that 97 individuals employed by a municipality on Guimaras during the response to the incident, had taken action in court against the mayor, the ship's captain, various agents, ship and cargo owners and the 1992 Fund on the grounds of not having been paid for their services, and that after a thorough review of the legal documents received, the 1992 Fund had filed pleadings of defence in court, noting in particular that the majority of claimants were not engaged in activities admissible in principle. The Executive Committee also recalled that a number of the claimants were already included within a claim submitted and settled by the Municipality of Guimaras.

3.3.11 The Executive Committee further recalled that in April 2012, the Guimaras Court had ordered that a pre-trial hearing take place in July 2012, in order to explore the possibility of an amicable settlement, but no progress was made, as the claimants' lawyers had made no further proposals nor did they produce any further evidence to support their case.

3.3.12 It was recalled that the Guimaras Court initially set a similar timetable as for the claim involving the 967 fisherfolk, and a number of court hearings occurred between 2012 and April 2015, during which the status of several of the claimants presented by their lawyers, was examined.

3.3.13 It was finally noted that further court hearings to conclude the examination of the witnesses submitted by the claimants were set to take place in July 2015, but no witnesses were presented for the claimants, and the matter was adjourned and a further hearing date had been set for March 2016 for the continuation of the presentation of witnesses, but that it had been adjourned until June 2016.

Debate

Statement by the delegation of the Republic of the Philippines

3.3.14 The delegation of the Republic of the Philippines made the following statement.

> 'We thank the Secretariat for this paper on the *Solar 1* and the briefing by the Claims Manager.
>
> The legal process in the Philippines is such that substantive procedural matters will have to be given due course in an effort to give claimant parties the opportunity to support their claim. In turn, the Fund through its lawyers in the Philippines would be able to examine the claims and put up the necessary defences. As such, the resolution of all claims from the *Solar 1* incident may take some time.
>
> Aside from the legal processes, there are administrative procedures arising from law that also need to be complied with and this applies to the PCG wherein the concurrence or signature of the Solicitor General to the compromise agreement is being awaited.
>
> This delegation appreciates and fully understands the importance of reaching a full closure of the claims arising from this incident and for this reason, we will continue to work closely with the Secretariat in achieving this goal.
>
> In the meantime, we need to give the time for the completion of the legal processes in the Philippines for the proceedings initiated by the fisherfolk and the municipal employees.'

3.3.15 The 1992 Fund Executive Committee noted the information contained in document IOPC/APR16/3/3 and the intervention by the delegation of the Republic of the Philippines.

3.4	**Incidents involving the IOPC Funds—1992 Fund: *Volgoneft 139* Document IOPC/APR16/3/4**		**92EC**	

3.4.1 The 1992 Fund Executive Committee took note of the information contained in document IOPC/ARP16/3/4 regarding the *Volgoneft 139* incident.

Limitation proceedings

3.4.2 The Executive Committee recalled that the owner of the *Volgoneft 139* had been declared bankrupt. It was also recalled that the *Volgoneft 139* was insured by Ingosstrakh (Russian Federation) for 3 million SDR, i.e. the minimum limit of liability under the 1992 CLC prior to November 2003. It was further recalled that since the minimum limit under the 1992 CLC after November 2003 was 4.51 million SDR, there was an 'insurance gap' of some 1.51 million SDR.

3.4.3 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 (RUB 116.3 million).

Civil proceedings and claims for compensation

June 2012 judgment

3.4.4 The Executive Committee recalled that in June 2012, the Arbitration Court of Saint Petersburg and Leningrad Region had delivered its judgment on quantum, awarding amounts totalling RUB 503.2 million, including legal interest. It was also recalled that the Court had decided that the shipowner/Ingosstrakh should pay the awarded amounts up to 3 million SDR and that the 1992 Fund should pay all amounts above 3 million SDR.

3.4.5 It was recalled that at its April 2013 session, the 1992 Fund Executive Committee had decided to authorise the Director to pay private claimants in full according to the 2012 ruling of the Arbitration Court of Saint Petersburg and Leningrad Region and make provisional payments to the three government claimants with pro-rated deductions to cover the 'insurance gap'. It was also recalled that the 1992 Fund paid all private claimants in full and only the three government agencies remained to be paid.

October 2013 Presidium of the Supreme Court's ruling

3.4.6 It was recalled that in a judgment rendered in October 2013 the Presidium of the Supreme Court had ordered that the judgments of the Arbitration Court of Saint Petersburg and Leningrad Region, the Court of Appeal and the Court of Cassation be set aside in respect of the part that had ordered the 1992 Fund to cover the 'insurance gap' of 1.51 million SDR and had ordered the case to be sent to the Arbitration Court of Saint Petersburg and Leningrad Region for reconsideration on that point.

November 2014 judgment

3.4.7 The Executive Committee recalled that in a judgment delivered in November 2014, the Arbitration Court of Saint Petersburg and Leningrad Region had decided to deduct the 'insurance gap' of 1.51 million SDR pro rata from the amount previously awarded to all claimants.

Recovery of the amounts overpaid by the 1992 Fund

3.4.8 It was recalled that the 1992 Fund had the right to recover from the private claimants a total of RUB 8.7 million, i.e. the difference between the amounts awarded to them against the 1992 Fund under

the 2012 judgment, fully paid by the 1992 Fund, and the amounts awarded to them under the 2014 judgment.

3.4.9 It was also recalled that the 1992 Fund had applied for the reversal of the execution of the 2012 judgment and that the Fund's application had been accepted. It was further recalled that reversal of the execution of the judgment would formally entitle the 1992 Fund to receive from private claimants the amounts overpaid to them in comparison with what the November 2014 judgment awarded. The Executive Committee noted that the next hearing to consider the application was scheduled for May 2016.

3.4.10 It was recalled that initial discussions with Ingosstrakh suggested that the shipowner's insurer might be willing, when the time comes for it to pay claimants, to discount from the amount due by them to private claimants, the amounts overpaid by the 1992 Fund to these claimants, and that the insurer would then pay the deducted amounts to the 1992 Fund.

Enforcement of the judgment against the shipowner's insurer

3.4.11 The Executive Committee noted that the 2012 judgment only directly ordered the shipowner to pay. The Executive Committee also noted that the shipowner was bankrupt, and that Ingosstrakh was denying payment arguing that it was not strictly required to pay and that doing so would be illegal.

3.4.12 It was further noted that one of the claimants, a salvage company, had requested that the Court either changed the wording of the judgment or clarified how the judgment could be executed against Ingosstrakh. It was noted, however, that the Court had rejected the claimant's request and that the salvage company had brought a separate action against Ingosstrakh for payment of the amount awarded to them from the liability limitation fund by the 2012 judgment.

3.4.13 The Executive Committee noted that the 1992 Fund had constituted itself as third party in these proceedings, requesting that the Court orders that, when Ingosstrakh pays the amount owed by it to the salvage company, the amount overpaid to the claimant by the 1992 Fund should be paid back to the 1992 Fund.

Debate

3.4.14 One delegation stated that it had initially been hopeful when Ingosstrakh had at first agreed that when making payments to claimants it could retain the amount overpaid to them by the 1992 Fund with the intention of repaying it to the 1992 Fund. That delegation stated that it was disappointing that the insurer was now refusing to pay the claimants. In the view of that delegation, this case shows that cooperation with such insurers was not always easy and there was not much the 1992 Fund could do now, except to closely monitor the proceedings regarding the reversal of the execution of the 2012 judgment and the proceedings of the salvage company against the insurer. That delegation also highlighted the risks of overpayment and emphasised that lessons should be learned from this case, in order that the Executive Committee would in future be more cautious when deciding on compensation payments.

3.4.15 Another delegation stated that the insurer should pay the amounts awarded against the shipowner/insurer in spite of the wording of the judgment, as the shipowner and its insurer were liable under the 1992 Civil Liability Convention. That delegation suggested that the Fund could submit a petition to the Court asking for the wording of the 2012 judgment to state clearly that the insurer should pay claimants the amount awarded against the shipowner/insurer.

1992 Fund Executive Committee Decision

3.4.16 The 1992 Fund Executive Committee instructed the Director to continue monitoring the legal proceedings arising from the *Volgoneft 139* incident.

3.5	**Incidents involving the IOPC Funds—1992 Fund: *Hebei Spirit* Documents IOPC/APR16/3/5 and IOPC/APR16/3/5/1**		**92EC**	

3.5.1 The 1992 Fund Executive Committee took note of the information contained in documents IOPC/APR16/3/5 and IOPC/APR16/3/5/1 submitted by the Secretariat.

DOCUMENT IOPC/APR16/3/5, SUBMITTED BY THE SECRETARIAT

Claims situation

3.5.2 The 1992 Fund Executive Committee noted that as at 26 April 2016, 128 406 individual claims totalling KRW 2 776 billion had been registered. It also noted that the total amount available for compensation under the 1992 Fund Convention is 203 million SDR or KRW 321.6 billion (£196 million) including the amount paid by the shipowner's insurer, Assuranceföreningen Skuld (Gjensidig) (Skuld Club) in accordance with the provisions of the 1992 Fund Convention. The Executive Committee noted that the Skuld Club has paid KRW 186.8 billion in compensation and that the 1992 Fund had made payments totalling KRW 44.6 billion to the Korean Government with respect to 40 027 subrogated claims.

Limitation proceedings by the owner of the Hebei Spirit

3.5.3 The Executive Committee noted that the Court of First Instance in Seosan (Seosan Court) and the Daejeon Court of Appeal (Appeal Court) had been proposing mediation settlements to the parties in cases where matters of principle were not under discussion. The Executive Committee further noted that, as a result, 119 156 (93% of the total) claims had been resolved by judgments or mediation and had been awarded a total of KRW 388 billion (£223 million), and that 8 327 claims were pending in the Courts.

Judgments in the Korean Courts

3.5.4 The Executive Committee noted that the Seosan Court has rendered judgments in respect of 32 249 claims and that, since October 2015, 33 judgments covering 14 656 claims have been appealed either by the claimants or by the 1992 Fund.

3.5.5 The Executive Committee further noted that in the same period, the Appeal Court has rendered judgments in respect of 4 666 claims. The Executive Committee also noted that a claimant further appealed a judgment to the Supreme Court but permission to appeal was refused.

DOCUMENT IOPC/APR16/3/5/1, SUBMITTED BY THE SECRETARIAT

Agreement with the Korean Government

3.5.6 It was recalled that at its October 2015 session, the 1992 Fund Executive Committee instructed the Director to explore with the Korean Government a possible settlement and to present it to the 1992 Fund Executive Committee at its April 2016 session for the Committee's consideration and approval. The Executive Committee recalled that the basis of the settlement was that the 1992 Fund would pay the Korean Government the total amount available for compensation and that the Korean Government would provide the safeguards the 1992 Fund would need to be protected against judgments by the Korean Courts against it.

3.5.7 The Executive Committee noted that since October 2015, the Director had a number of exchanges with the Korean Government on the agreement. The Executive Committee further noted that more time was needed to reach an agreement.

3.5.8 The Executive Committee noted that the Director hoped to present a draft agreement to the October 2016 session of the Executive Committee.

Level of payments

3.5.9 The Executive Committee recalled that in June 2008, in view of the uncertainty as to the total amount of the admissible claims, it had decided that the level of payments should be limited to 35% of the amount of the damage actually suffered by the respective claimants as assessed by the Fund. It was also recalled that at its October 2015 session, the Executive Committee had decided to increase the level of the Fund's payments to 50% of the established losses.

3.5.10 The Executive Committee noted that the Korean Courts had resolved about 93% of the claims, but that some 7% of the claims in the limitation proceedings were still pending.

3.5.11 The Executive Committee noted that, in the Director's view, it was possible to increase the level of payments from 50% to 60% of the established losses, taking into consideration the safeguards provided by the Korean Government, and still preserving a sufficient safety margin, in case the amounts awarded for the remaining claims were larger than the amounts awarded by the Limitation Court.

Debate

3.5.12 The delegation of the Republic of Korea thanked the Director for the work on the incident and noted that, as the remaining uncertainty with regard to this incident had reduced since the last session of the Executive Committee, the safety margin suggested by the Director would be sufficient to protect the 1992 Fund from an overpayment situation. That delegation therefore welcomed the Director's proposal to increase the level of payments to 60% of the established losses.

3.5.13 One delegation, although supporting the Director's proposal to increase the level of payments to 60% of the established claims, expressed concern with regard to the extent of the remaining uncertainties. That delegation noted that, despite the fact that the pending claims accounted for only 7% of all claims submitted to Court, the total amount of these pending claims was almost equal to the amount awarded for the established losses. That delegation noted that the Director had included in his consideration a generous safety margin, however it recalled that, the Executive Committee had found itself, at the beginning of this incident, in a position of having to decrease the level of payments in view of changed circumstances. That delegation therefore urged caution when deciding on whether to increase the level of payments.

3.5.14 One delegation welcomed the report by the Director on the work carried out by the Secretariat together with the Republic of Korea towards a bilateral agreement and expressed its hope that such an agreement could be presented at the October 2016 session. That delegation noted that, since this agreement would be only between the 1992 Fund and the Republic of Korea, the Club and the claimants would not be bound by it. In the view of that delegation that could mean that, if the claimants were not satisfied with the compensation received from the Government they could redirect their action against the 1992 Fund. Furthermore, in that delegation's view, the national Courts may not recognise the payments made to the Government as compensation and could order the 1992 Fund to make further payments to the claimants. That delegation also stated that the risk of overpayment should be fully covered within the agreement.

3.5.15 The Chairman concluded the debate by noting that while some delegations expressed the need for caution given the potential risk of the 1992 Fund finding itself in an overpayment situation, all delegations who spoke had supported the Director's proposal to increase the level of payments to 60%. The Chairman also underlined that the Executive Committee looked forward to seeing the Director's report on the progress made in respect of the bilateral agreement at its October 2016 session.

1992 Fund Executive Committee Decision

3.5.16 The 1992 Fund Executive Committee decided to increase the level of payments to 60% of the amount of the established losses and to review this decision at the next session of the 1992 Fund Executive Committee.

3.6	**Incidents involving the IOPC Funds—1992 Fund: *Alfa I* Documents IOPC/APR16/3/6 and IOPC/APR16/3/6/1**		**92EC**	

3.6.1 The 1992 Fund Executive Committee took note of documents IOPC/APR16/3/6 and IOPC/APR16/3/6/1 containing information relating to the *Alfa I* incident.

3.6.2 The Executive Committee recalled that at the October 2015 sessions of the IOPC Fund governing bodies, the Executive Committee had decided to authorise the Director to agree a settlement of €12 million including interest, in full and final settlement of the first clean-up contractor's claim against the shipowner, insurer and the 1992 Fund, on condition that the insurer first paid the equivalent of the limitation amount due (4.51 million SDR).

3.6.3 It was noted that after the Secretariat reported the decision of the Executive Committee to the insurer, regrettably the insurer indicated that it was not willing to pay the full equivalent of the limitation amount due (4.51 million SDR equivalent to €5.65 million), but was only willing to pay €4 million, and thus the condition under which the Director was authorised to reach settlement with the clean-up contractor had not been met.

3.6.4 The Executive Committee noted that the main contractor had recently indicated that in order to avoid further long delays and expensive legal costs, it would be prepared to continue with the settlement of €12 million, provided that the insurer would pay €4 million instead of its CLC liability of €5.65 million, and the Fund would pay any shortfall left outstanding by the insurer i.e. if the Fund would agree to pay €8 million, instead of €6.35 million (€12 million - €5.65 million). The Executive Committee also noted that this offer would stand until the end of June 2016, after which he would pursue his claim in its entirety by appealing the judgment.

3.6.5 It was also noted that the Director was aware that currently the main contractor had received no compensation in respect of the incident which took place in 2012, and that for this reason the Director recommended the Executive Committee consider authorising him to settle the main contractor's claim in the amount of €12 million on the basis that the 1992 Fund pay the full settlement amount and claim from the insurer the CLC limit of 4.51 million SDR (€5.65 million).

3.6.6 It was further noted that the advantages of such an approach were that the 1992 Fund would comply with its obligation under the 1992 Fund Convention to pay the main contractor who had received no compensation, and would then claim back from the insurer the CLC limit.

3.6.7 The Executive Committee noted that from a commercial viewpoint, a settlement of the main contractor's claim for €12 million, when the main contractor had already obtained a first instance judgment for €14.4 million, continued to make financial sense and in addition, the Court of Appeal was unlikely to render a judgment within two years, meaning that interest at approximately 10% per annum would continue to accrue on the judgment.

3.6.8 The Executive Committee also noted that in addition to the claim by the first clean-up contractor, there remained outstanding the claim by the second clean-up contractor for €350 000. In addition, the shipowner and insurer would also face the claim by the Greek State for some €222 000.

Debate

3.6.9 The delegations which spoke supported the proposal to authorise the Director to settle the main contractor's claim for €12 million and to claim back from the insurer the CLC limit, noting that it was a pragmatic solution to avoid incurring further costs and interest, and bearing in mind that the 1992 Fund was unlikely to better the proposed settlement in any future appeal proceedings.

3.6.10 In response to one delegation's request for further information regarding the prospects and likelihood of recovering the CLC limit from the insurer, the Director stated that he shared that delegation's concern because the insurer had changed its position on various occasions previously. Noting that the

insurer was still trading and underwriting marine business, the Director stated that it was difficult to know for certain whether a full recovery from the insurer would be possible.

3.6.11 Another delegation stated that this incident provided another example of the 1992 Fund having to find a solution in a situation which ran counter to the principles of the Conventions. That delegation stated that while it supported the proposal to settle the main clean-up contractor's claim, it was not happy with the result and there was a risk that the insurer would not fulfil its obligations under the international conventions.

1992 Fund Executive Committee Decision

3.6.12 The 1992 Fund Executive Committee instructed the Director to settle the main clean-up contractor's claim for €12 million and to pursue the insurer for the recovery of the CLC limit.

3.7	**Incidents involving the IOPC Funds—1992 Fund: *Nesa R3* Document IOPC/APR16/3/7**		**92EC**	

3.7.1 The 1992 Fund Executive Committee took note of the information contained in document IOPC/APR16/3/7.

3.7.2 The Executive Committee recalled that, at its October 2013 session, it had authorised the Director to make payments of compensation in respect of admissible losses arising out of the *Nesa R3* incident and to claim reimbursement from the shipowner.

3.7.3 It further recalled that the shipowner had never responded to the requests from the Omani Government to pay compensation for the pollution damage caused by the incident. It was also recalled that the Omani Government had commenced legal proceedings against the shipowner and its insurer.

3.7.4 The Executive Committee noted that in February 2016, the 1992 Fund had joined the Omani Government proceedings against the shipowner and its insurer in the Court of Muscat.

3.7.5 It was noted that 31 claims for clean-up related activities, surveys of the wreck and economic losses suffered in the fisheries sector, totalling OMR 5 905 599 (£10.7 million), had been received of which 11 claims, totalling OMR 1 119 785 (£1.9 million), had been paid and that three further claims had been assessed at OMR 453 782.

3.7.6 It was also noted that other claims had been queried pending the submission of additional information.

4 Compensation matters

4.1	**Guidance for Member States—Consideration of the definition of 'ship' Document IOPC/APR16/4/1**	**92AC**		**SA**

4.1.1 The 1992 Fund Administrative Council and Supplementary Fund Assembly took note of document IOPC/APR16/4/1 containing the proposed text for a publication entitled 'Guidance for Member States: Consideration of the definition of 'ship''.

4.1.2 The governing bodies recalled that at its October 2015 session, the 1992 Fund Administrative Council had considered the recommendations of the 1992 Fund seventh intersessional Working Group regarding the definition of 'ship' under Article I(1) of the 1992 Civil Liability Convention (1992 CLC). It was recalled that the 1992 Fund Administrative Council had decided to accept the recommendations regarding an illustrative list of vessels falling clearly within or outside the definition of 'ship' under Article I(1) of the 1992 CLC that forms the first part of the hybrid approach discussed within the Working Group. It was recalled that the Administrative Council had also decided to adopt the concept of the maritime transport chain as an interpretive tool, to address those situations or 'grey areas' on a

case-by-case basis, where it was not clear whether a vessel fell within the definition of 'ship', which forms the second part of the hybrid approach.

4.1.3 It was also recalled that at its October 2015 session, the 1992 Fund Administrative Council had decided to instruct the Secretariat to produce a guidance document reflecting the conclusions of the Working Group to be considered by the 1992 Fund Assembly at its April 2016 session.

4.1.4 The governing bodies noted the proposed text of the guidance document as contained in Annex I and the set of examples of when the maritime chain commences and concludes as contained in Annex II.

Debate

4.1.5 A number of delegations suggested minor editorial amendments to the draft text aimed at ensuring consistency, which were agreed by a large number of delegations.

4.1.6 The delegation of Singapore made the following statement:

> 'Thank you Mr Chairman and a very good morning to all. We would like to thank the Secretariat for the excellent work on the guidance document.
>
> Mr Chairman, Singapore supports the draft guidance for Member States on the "hybrid" approach to be taken when considering whether a vessel falls within or outside of the definition of 'ship' under Article I(1) of the 1992 CLC.
>
> We note that offshore vessels, including FSOs (floating storage and offloading units) and FSUs (floating storage units) which lack motive power but store oil in bulk, and which are not under tow at the material time, have not been expressly included within the illustrative list of vessels clearly falling within the definition of 'ship'.
>
> This delegation understands that even if such FSOs and FSUs are not included in the list, they are also not excluded from the scope of the 1992 CLC, and that they may still be considered on a "case-by-case" basis pursuant to the second part of the "hybrid" approach, which uses the maritime transport chain as an interpretive tool.'

4.1.7 A proposal by one delegation that the decision taken by the 1992 Fund Assembly in October 1999 regarding the applicability of the 1992 Conventions to offshore craft, be repeated in the guidance document, met with some support, but the majority of delegations that spoke stated that they supported the Chairman's proposal to adopt the guidance document as presented, subject to the minor editorial amendments previously suggested.

4.1.8 In response to a suggestion by one delegation that paragraph 3.1(6) of the guidance document was not necessary and could be deleted, another delegation stated that the Working Group had discussed the matter, and that discussions should not be re-opened at this stage, since the guidance document accurately reflected the decision taken by the 1992 Fund Administrative Council in October 2015. That delegation's comments were endorsed by a number of other delegations who preferred to maintain the text as drafted, subject to minor editorial improvements.

4.1.9 One observer delegation suggested that wording be added to the preface of the guidance document, to ensure that the guidance document was not to be applied to an individual incident retrospectively. This was because shipowners and insurers needed to know in advance whether CLC insurance for a vessel is required.

4.1.10 Another observer delegation questioned why the guidance document did not expressly refer to the requirement for vessels to be 'seagoing' or 'seaborne', in all examples in the illustrative list of vessels clearly within the definition of 'ship'. That delegation also questioned why the guidance document did not clarify that all vessels which were certified or classed for use only on inland waterways, were not within the definition of 'ship'.

4.1.11 One delegation stated that due to improvements in technology, the guidance document should be updated and discussed regularly at the sessions of the IOPC Funds' governing bodies. In response, another delegation stated that, in view of the comments made by the previous delegation and by the two observer delegations, these delegations could submit papers at future sessions of the IOPC Funds' governing bodies, with suggestions to improve the text of the guidance document.

4.1.12 The Chairman proposed that the guidance document be adopted as drafted subject to minor editorial amendments and that if delegations wished to discuss the matter further, they should submit documents at the next meeting of the IOPC Funds' governing bodies.

1992 Fund Administrative Council Decision

4.1.13 The 1992 Fund Administrative Council approved the text of the guidance document as set out in Annex II and instructed the Director to publish the document electronically and in a similar format to other IOPC Funds' publications.

Supplementary Fund Assembly

4.1.14 The Supplementary Fund Assembly noted the decision of the 1992 Fund Administrative Council as set out in paragraph 4.1.13 above and approved the text of the guidance document as set out in Annex II.

4.2	**Guidance for Member States—Management of fisheries closures and restrictions** **Document IOPC/APR16/4/2**	**92AC**		**SA**

4.2.1 The 1992 Fund Administrative Council and Supplementary Fund Assembly recalled that, in April 2015 and October 2015, draft guidelines for Member States in respect of the management of fisheries closures and restrictions following an oil spill were presented for consideration and comments by delegations.

4.2.2 It was recalled that, at their October 2015 sessions, the governing bodies had indicated their support for the development of a guidance document. It was also recalled, however, that some delegations had provided further comments on the text during the session and that the governing bodies had therefore instructed the Director to further revise the text. Delegations were encouraged to contact the Secretariat to provide any further input in advance of the April 2016 sessions, with the view to the revised guidelines being adopted at those sessions.

4.2.3 A revised draft of the Guidelines was presented to the governing bodies for approval, as set out at the Annex to document IOPC/APR16/4/2. It was noted that this latest draft incorporated comments made at the October 2015 session and suggestions provided by delegations intersessionally.

4.2.4 It was noted that, if approved, the Secretariat intended to publish the document in a similar format to the 2014 guidance document for Member States relating to measures to facilitate the claims-handling process.

Debate

4.2.5 The delegation of the Republic of Korea recalled that it had originally suggested that a guidance document on the management of fisheries restrictions should be developed in 2010 following its experience of the *Hebei Spirit* incident. That delegation thanked the Secretariat for the final text and expressed hope that Member States would find the publication useful.

4.2.6 Several delegations expressed appreciation to the Secretariat for reviewing the draft text and submitting an improved version for consideration, which included the comments made by certain delegations at previous sessions. A number of delegations commented that the guidance document would be of great assistance to Member States and fisheries authorities in particular, and expressed their hope that the publication would be made available via the usual channels as soon as possible.

1992 Fund Administrative Council and Supplementary Fund Assembly Decisions

4.2.7 The 1992 Fund Administrative Council and Supplementary Fund Assembly decided to instruct the Secretariat to publish the Guidelines for the management of fisheries closures and restrictions in a similar format as previous publications.

4.3	**Information for claimants—Guidelines for presenting claims for environmental damage Document IOPC/APR16/4/3**	**92AC**		**SA**

4.3.1 Draft Guidelines to assist claimants with the submission of claims for environmental damage were presented to the governing bodies for review, as set out in document IOPC/APR16/4/3. It was pointed out that these latest draft Guidelines set out what could be done following an oil spill to formulate claims for environmental damage covered by the international liability and compensation regime. The Guidelines also explain, through the use of examples, how the criteria set out in the 1992 Fund Claims Manual could be applied to such claims.

4.3.2 Before inviting delegations to comment on the draft text, the Chairman of the 1992 Fund Administrative Council emphasised that the aim of developing Guidelines for presenting claims for environmental damage would be to provide clarification of these type of claims within the framework of the existing 1992 Civil Liability and Fund Conventions and that the text presented had been prepared on that basis. He made the point that, while some delegations may consider that the Conventions should be expanded in respect of environmental damages, any such discussion should not take place within the forum of the IOPC Funds.

4.3.3 The governing bodies noted that these particular Guidelines were considered more complex than those produced to date by the IOPC Funds and, as such, while the Secretariat had incorporated useful feedback and contributions from a number of external experts and interested parties during the development of the Guidelines, it was anticipated that the governing bodies were likely to have a number of comments which would necessitate further drafts of the text to be prepared. Taking into account that the intention for this session was for the governing bodies to hold a preliminary discussion only, delegations were invited to provide comments on the draft text contained in the Annex to document IOPC/APR16/4/3 and were also encouraged to submit comments in writing intersessionally.

4.3.4 It was noted that when the Guidelines were eventually approved, the intention was that they would be published as a new addition to the Claims Information Pack, which currently contains the Claims Manual, a number of other guidelines relating to specific sectors and an example Claim Form.

Debate

4.3.5 All delegations which spoke thanked the Secretariat for the work undertaken and expressed support in principle for the further development of the publication. Several delegations expressed the view that such guidelines on claims for environmental damage would be particularly useful to those in the field of pollution response.

4.3.6 Many delegations, however, considered that the draft text was too technical and should be reviewed taking into account the intended users, with a number of delegations suggesting that the language used should be simplified. One delegation suggested that, as in the case of the Guidelines for presenting claims in the fisheries sector, there could be two sets, one addressed to claimants and another addressed to experts.

4.3.7 One delegation stated that the Guidelines should be consistent with other publications produced by the IOPC Funds, most importantly the Claims Manual. Another delegation added that the Guidelines should make it clear that abstract models were outside the Conventions.

4.3.8 One delegation expressed concern that the IOPC Funds should be cautious when looking at post-spill studies and should emphasise the operational aim of post-spill studies. That delegation also stated

that, in their view, the focus should be placed on the actual damage and how it could be reimbursed. Several delegations agreed on that point.

4.3.9 One delegation reported that it had shared the draft text of the Guidelines with colleagues dealing with environment and climate change and confirmed, in their opinion, that the draft Guidelines were a positive addition to the Funds' publications.

4.3.10 Several delegations expressed their intention to provide the Secretariat with more detailed comments in writing following the current sessions.

4.3.11 The observer delegation of the Conference of Peripheral Maritime Regions (CPMR) made a statement in which it provided comments on the draft Guidelines and the subject of environmental damage in general. In particular, that delegation stated that the jurisprudence that arose from the *Erika* incident had underlined the risk of non-uniform interpretations of the concept of environmental damage and its reparation.

4.3.12 That delegation reported that the questions arising from the *Erika* jurisprudence had been included in the discussions that had taken place within the European Commission on the future of the Environmental Liability Directive (ELD) adopted by the European Union. He also reported that some studies undertaken by the European Commission had concluded with proposals to end the ELD's exception in respect of international conventions, including the Civil Liability and Fund Conventions. That delegation added that the conclusion of those studies was that damage to the marine environment should be directly covered within the framework of European law.

4.3.13 The observer delegation of CPMR also added that in a report published in April 2016 the European Commission considered that the ELD and the 1992 Conventions applied different rules for compensation of environmental damage. In that report the European Commission claimed that it would examine the possibility of treating the problems arising from these discrepancies by non-legislative methods and referred specifically to considering the interpretations provided within the 1992 Fund Claims Manual.

4.3.14 That delegation stated that the issue and the relation between European law and the Civil Liability and Fund Conventions would continue to be debated within the European Union.

4.3.15 That delegation congratulated the Secretariat on the technical quality of the draft Guidelines, but suggested that a wider approach should be taken to increase the coverage of environmental damage within the framework of the current Conventions. That delegation suggested that such extended coverage could be achieved through the establishment of a voluntary supplementary fund dedicated to environmental damage within the IOPC Funds.

4.3.16 That delegation stated that the proposed fund would supplement the IOPC Funds by providing compensation for the loss of ecosystem services from the moment of damage up to the re-establishment of the normal functionality of the affected ecosystem. This would not include compensation for pure environmental damage, but only the estimation of a cost corresponding to the loss of ecosystem services.

4.3.17 That delegation provided further details relating to other discussions on the subject within the European Union and concluded by proposing further discussion of the points raised, if appropriate within the forum of a Working Group, which it would be happy to contribute to.

4.3.18 The Chairman of the 1992 Fund Administrative Council and the Chairman of the Supplementary Fund Assembly concluded the debate by asking delegations to engage with the Secretariat on the points raised and to provide any other comments intersessionally.

4.4	**Proposed text for the Claims Manual in respect of compensation for claims for VAT by central governments** **Document IOPC/APR16/4/4**	**92AC**		**SA**

4.4.1 The 1992 Fund Administrative Council and Supplementary Fund Assembly took note of document IOPC/APR16/4/4 which contained the proposed text for the Claims Manual in respect of compensation for claims for VAT by central governments.

4.4.2 The 1992 Fund Administrative Council recalled that at its meeting held in October 2015, it had discussed document IOPC/OCT15/4/4 submitted by the Secretariat and document IOPC/OCT15/4/4/1 submitted by the delegation of France.

4.4.3 The 1992 Fund Administrative Council also recalled that at the same session, the 1992 Fund Administrative Council and Supplementary Fund Assembly had decided that the IOPC Funds may pay compensation for claims for VAT by central governments if a State's national law allowed for the inclusion of VAT in the State's claim for compensation, and to use criteria based on the principles of the law of damages (as contained in document IOPC/OCT15/4/4) to be applied in cases where the national law was not clear.

4.4.4 The 1992 Fund Administrative Council further recalled that it had instructed the Director to present a new text for the Claims Manual reflecting the decision in respect of compensation for claims for VAT by central governments for consideration at the April 2016 session of the governing bodies.

Proposed new text for the Claims Manual

4.4.5 It was noted that the suggested amendment to the Claims Manual could be made in section 3.1 by introducing new paragraphs 3.1.20, 3.1.21, and 3.1.22 under the new subheading 'Claims for VAT by central governments':

> Claims for VAT by central governments
>
> 3.1.20 The central government of an affected State may incur significant costs following an oil spill, *inter alia*, by using its own resources to undertake the clean-up and counter-pollution operations, or by engaging private contractors specialising in the collection, transport and treatment of waste.
>
> 3.1.21 The central government of a Member State which incurs VAT in connection with the prevention of oil pollution operations may recover VAT, if its national law allows for its inclusion in the claim for compensation.
>
> 3.1.22 In cases where it is not clear whether national law allows for the inclusion of VAT in the claim for compensation, the claim will be assessed applying the rules of the law of damages, namely that:
>
> (1) a party may not recover damages where it has suffered no loss; and
>
> (2) a party may not enjoy a double recovery of damages.

1992 Fund Administrative Council and Supplementary Fund Assembly Decision

4.4.6 The 1992 Fund Administrative Council and Supplementary Fund Assembly decided to adopt the proposed amendment to the Claims Manual as set out in paragraph 4.4.5 above.

4.5	**Interim payments—progress report** **Document IOPC/APR16/4/5**	**92AC**		**SA**

4.5.1 The Chairman of the Consultation Group on interim payments, Mr Volker Schöfisch, introduced the progress report of the Consultation Group. He was pleased to report that the Consultation Group had

made good progress with this complicated subject and that this had been possible through positive cooperation with the International Group and with advice from the Chairmen of the governing bodies and the Consultation Group's legal experts.

4.5.2 He recalled that, with the aim of finding a solution to the long-running issue of interim payments which would be agreeable to both the International Group and the IOPC Funds, in October 2015 the 1992 Fund Administrative Council had decided to establish a Consultation Group to work with the Director and the International Group on the issue of interim payments. He further recalled that the mandate of the Consultation Group was to examine the issues which needed to be resolved in respect of interim payments, to discuss the text of a new Memorandum of Understanding (MoU) between the International Group and the 1992 Fund and Supplementary Fund, which would contain the terms and conditions under which interim payments would be made in future and to make recommendations to the governing bodies at their October 2016 sessions.

4.5.3 The governing bodies noted that the Consultation Group had met twice since its establishment, namely on 21 October 2015 and on 12 February 2016. The governing bodies also noted that the Chairman of the Consultation Group had met separately with the Director and Dr Rosalie Balkin in November 2015 and with the Director and representatives of the International Group in January 2016.

4.5.4 The governing bodies noted that the Consultation Group had agreed that the existing MoU between the International Group and the 1992 Fund and Supplementary Fund, which had been signed on 19 April 2006 provided, *inter alia*, details of cooperation on claims-handling procedures, including the need for the establishment of a joint Claims Handling Office, and the use and sharing of costs of joint experts and surveyors employed to assess claims under the Conventions, should be maintained.

4.5.5 The governing bodies further noted that the Consultation Group had also considered the proposed draft amendments to the existing MoU and new Appendix that had been submitted to the Consultation Group for consideration.

4.5.6 The governing bodies also noted that the Consultation Group had also considered an alternative approach, namely the use of case-specific agreements between the 1992 Fund and an International Group Club in the event of a future case that would set out the desire of both parties that the practice of making interim payments should be maintained, and specifying clearly the obligations on the Club and the IOPC Funds (a 'template').

4.5.7 The governing bodies furthermore noted that, given the divergent views that existed, the Consultation Group had agreed with the proposal of case-specific agreements in future cases and had agreed to produce a draft template which would contain a set of terms, conditions and obligations that the parties could agree on a case-by-case basis. If interim payments were to be made by an International Group P&I Club, which met the conditions set out in such an agreement, they would be recognised by the Funds. This agreement could also involve the Member State affected by the oil spill, as described in section 3 of the IOPC Funds' publication, 'Guidance for Member States—Measures to facilitate the claims-handling process'. This had been the case with the *Hebei Spirit* incident. The template would also contain a clause which provides that any disputes between the parties would be subject to the jurisdiction of the English High Court of Justice. This jurisdiction clause would amount to a waiver of immunity by the 1992 Fund and Supplementary Fund in a particular case. The governing bodies noted that the International Group had made it clear that individual International Group Clubs would be unable to agree any future case-specific agreements without the inclusion of such a clause.

4.5.8 The governing bodies noted that the Consultation Group would be holding its third meeting on 28 April 2016 and would be reporting back to the governing bodies at their October 2016 sessions.

4.5.9 The governing bodies also noted that, at its second meeting in February 2016, the Consultation Group had noted that Captain Olugbade had had to step down as a member of the Consultation Group as he had returned to Nigeria and would not be in a position to attend this meeting or future meetings of the Consultation Group. The governing bodies noted the contribution that Captain Olugbade had made to the work of the Consultation Group.

4.5.10 The governing bodies further noted the Consultation Group's view that, given the difficult nature of the subject matter, the appointment of a replacement for Captain Olugbade at this stage would be likely to delay the work of the Consultation Group, and that the Group should continue its work with its remaining four members.

Debate

4.5.11 One delegation noted that the International Group had expressed the wish for the IOPC Funds to waive their immunity. That delegation was of the view that the waiver of immunity should be decided on a case-by-case basis by the Executive Committee and that the twice-yearly meetings of the Executive Committee should be frequent enough to decide on case-specific agreements. This view was shared by another delegation which emphasised the sovereign right of Member States to take decisions in respect of interim payments.

4.5.12 Another delegation was of the view that there was the need for the IOPC Funds to reach an agreement with the P&I Clubs in order to make early interim payments. It noted, however, that the solution being looked at so far was interesting but, in its view, was not as good as a more lasting agreement which would guarantee legal agreement. This view was shared by another delegation which agreed that a template arrangement might get in the way of a full legal agreement.

4.5.13 A further delegation expressed its hope that interim payments would be maintained and that the template arrangement would be agreed upon by the Consultation Group as soon as possible.

4.5.14 The observer delegation of the International Group welcomed the report which, in its view, indicated that the possibility of reaching an agreement was in sight and accurately reflected the current situation, particularly in respect of the treatment of immunity and of interim payments. It expressed its view that a template setting out the basis for interim payments in future incidents on a case-specific basis has now been accepted and that it was looking forward to continuing to work with the Consultation Group.

4.5.15 The majority of delegations which spoke were of the view that the Consultation Group should continue its work with its remaining four members as it would be very difficult for a new member to quickly understand the complex legal issues at this stage of the work of the Group.

4.5.16 The governing bodies expressed their appreciation to the Consultation Group and its Chairman, the Chairmen of the 1992 Fund Administrative Council and Supplementary Fund Assembly, the representatives of the International Group, the Secretariat and to the legal advisers for their input to the work of the Consultation Group.

1992 Fund Administrative Council and Supplementary Fund Assembly Decision

4.5.17 The 1992 Fund Administrative Council and the Supplementary Fund Assembly decided that the Consultation Group should continue its work with its remaining four members.

4.6	**Implementation of the 1992 Civil Liability Convention— Additional guidance document to assist Member States when verifying CLC certificates Document IOPC/APR16/4/6**	**92AC**		**SA**

4.6.1 The governing bodies recalled that, at its April 2015 session, the 1992 Fund Administrative Council instructed the Director to look into the specific issues of open incidents where the insurer had not fulfilled its obligations under the 1992 CLC and to report back to the 1992 Fund Assembly at a future session.

4.6.2 In this regard, the 1992 Fund Administrative Council and the Supplementary Fund Assembly took note of document IOPC/APR16/4/6, which contained information on the examination of open incidents where the insurer had not fulfilled its obligations under the 1992 CLC in the light of the IMO

Guidelines for accepting insurance companies, financial security providers and the International Group of Protection and Indemnity Associations (P&I Clubs) (IMO Guidelines).

4.6.3 It was also recalled that, at the same session, the 1992 Fund Administrative Council instructed the Secretariat, in consultation with the IMO Secretariat, to explore whether the IOPC Funds could develop some additional guidance documents, such as flowcharts, to assist States when verifying CLC certificates. In this regard, the Secretariat had drafted a flowchart to provide an overview of the IMO Guidelines, for reference purposes only, at this stage.

4.6.4 It was noted that the Secretariat concluded that the current IMO Guidelines could be further developed in this area, in order to prevent the insurers' non-fulfilment of the 1992 CLC obligations in future. The 1992 Fund Administrative Council was invited to consider whether to instruct the Director to request the IMO Legal Committee to review the current IMO Guidelines.

Debate

Delegations in favour of requesting the IMO Legal Committee to review the current IMO Guidelines for accepting insurance companies, financial security providers and P&I Clubs

4.6.5 One delegation speaking in support of requesting the Legal Committee to review the current IMO Guidelines indicated that in its view, there were a number of other areas that could be considered. In that respect that delegation suggested that IUMI might have a role assisting Member States in accessing information on IUMI member solvencies and policies. It also suggested that Member States could share the details of an international 'whitelist' of non-International Group insurers which were considered feasible (perhaps using the IMO GISIS (Global Integrated Shipping Information System) as a platform), and that the International Group Club database, which allows Member States' governments to confirm the ships entered in an International Group P&I Club, could be replicated for non-International Group insured vessels.

4.6.6 Another delegation speaking in support of the proposal, also stated that in its opinion it was perhaps premature to send the request to the IMO in the light of the first delegation's comments. That delegation also stated that it had prior experience in another context, of some of the problems experienced by other delegations, and that it recognised that it was an administrative burden that took time and incurred costs.

4.6.7 A further delegation stated that it had already issued a Directive requiring P&I Clubs to be accredited with its authorities, and as a consequence had not experienced any difficulties to date with such P&I Clubs. One delegation stated that it had also already established a system for shipowners to provide additional documentation such as the insurance policy in support of their applications for CLC certificates, and had not experienced any significant problems during the years the system had been operating.

4.6.8 One delegation stated that while it was in favour of requesting the Legal Committee to review the current IMO Guidelines, it questioned the relevance of considering contracts between the shipowners and their insurers. Another delegation suggested that one possible solution was to place any specific warranties or exclusions contained within the insurance policy, onto the blue card itself.

4.6.9 A further delegation stated that while it supported requesting the Legal Committee to review the current IMO Guidelines, it understood that there were limits and did not want these to lead to administrative costs.

4.6.10 A delegation, recognising that this was not the first time that this matter had been discussed before Member States, highlighted that similar debates had occurred during the discussions leading to the adoption of the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Bunkers Convention 2001). In its view, the current IMO Guidelines already imposed a rigorous regime, and considered that the problem being discussed was not on a large scale, since the vast majority of tankers were insured by one of the members of the International Group of P&I Clubs. Recognising however, that some tankers were insured by non-International Group Clubs, that

delegation questioned how its maritime authorities were to be expected to understand insurance policies issued pursuant to foreign law and jurisdiction. That delegation also highlighted that there were real issues in attempting to regulate tankers registered in non-State parties or which were foreign-flagged, and that there were also limits as to what States could be asked to do.

4.6.11 Another delegation questioned the procedural aspects of attempting to bring a matter before the IMO Legal Committee, and asked whether there was an agenda item available for such a proposed request to fit into. That delegation suggested that the Director could discuss the matter further with IMO and report back to the Assembly with more information at a future session.

Delegations against the proposal to request the IMO Legal Committee to review the current IMO Guidelines for accepting insurance companies, financial security providers and P&I Clubs

4.6.12 One delegation stated that the proposal to request the Legal Committee to review the current IMO Guidelines for accepting insurance companies, financial security providers and P&I Clubs, were a step too far and would impose costs upon the industry as well as administrations.

4.6.13 Another delegation stated that blue cards gave a clear indication to other Member States and could be relied upon by third parties, and therefore there was no need to undertake further examination of the IMO Guidelines.

4.6.14 A further delegation stated that based on its past experience with non-International Group insurers, and the fact that maritime authorities may not be experienced with examining the financial standing of insurance companies, financial security providers and P&I Clubs, it foresaw great difficulties with imposing an administrative burden upon maritime authorities by forcing them to scrutinise every insurance policy. That delegation also stated that regarding the *Alfa I* incident, its maritime authorities had implemented the CLC absolutely correctly.

4.6.15 Speaking in relation to the *Nesa R3* incident, another delegation stated that insurers should not feel relaxed from their duties and obligations purely because sanctions may be in place.

4.6.16 A number of delegations stated that maritime authorities should not have to double check every insurance policy issued in support of a CLC certificate. One delegation considered that Member States could better share information and that the existing IMO platforms could assist in this regard.

4.6.17 Another delegation stated that not only did it foresee an administrative burden for maritime authorities, but the requirement to double check the insurance policy behind each CLC certificate application, could shift responsibility from the shipowner to the maritime authority to ensure compliance with the Conventions.

4.6.18 The observer delegation of IMO stated that since the matter had been discussed in 2014, it was not on the Agenda, nor was there an instruction to keep it under review, so any review would require a new output for the high-level action plan in the Legal Committee.

4.6.19 In response to a request for his views, the Director indicated that in the history of the IOPC Funds, this was not a big issue, since it was only the *Alfa I* incident which had caused a problem of this nature, but that he considered the flowchart, attached at Annex II to document IOPC/APR16/4/6, to be useful for Member States.

4.6.20 In summarising the debate, the Chairman stated that while it appeared that there was significant support for requesting the Legal Committee to review the current IMO Guidelines, and that many valid points had been made, such a review appeared to be very open, and it was not clear what issues the Administrative Council would like the Legal Committee to address.

1992 Fund Administrative Council and Supplementary Fund Assembly Decision

4.6.21 The 1992 Fund Administrative Council and Supplementary Fund Assembly requested the Director to study the matter further taking into consideration the views expressed by the delegations during the

debate and the implications for Member States, and to report back to the governing bodies at a future session.

4.7	**Web-based Claims Handling System** **Document IOPC/APR16/4/7**	**92AC**		**SA**

4.7.1 The 1992 Fund Administrative Council and Supplementary Fund Assembly took note of the information contained in document IOPC/APR16/4/7 and of the presentation made by the Secretariat.

4.7.2 The governing bodies recalled that the introduction of the Web-based Claims Management System (WCMS) in 2007 for the *Hebei Spirit* incident had allowed a significant improvement in the overall management of claims and that the System had been subsequently used for later incidents and was currently an integral part of the claims-handling process.

4.7.3 The 1992 Fund Administrative Council and Supplementary Fund Assembly also recalled that in 2014, based upon the findings of a wide-ranging review involving input from the staff of the Secretariat and other parties who had actively used the WCMS in their work, the Secretariat had commenced an upgrade of the system and had developed a new web-based Claims Handling System (CHS).

4.7.4 The governing bodies noted that the incident management aspect of the new CHS had been strengthened and that the System had been further improved by the introduction of a more advanced reporting capability. The governing bodies also noted that the prototype system had been tested.

4.7.5 The 1992 Fund Administrative Council and Supplementary Fund Assembly further noted that the CHS was being developed further to allow claimants to submit claims online. It was also noted that the prototype online claim form was expected to be ready by the end of 2016.

4.8	**Legal proceedings arising from *Plate Princess* incident** **Document IOPC/APR16/4/8**	**92AC**		

4.8.1 The 1992 Fund Administrative Council took note of document IOPC/APR16/4/8 containing information regarding the legal proceedings arising from the *Plate Princess* incident.

4.8.2 The 1992 Fund Administrative Council recalled that in May 2015, the Director had been served with a copy of a Registration Order, issued by the English High Court, registering a judgment of the Maritime Court of Appeal of Venezuela dated 24 September 2009.

4.8.3 The 1992 Fund Administrative Council also recalled that the Venezuelan judgment had been granted in favour of the Puerto Miranda Union, in respect of claims allegedly arising from the *Plate Princess* incident which took place in Venezuela in 1997.

4.8.4 The 1992 Fund Administrative Council further recalled that the Registration Order was obtained against the 'International Oil Pollution Compensation Fund', and it was therefore unclear whether it was intended to be directed against the 1992 Fund, or the 1971 Fund which had been dissolved and had ceased to exist on 31 December 2014, or both.

4.8.5 It was recalled that the 1992 Fund had therefore applied for (i) a declaration that the Registration Order did not apply to it; alternatively (ii) that the Registration Order be set aside on the basis that the 1992 Fund was immune from jurisdiction and enforcement pursuant to the Headquarters Agreement and Article 5 of the 1996 Order.

4.8.6 It was also recalled that on the 22 July 2015 in a judgment issued immediately after the hearing, the Judge had set aside the Registration Order and affirmed the 1992 Fund's immunity from jurisdiction. The Judge had also awarded the 1992 Fund its legal costs, amounting to some £61 000. It was noted that to date, these legal costs had not yet been paid by the Puerto Miranda Union and in the view of the Director, it was unlikely that such costs would be paid.

4.8.7 It was further recalled that in September 2015, the Puerto Miranda Union had applied to the Court of Appeal for permission to appeal the July 2015 judgment by the English High Court, and that the 1992 Fund filed submissions opposing the granting of the request for permission to appeal.

4.8.8 The 1992 Fund Administrative Council noted that on 9 February 2016, the Puerto Miranda Union's application for permission to appeal was rejected on paper by the Court of Appeal. The Administrative Council also noted that the Puerto Miranda Union was entitled until 29 February 2016 to request an oral hearing by the Court of Appeal to reconsider the refusal for permission, and that on 25 February 2016, it had made such a request. The Administrative Council further noted that the Court of Appeal Listing Office had informed the 1992 Fund that the oral hearing would take place on 26 October 2016.

5 Treaty matters

5.1	**HNS Convention and Protocol** **Document IOPC/APR16/5/1**	**92AC**		

5.1.1 The 1992 Fund Administrative Council took note of the information contained in document IOPC/APR16/5/1 submitted by Canada and presented by Mr François Marier, Coordinator of the HNS Correspondence Group.

5.1.2 The 1992 Fund Administrative Council recalled that at its 101st session the Legal Committee of IMO had agreed to extend the mandate of the HNS Correspondence Group and had added three specific items to its Terms of Reference, namely the development of a publication covering the theme 'Understanding the HNS Convention'; the development of a number of possible HNS Scenarios; and a draft resolution on implementation and entry into force of the 2010 HNS Convention.

5.1.3 In his presentation of the document, Mr Marier reported that since the October 2015 session of the 1992 Fund Administrative Council, the Correspondence Group had developed the new publication referred to above with the assistance of IMO, the IOPC Funds and ITOPF. It was noted that the brochure, entitled 'The HNS Convention: Why it is Needed', was aimed at policy and decision makers in States as well as industry stakeholders to assist them in their implementation work and was available on the HNS Convention's website (www.hnsconvention.org) as well as those of IMO, the IOPC Funds and ITOPF.

5.1.4 Mr Marier also reported that the Correspondence Group had begun to develop the HNS Incident Scenarios, which was intended to be an information tool for States and industry stakeholders in a PowerPoint presentation format. It was noted that an outline of the presentation was in circulation amongst the Correspondence Group and that a draft was expected to be presented at the next session of the Legal Committee in June 2016.

5.1.5 With regard to the draft resolution, Mr Marier reported that its purpose would be to encourage States to take the steps necessary to implement the HNS Convention domestically using the tools available and with the aim of rapidly bringing the Convention into force. He explained that it would also encourage collaboration among States in order to ensure a coordinated effort, which is critically needed in order to have the critical mass to trigger its entry into force. It was noted that the draft resolution would potentially propose a timeframe to achieve this and that it was expected to be presented for consideration at the next session of the Legal Committee.

5.1.6 The 1992 Fund Administrative Council noted that Transport Canada had hosted a two-day workshop on the 2010 HNS Convention on 17 and 18 March 2016 in Montreal. It was noted that the workshop had had a full programme which attracted speakers and participants from government and industry and covered many of the key areas pertinent to the entry into force of the Convention. It was noted that the Director and the Head of External Relations and Conference Department had attended the workshop on behalf of the IOPC Funds, delivered presentations and provided information on the work carried out by the 1992 Fund in relation to the 2010 HNS Convention.

5.1.7 It was noted that the concluding session of the workshop had focussed on the development of the draft resolution (see paragraph 5.1.5 above), including possibly setting out a target date for the Convention's coming into force as part of an international coordinated effort towards ratification.

5.1.8 A summary of the topics covered at the workshop was set out in document IOPC/APR16/5/1 and the workshop programme was provided in the Annex to that document.

5.1.9 The 1992 Fund Administrative Council noted the progress made by Canada towards the implementation of the 2010 HNS Convention into Canadian Law. It was noted in particular that proposed reporting regulations were expected to come into force on 1 January 2017 and the first report from receivers for the 2017 calendar year would be due by 28 February 2018. It was also noted that Transport Canada was in the process of building an electronic reporting system.

5.1.10 It was further noted that an Act implementing the HNS Convention in Denmark was adopted by its Parliament in 2013, that reporting requirements were already in force, and other provisions would enter into force simultaneously with the HNS Convention. It was also noted that the order on the reporting obligation of receivers of bulk HNS came into force in Denmark in 2015 retroactive to 2014.

5.1.11 It was noted that Norway had also passed legislation to implement the HNS Convention in May 2015 and that the provision on reporting requirements as well as regulations to implement the reporting obligation had also entered into force. It was noted that the first reporting requirement will be on 15 March 2017 for contributing cargo received in the calendar year 2016.

5.1.12 Mr Marier thanked the Secretariat and the Members of the Correspondence Group for their support in developing the HNS brochure and stated that he looked forward to working with them and all delegations on the next steps towards entry into force of the 2010 HNS Convention.

Debate

5.1.13 One delegation expressed its appreciation to Canada for its efforts in coordinating the work of the Correspondence Group and in hosting the recent workshop in Montreal. That delegation, recognised the importance of the early entry into force of the 2010 HNS Convention as it covered important gaps in the international compensation regime. However, that delegation reminded the Administrative Council that many stakeholders were involved, who would also have to recognise the need for the regime before it can enter into force. It also emphasised the importance of systems being in place to assist potential Member States with the reporting of receipts of contributing cargo and also the management of contributions. That delegation encouraged those States who are progressing towards ratification to continue to act as pathfinders and share within IOPC Funds' meetings the methods and systems developed by them to effectively implement the Convention nationally.

5.1.14 Another delegation also expressed its appreciation to the Secretariat and the Correspondence Group for the work undertaken and confirmed its support for the continued efforts to facilitate the early entry into force of the 2010 HNS Convention, in particular with regards to the preparation of the incident scenarios and draft Resolution.

6 Financial policies and procedures

6.1	**Draft resolutions in respect of outstanding oil reports and outstanding contributions Document IOPC/APR16/6/1**	**92AC**		**SA**

6.1.1 This document was introduced by Mr Jerry Rysanek, Chairman of the Audit Body. He recalled that the Audit Body had presented an evaluation of the effectiveness of policy measures on outstanding oil reports and outstanding contributions to the governing bodies at their October 2014 sessions. He further recalled that the outcome of the discussion on that evaluation had been the decision set out in paragraph 1.3 of the Audit Body's document IOPC/APR16/6/1. He noted that this decision had served as the basis on which the Audit Body had been instructed to proceed with its subsequent work,

including the development of two draft Resolutions that were being presented to the governing bodies for consideration and adoption at the present sessions.

6.1.2 Mr Rysanek further noted that the majority of the work on the development of the two draft Resolutions had been carried out by Mr Makoto Harunari and Mr José Luis Herrera, two members of the Audit Body, with the valuable contribution of Dr Rosalie Balkin, former Assistant Secretary-General and Director of Legal Affairs and External Relations Division of IMO. He noted that Mr Harunari would present the draft Resolution in respect of the 1992 Fund (Annex I to the Audit Body's document) and Mr Herrera would present the draft Resolution for the Supplementary Fund (Annex II to the Audit Body's document).

6.1.3 Mr Harunari drew the attention of the governing bodies to a drafting point which required correction (in the English version of the document only) in Annex I, paragraph 7 of the preamble, starting with the words 'Recalling the decision taken…', where the word 'liability' in the penultimate line should be replaced by 'admissibility'.

6.1.4 Mr Harunari then drew the attention of the governing bodies to the overview of the various preamble and operative paragraphs in the draft Resolutions as set out in paragraph 2.4 of the document and how they corresponded to the instructions given to the Audit Body. He recalled that the governing bodies had expressed their intention to seek compensation in case of outstanding oil reports or contributions. However, this objective had only been covered in part, mainly in paragraph 5 of the preamble that made it clear that State Parties in breach of their obligations bore a responsibility to the 1992 Fund under public international law. He noted that, regarding the intention of Member States to seek compensation from a Member State in cases of outstanding oil reports and contributions, as indicated in paragraph 2.5 of the document, the Audit Body maintained its view, as presented to the governing bodies at their October 2013 sessions, that such an action may prove to be difficult due to issues of jurisdiction and State immunity. He noted that, consequently, no provision for such action had been included in either of the draft Resolutions.

6.1.5 Mr Harunari further noted that the focal point of the instructions of the governing bodies had been the existing policy on outstanding oil reports as adopted in October 2008 (as contained in 92Fund/Circ.63) (2008 Policy) and its extension to outstanding contributions and, to that effect, the Audit Body had included specific provisions in the draft Resolution as follows:

- In operative paragraph 8, the 2008 Policy would continue to apply in case of a breach of a State party to submit oil reports for two or more years.
- In operative paragraph 9, the 2008 Policy would apply in cases of a breach of a State party to take measures to ensure that contributors paid contributions that had been outstanding for two or more years.
- In support of these two provisions on the application of the 2008 Policy, a number of provisions had been included in operative paragraph 7 that would require the Director to take certain steps and fully inform the 1992 Fund Assembly so that it had all the facts in order to determine if a State was in a breach under either of the two scenarios.

6.1.6 Mr Harunari further noted that, in addition, the Audit Body had also formulated other incentives to encourage Member States to meet their obligations under the 1992 Fund Convention, as set out in operative paragraph 10, whereby if a State failed to meet its obligations in respect of outstanding oil reports or contributions, such a State would not be able to nominate candidates for election to the Audit Body, nor will that State be able to stand for election to the 1992 Fund Executive Committee. He noted that these incentives were inspired by the existing 1992 Fund Resolution N°5 that enabled the 1992 Fund Assembly to take into account whether and to what extent any State had outstanding reports when electing Member States of the Executive Committee.

6.1.7 Mr Herrera introduced the draft Resolution relating to the Supplementary Fund which he pointed out contained several provisions that were similar to those in the draft 1992 Fund Resolution with one notable difference. He noted that, as indicated in paragraph 2.3 of the Audit Body document, the draft Resolution for the Supplementary Fund, just like the draft Resolution for the 1992 Fund, also contained

a provision for the application of the 2008 Policy in case of a breach by a State Party to take measures to ensure that contributors paid contributions that had been outstanding for two or more years. He noted, however, that there was no provision concerning outstanding oil reports as that issue was already dealt with in Article 15 of the Supplementary Fund Protocol, and therefore there was no need to address this issue in the draft Resolution.

6.1.8 Mr Herrera noted that the draft Resolutions presented by the Audit Body were intended to replace existing 1992 Fund Resolution N°11 and Supplementary Fund Resolution N°2.

6.1.9 Mr Herrera noted, in concluding, that if the draft Resolutions were adopted by the 1992 Fund Assembly and the Supplementary Fund Assembly respectively and, if the governing bodies so decided, the Audit Body would monitor the effectiveness of these Resolutions and would report on its findings at future sessions of the governing bodies.

Debate

Statement by the delegation of Marshall Islands

6.1.10 The delegation of Marshall Islands made the following statement:

> 'Thank you Mr Chairman.
>
> We express our gratitude to the Audit Body for their work on this important topic, and their efforts in preparing document IOPC/APR16/6/1.
>
> We are keenly aware of the problems created by late or non-submission of oil reports, and the late or non-payment of contributions. We welcome the exploration of methods to increase Member States' and receivers' compliance with the 1992 Fund Convention, which is the one Convention this delegation is concerned with at this point, since the Marshall Islands is not a party to the Supplementary Fund Protocol. This delegation has in many occasions opposed proposals that are not supported by the text of the Convention, and will in this case do the same. Given that neither the CLC nor the 1992 Fund Convention have language that permits deferment of payment of valid claims, we are unable to lend our support to the Audit Body's document, and the draft Resolution in its Annex I, regarding the 1992 Fund.
>
> More generally, this delegation notes the suggestion by the Audit Body in this document and its predecessor, submitted to the October 2014 sessions of the governing bodies of the IOPC Funds, that withholding payments in circumstances not contemplated by the Conventions is, nevertheless, somehow supported by the so called 'Draft Articles of State Responsibility for Internationally Wrongful Acts'. This suggestion raises an issue that we must address. This delegation is not prepared to elevate the 'Draft Articles of State Responsibility for Internationally Wrongful Acts' to the category of international law. Said Draft Articles are that: a draft, and a draft whose principles cannot readily be applied to the legal relationships existing between flag States, the Fund, receivers, and claimants. Consequently, the Marshall Islands does not agree to be bound by said Draft Articles, and does not agree to any practices that may be derived from the application of those Draft Articles.'

6.1.11 All the other delegations that spoke acknowledged that the Audit Body had completed a very challenging task as the submission of oil reports and the payment of contributions were inseparable cornerstones of the international compensation regime.

6.1.12 One delegation wished we did not need such Resolutions but felt that they were inevitable to encourage Member States to submit their oil reports and for their contributors to pay their contributions. Another delegation shared that view and noted that with rights came obligations and these Resolutions were a good way forward to addressing this issue.

6.1.13 One delegation, a Member State of the Supplementary Fund, drew attention to the fact that the Supplementary Fund Protocol already contained a provision relating to oil reporting obligations.

6.1.14 One delegation expressed its view that Resolutions were voluntary in nature and, in practical terms, they should not contain binding language. The Chairman of the Audit Body responded that the Audit Body had been given instructions by the governing bodies to address the issue in the form of a Resolution and that the terminology used in the Resolutions was consistent with the measures that needed to be taken. The Chairman of the 1992 Fund Administrative Council recalled that the Audit Body had been assisted by Dr Balkin so the terminology used should be in accordance with other Resolutions approved by the governing bodies.

1992 Fund Administrative Council Decision

6.1.15 The 1992 Fund Administrative Council decided to adopt the draft Resolution set out in Annex III.

Supplementary Fund Assembly Decision

6.1.16 The Supplementary Fund Assembly decided to adopt the draft Resolution set out in Annex IV.

6.2	**Amendment to the oil reporting form—The issue of oil discharged into permanently or semi-permanently anchored vessels** **Documents IOPC/APR16/6/2 and IOPC/APR16/6/2/Corr.1**	**92AC**		**SA**

6.2.1 The 1992 Fund Administrative Council and Supplementary Fund Assembly took note of document IOPC/APR16/6/2 and of document IOPC/APR16/6/2/Corr.1 containing a proposal to amend the oil reporting form.

6.2.2 The governing bodies recalled that at its October 2015 session, the 1992 Fund Administrative Council had decided to reverse the Assembly's 2006 decision that oil discharged into 'permanently or semi-permanently' anchored vessels engaged in ship-to-ship (STS) operations should qualify as contributing oil for the purpose of Article 10 of the 1992 Fund Convention and to discard the concept of craft 'permanently or semi-permanently' at anchor.

6.2.3 The Director recommended that the text of the form for reporting receipts of contributing oil be amended, as set out in the Annex to document IOPC/APR16/6/2/Corr.1, to reflect the October 2015 decision of the Administrative Council. He also recommended that, for practical reasons, the amendment should take effect from 1 January 2017.

1992 Fund Administrative Council and Supplementary Fund Assembly Decisions

6.2.4 The 1992 Fund Administrative Council and Supplementary Fund Assembly decided to amend the text of the form for reporting receipts of contributing oil as contained in the Annex of document IOPC/APR/16/6/2/Corr.1. The governing bodies also decided that the amendment to the report on receipts of contributing oil should take effect from 1 January 2017.

7 Secretariat and administrative matters

7.1	**Relocation of the IOPC Funds' office premises** **Document IOPC/APR16/7/1**	**92AC**		

7.1.1 The 1992 Fund Administrative Council noted the information contained in document IOPC/APR16/7/1. It recalled that, at its October 2015 session, the 1992 Fund Administrative Council had noted that the Secretary-General of IMO, after discussions and meetings between representatives of IMO, the United Kingdom Government and the IOPC Funds, had confirmed IMO's agreement in principle to accommodate the IOPC Funds' Secretariat in the IMO Headquarters building from June 2016 onwards on the understanding that no costs would be incurred by IMO. It further recalled that, pending further discussions with the IMO Secretariat in relation to the exact size and location of space available to the IOPC Funds, and taking into account the preference expressed by the United Kingdom Government to relocate the IOPC Funds' offices to the IMO Headquarters building, the Director had

considered that a relocation of the IOPC Funds to the IMO Headquarters building would be a pragmatic and mutually agreeable solution to all.

7.1.2 The 1992 Fund Administrative Council noted that on 15 February 2016, the terms of an underlease between IMO and the IOPC Funds had been agreed and the underlease had been signed by the Secretary-General of IMO and the Director of the IOPC Funds. It further noted that the underlease, the key conditions of which were set out in paragraph 2.3 of the document, had entered into force on 1 March 2016 and would expire on 25 October 2032. It also noted that notice had been served on the current landlord of Portland House, terminating the lease on 24 August 2016 and that it was anticipated that the move from Portland House to the IMO Headquarters building would take place during the week of 18 July 2016 with the Secretariat in operation from its new location from Monday 25 July 2016.

7.1.3 With respect to the estimated cost of the relocation, as set out in paragraph 2.11 of the document, the 1992 Fund Administrative Council noted that the Director hoped to be able to confine the costs to the budgetary provisions approved for the years 2014–2016 and to meet any excess due to the unforeseen cost of relocation of IMO staff and services from the space to be occupied by the IOPC Funds' Secretariat from the overall Secretariat administrative budget for 2016. In this respect, the Administrative Council noted that the Director would provide a final breakdown of the relocation cost at the October 2016 sessions of the governing bodies.

7.1.4 The Administrative Council also noted the Director's appreciation, not only to the Secretary-General of IMO and his staff for their continued assistance and cooperation in respect of the logistical arrangements related to the move, but also to the staff of the Funds' Secretariat, all whom had contributed to the design of the new offices and had shown both flexibility and willingness to accept change to the working environment.

7.1.5 On behalf of the Secretary-General of IMO, Mr Frederick Kenney, Director, Legal Affairs and External Relations Division, expressed his appreciation to the IOPC Funds' Secretariat for its collaboration in developing the underlease and to the United Kingdom Government for its support. He noted that IMO was looking forward to having the IOPC Funds' Secretariat back under the same roof.

7.2	**Amendments to Internal Regulations—Due date of contributions as a result of late receipt of oil reports Document IOPC/APR16/7/2/Rev.1**	**92AC**		**SA**

7.2.1 The 1992 Fund Administrative Council and Supplementary Fund Assembly noted the information contained in document IOPC/APR/16/7/2/Rev.1 and agreed that the Internal Regulations should be strengthened to cover instances where oil reports are submitted late and the subsequent invoice has a later due date.

1992 Fund Administrative Council and Supplementary Fund Assembly Decision

7.2.2 The governing bodies decided to approve a new Internal Regulation 3.6*bis* to be inserted into both the 1992 Fund and Supplementary Fund Internal Regulations as follows:

3.5 The Director shall promptly issue to every person liable to pay contributions under Articles 10, 12 and 14 of the 1992 Fund Convention an invoice in respect of the sums for which he or she is liable. A copy of each invoice shall also be sent to the State within whose territory the relevant quantities of contributing oil were received. An invoice shall state:

(a) the amount of the contribution due and the currency in which payment shall be made;
(b) the data on the basis of which the amount of contribution has been calculated;
(c) the date by which payment is due;
(d) the bank account to which payment shall be made;
(e) that interest is payable in respect of overdue annual contributions;
(f) any other relevant information.

If the payment due is less than 30 SDRs, the amount shall be waived and no invoice shall be issued in respect of the person in question.

3.6 Payment of annual contributions shall be due on 1 March of the year following that in which the Assembly decides on the annual contributions, unless the Assembly decides otherwise.

3.6*bis* Notwithstanding the due date prescribed in Internal Regulation 3.6, in instances where an invoice is issued at a later date than the invoices issued as per Internal Regulation 3.5, the due date for such an invoice shall be two months from the date it was issued.

7.3	**Appointment of members and substitute members of the Appeals Board** **Document IOPC/APR16/7/3**	**92AC**		

7.3.1 The 1992 Fund Administrative Council took note of the information contained in document IOPC/APR16/7/3.

7.3.2 It noted that since the appointment of the Appeals Board in October 2015, the Director had been informed that Ms Susana Garduño Arias had left her post in London and thus could no longer serve as a substitute member of the Appeals Board. It further noted that her successor, Ms Ana Aureny Aguirre O. Sunza, had kindly accepted to serve as a substitute member of the Appeals Board until the October 2017 session of the 1992 Fund Assembly in accordance with Section II, paragraph (c) of the Statute of the Appeals Board.

7.3.3 The 1992 Fund Administrative Council thus noted that the new composition of the Appeals Board was as follows:

Members		Substitute Members	
Mme Nicole Taillefer	(France)	Dr Christos Atalianis	(Cyprus)
Mr Jotaro Horiuchi	(Japan)	Ms Ana Aureny Aguirre O. Sunza	(Mexico)
Sir Michael Wood	(United Kingdom)	Mr Park Jun-Young	(Republic of Korea)

7.3.4 The 1992 Fund Administrative Council expressed their appreciation to the members and substitute members of the Appeals Board.

7.4	**Modification of the IOPC Funds' logo** **Document IOPC/APR16/7/4**	**92AC**		**SA**

7.4.1 The 1992 Fund Administrative Council and the Supplementary Fund Assembly noted the information contained in document IOPC/APR16/7/4 and the Director's proposal that the existing logo of the IOPC Funds should be modified to incorporate the name of the organisation.

7.4.2 The governing bodies considered four modified versions of the logo as contained at the Annex to document IOPC/APR16/7/4. It was noted that, while accepting that it is very subjective, the Director was of the view that option one provides the best improvement on the existing logo. It was also noted that the other options explored, which incorporated an indication of the field in which the organisation works, appeared, in the Director's view, to be too detailed, potentially making them less versatile for use as a logo.

1992 Fund Administrative Council and Supplementary Fund Assembly Decisions

7.4.3 Having considered the four options presented, the 1992 Fund Administrative Council and Supplementary Fund Assembly decided to adopt option one of the modified logos, contained at the Annex to document IOPC/APR16/7/4, to be used by both the 1992 Fund and Supplementary Fund.

7.5	**Proposal for amendments to print procedures for IOPC Funds' meeting documents Document IOPC/APR16/7/5**	**92AC**		**SA**

7.5.1 The 1992 Fund Administrative Council and Supplementary Fund Assembly took note of document IOPC/APR16/7/5 containing information relating to proposed amendments to print procedures for IOPC Funds' meeting documents.

7.5.2 It was also noted that the Secretariat had to date printed all of its meeting documents in the three working languages, making them available in hard copy for each delegation at the sessions of the governing bodies. It was further noted that the current practice was resource-intensive and that a significant surplus of meeting documents had to be disposed of after each meeting.

7.5.3 It was further noted that the Secretariat had looked into various options that would improve the IOPC Funds' document production process and align itself with practices of other intergovernmental organisations such as IMO, which had changed its procedure in 2010 resulting in IMO ceasing to print documents for meetings.

7.5.4 The governing bodies noted that after having considered all the facts, the Director recommended that the Secretariat should cease printing meeting documents as from the October 2016 sessions of the governing bodies. They also noted that it should also cease using different coloured headed paper and apply the same green logo in the header of documents across all three languages with an indication of the documents' language, in order to further simplify the production process. They further noted that, should it be decided to cease printing meeting documents for the sessions of the governing bodies, working papers and draft Records of Decisions will continue to be printed and made available during the sessions of the governing bodies. Delegations wishing to have access to meeting documents at the sessions of the governing bodies would be able to request a limited number of copies of meeting documents, under exceptional circumstances.

7.5.5 In response to an enquiry from a delegation regarding the possibility of aligning the meeting registration system with that of IMO, the Secretariat confirmed that it would be happy to look closer at the system IMO has in place to see whether improvements can be made. The Secretariat pointed out that certain features to facilitate registration of the current system were already in place but agreed to take on board suggestions from Member States to improve the current registration system.

1992 Fund Administrative Council and Supplementary Fund Assembly Decisions

7.5.6 The 1992 Fund Administrative Council and the Supplementary Fund Assembly agreed with the Secretariat's proposed amendments to the print procedures and decided to cease printing meeting documents for the sessions of the governing bodies.

7.5.7 The governing bodies also agreed to cease using different coloured logos on meeting documents according to the language in which they are printed.

8 Other Matters

8.1	**Any other business**	**92AC**	**92EC**	**SA**

No items were raised under this agenda item.

9 Adoption of the Record of Decisions

1992 Fund Administrative Council, 1992 Fund Executive Committee and Supplementary Fund Assembly Decision

The draft Record of Decisions of the April 2016 sessions of the IOPC Funds' governing bodies, as contained in documents IOPC/APR16/9/WP.1 and IOPC/APR16/9/WP.1/1, was adopted, subject to certain amendments.

* * *

ANNEX I

1.1 Member States present at the sessions

		1992 Fund Assembly	1992 Fund Executive Committee	Supplementary Fund Assembly
1	Algeria	●	●	
2	Angola	●		
3	Australia	●		●
4	Bahamas	●	●	
5	Belgium	●		●
6	Bulgaria	●		
7	Cameroon	●	●	
8	Canada	●	●	●
9	China[<1>]	●		
10	Colombia	●		
11	Côte d'Ivoire	●		
12	Cyprus	●		
13	Denmark	●		●
14	Ecuador	●		
15	Finland	●		●
16	France	●	●	●
17	Germany	●		●
18	Ghana	●		
19	Greece	●		●
20	Islamic Republic of Iran	●		
21	Italy	●		●
22	Japan	●	●	●
23	Liberia	●		
24	Madagascar	●		
25	Malaysia	●		
26	Malta	●		
27	Marshall Islands	●	●	
28	Mexico	●	●	
29	Monaco	●		
30	Morocco	●		●
31	Mozambique	●		
32	Netherlands	●		●
33	New Zealand	●	●	
34	Nicaragua	●		
35	Nigeria	●		
36	Norway	●		●
37	Oman	●		

[<1>] The 1992 Fund Convention applies to the Hong Kong Special Administrative Region only.

		1992 Fund Assembly	1992 Fund Executive Committee	Supplementary Fund Assembly
38	Panama	●		
39	Papua New Guinea	●		
40	Philippines	●		
41	Poland	●		●
42	Portugal	●		●
43	Qatar	●		
44	Republic of Korea	●		●
45	Russian Federation	●		
46	Singapore	●	●	
47	Spain	●	●	●
48	Slovakia	●		●
49	Sri Lanka	●		
50	Sweden	●	●	●
51	Trinidad and Tobago	●		
52	Turkey	●	●	●
53	United Arab Emirates	●		
54	United Kingdom	●	●	●
55	Uruguay	●		
56	Venezuela (Bolivarian Republic of)	●		

1.2 States represented as observers at the sessions

		1992 Fund	Supplementary Fund
1	Bolivia (Plurinational State of)	●	●
2	Brazil	●	●
3	Peru	●	●
4	Saudi Arabia	●	●
5	Ukraine	●	●

1.3 Intergovernmental organisations represented at the sessions

		1992 Fund	Supplementary Fund
1	International Maritime Organization (IMO)	●	●

1.4 International non-governmental organisations represented at the sessions

		1992 Fund	Supplementary Fund
1	BIMCO	●	●
2	Comité Maritime International (CMI)	●	●
3	Conference of Peripheral Maritime Regions (CPMR)	●	●
4	International Association of Classification Societies Ltd (IACS)	●	●
5	International Association of Independent Tanker Owners (INTERTANKO)	●	●
6	International Chamber of Shipping (ICS)	●	●
7	International Group of P&I Associations	●	●
8	International Spill Control Organization (ISCO)	●	●
9	International Tanker Owners Pollution Federation Ltd (ITOPF)	●	●
10	International Union of Marine Insurance (IUMI)	●	●
11	Oil Companies International Marine Forum (OCIMF)	●	●
12	World LP Gas Association (WLPGA)	●	●

* * *

ANNEX II

GUIDANCE DOCUMENT FOR MEMBER STATES

CONSIDERATION OF THE DEFINITION OF 'SHIP'

PREFACE

This guidance document provides a general guide to the consideration of the definition of 'ship' under Article I(1) of the 1992 Civil Liability Convention (1992 CLC).

This document may assist in determining whether compensation should, in principle, be paid following an oil spill incident.

This document reflects the decision taken by Member States of the International Oil Pollution Compensation Fund, 1992 (1992 Fund) at the October 2015 session of the 1992 Fund Administrative Council (document IOPC/OCT15/11/1, paragraph 4.3.23), and should not be seen as an authoritative interpretation of the relevant international Conventions.

THE DEFINITION OF 'SHIP'

1 What has been agreed in respect of the issue regarding the definition of 'ship'

1.1 In October 2015, the 1992 Fund Administrative Council, agreed to accept the recommendations of the seventh intersessional Working Group regarding the illustrative list of vessels which fall clearly within or outside the definition of 'ship' under Article I(1) of the 1992 Civil Liability Convention (1992 CLC).

1.2 The Administrative Council noted that the Working Group had emphasised that the list is not exhaustive and is only illustrative of the craft which clearly fall within the definition of 'ship' or clearly fall outside the definition, and that other craft with similar characteristics may fall within or outside the definition depending on the circumstances, which are to be considered on a case-by-case basis.

2 The 'hybrid approach'

2.1 Due to the difficulties that might arise in attempting to classify certain categories of vessels or scenarios as within or outside the definition of 'ship' under Article I(1) of the 1992 CLC, the 1992 Fund Administrative Council decided to adopt a 'hybrid approach' whereby Member States would rely on the agreed illustrative list of vessels which fall clearly within or outside the definitions where possible, and use the concept of the 'maritime transport chain' as an interpretive tool for addressing those 'grey areas' or situations where it was not clear if the craft was a 'ship' or not.

3 Illustrative list of vessels falling clearly within the definition of 'ship'

3.1 The list of vessels which fall clearly within the definition of 'ship' is as follows:

1) A seagoing vessel or seaborne craft constructed or adapted for the carriage of oil in bulk as cargo when it is actually carrying oil in bulk as cargo;

2) A seagoing vessel or seaborne craft in ballast following a voyage carrying oil with residue of oil onboard;

3) A craft[<1>] carrying oil in bulk as cargo being towed (or temporarily at anchor for purposes incidental to ordinary navigation or force majeure or distress);

4) A ship capable of carrying oil and other cargoes (i.e. an Oil Bulk Ore carrier (OBO)) when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues;

5) Offshore craft[<2>] that have their own independent motive power, steering equipment for seagoing navigation and seafarer onboard so as to be employed either as storage units or carriage of oil in bulk as cargo and that have the element of carriage of oil and undertaking a voyage; and

6) Craft that are originally constructed or adapted (or capable of being operated) as vessels for carriage of oil, but later converted to FSOs, with capacity to navigate at

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[<1>] This could be a barge or an offshore craft.

[<2>] The term 'offshore craft' could be a Floating Drilling Production Storage and Offloading unit (FDPSO), Floating Production Storage and Offloading unit (FPSO), Floating Storage and Offloading unit (FSO) or Floating Storage Unit (FSU) whether purpose-built, or converted or adapted from seagoing vessels constructed for the carriage of oil.

sea under their own power and steering retained and with seafarer onboard and that have the element of carriage of oil and undertaking a voyage.

3.2 The owner of a vessel which falls clearly within the definition of 'ship', and which carries more than 2 000 tons of oil in bulk as cargo, is required to maintain insurance or other financial security, to cover his liability for pollution damage under the 1992 CLC, in accordance with Article VII(1) of the 1992 CLC.

3.3 Similarly, a Contracting State shall issue a certificate to vessels falling within the definition of 'ship' in accordance with Article VII(2) of the 1992 CLC.

4 Illustrative list of craft which clearly fall outside the definition of 'ship'

4.1 The list of vessels which clearly do not fall within the definition of 'ship' is as follows:

1) Barges certified or classed only for use on inland water ways;

2) Vessels which are not constructed or adapted for the carriage of oil in bulk as cargo. Such categories include 'non-tanker' vessels, such as:

(a) Container vessels;
(b) Cruise Ships;
(c) Tugs;
(d) Dredgers;
(e) General cargo vessels;
(f) Diving support vessels;
(g) Bulk carriers;
(h) Passenger vessels;
(i) Car carriers;
(j) Fishing vessels; and
(k) Ferries.

3) Vessels or craft involved in:

(a) Exploration, for example jack-up rigs or Mobile Offshore Production Units (a jack-up platform whether or not it carries oil, gas and water separation equipment); or

(b) The production or processing of oil, for example Drill-ships, FDPSOs, and FPSOs, including separation of water and gas, and its management.

4.2 Vessels or craft which do not fall within the definition of 'ship', are not required to maintain insurance or other financial security, to cover liability for pollution damage under the 1992 CLC, in accordance with Article VII(1) of the 1992 CLC.

4.3 Similarly, there is no requirement for the Contracting State to issue a certificate attesting that insurance or other financial security is in place in accordance with the provisions of the 1992 CLC, in respect of those vessel types which clearly do not fall within the definition of 'ship'.

5 Maritime Transport Chain

5.1 Where in a situation it is not clear whether a vessel falls within or outside the definition of 'ship' from the lists above, the situation will be solved by the decision of the 1992 Fund governing bodies on a case-by-case basis, using the maritime transport chain, as an interpretive tool.

5.2 The concept of the maritime transport chain is designed to reflect the realisation by the maritime community of the dangers of pollution created by the international maritime carriage of oil in bulk as cargo.

5.3 The maritime transport chain commences after the loading of oil and concludes when the oil is finally discharged into a port or terminal installation as defined in Article 1.8 of the 1992 Fund Convention. This maritime transport chain includes maritime operations or transportation of oil. Maritime operations include ship-to-ship (STS) operations; periods of waiting; storage (excluding those without navigational capability)[<3>]; and anchoring pending final delivery to a port, terminal installation or final consumer/recipient)[<4>].

5.4 Examples of the maritime transport chain appear at the Annex.

* * *

[<3>] The maritime transport chain terminates at storage facilities without navigational capability and another maritime transport chain begins when the oil is loaded from such storage facilities to a vessel.

[<4>] It could be fuel oil delivered from a ship that is storing it for transfer to a ship that will use it for its engines. In this case, the maritime transport chain would finalise when the oil is transferred to the ship that uses it.

ANNEX

EXAMPLES OF WHEN THE MARITIME TRANSPORT CHAIN COMMENCES AND CONCLUDES

Example 1- loading oil from an onshore source

1.1 In the case of oil produced on land, the maritime transport chain commences when the oil is loaded as bulk cargo into a seagoing or seaborne craft and ends when the oil is discharged in a port or terminal installation in the territory of a Member State.

1.2 If that oil was then to be reloaded into another vessel for transportation, either internally (cabotage) within the Member State's territorial waters or exclusive economic zone (or equivalent), or outside of the territorial waters or exclusive economic zone (or equivalent), this would amount to a new maritime transport chain.

Example 2 – loading oil from a unit which received oil from an offshore source

1.3 A logical explanation of when the maritime transport chain commences for scenarios where oil is produced offshore, is when oil is loaded into a vessel other than the one which received the oil directly from the subsea well to which it was connected.

1.4 Typically, such scenarios would include:

A seagoing vessel or seaborne craft loading oil from:

(i) Another seagoing or seaborne craft in a typical ship-to-ship (STS) transfer operation (This item would only belong in this list if the seagoing/seaborne craft that was discharging oil had received that oil directly from a well) ;
(ii) FPSO;
(iii) FDPSO;
(iv) Jack-up rigs;
(v) Mobile offshore production units; or
(vi) FSO

1.5 In the case of the FSO, if it was a purpose-built FSO or craft as mentioned in paragraph 3.1 (5) or (6) of the Guidance document, the question would be whether the FSO or the craft was also carrying oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operate. If so, the FSO itself would also be classed as a ship under the 1992 Civil Liability Convention (1992 CLC), as well as the receiving vessel. However, the FSO would fall outside the scope of the 1992 Conventions when it leaves the offshore field for operational reasons or simply to avoid bad weather.

1.6 For other cases involving such offshore craft, specifically FPSOs and FDPSO units, the vessels are not within the maritime transport chain covered by the compensation regimes, since the activities of exploration, drilling, production or processing, are outside the scope of the compensation regime.

Example 3 – loading oil from a mooring or platform which received oil from an offshore source

1.7 There is a second situation where oil is produced offshore, where it could be said that the maritime transport chain commences when the oil is loaded into a seagoing or seaborne craft constructed or adapted for the carriage of oil in bulk. Much of the offshore oil produced is brought to the surface from subsea wells via pipes ('risers') leading from the seabed, up to a fixed mooring buoy or platform, rather than directly to a vessel. The oil is then pumped into a tanker, or series of tankers, FSO or FPSO, which connect to the fixed mooring buoy or platform.

1.8 In most cases a vessel, (typically a tanker) would attach to the platform or mooring, load the oil cargo, then depart on its voyage laden with oil, in which case, once the tanker had loaded the cargo, it would fall within the definition of 'ship' contained within Article I(1) of the 1992 CLC. It is submitted that if an FSO which has its own independent motive power, steering equipment for seagoing navigation and seafarer with certification of competency on board, attached to the platform or mooring buoy, loaded the oil cargo, then departed on its voyage laden with oil, only once the FSO had loaded the cargo, would it fall within the definition of 'ship' contained within Article I(1) of the 1992 CLC.

1.9 However, in some cases, an FSO that has its own independent motive power, steering equipment for seagoing navigation and seafarer with certification of competency on board and the appropriate connection device to attach to the platform or mooring, would attach to the mooring buoy or platform, then pump the oil collected onto a vessel (typically a tanker). In this case involving an FSO and a vessel, one maritime transport chain would commence when the oil was transferred onto the vessel, and if the FSO disconnected from the platform or mooring buoy, a separate maritime transport chain would commence in respect of that operation involving such an FSO.

Points to note

1.10 In Examples 1-3 above, the maritime transport chain would commence, irrespective of whether or not the cargo had a known destination at the time of loading[<5>].

1.11 Furthermore, even if the final destination of the oil cargo remains unknown, and as a consequence, the carrying vessel is directed to anchor at a location for an extended period of time, the carrying vessel or seaborne craft nevertheless remains within the maritime transport chain until the cargo is finally delivered.

1.12 It is important to note that all the examples are based on the following assumptions:

(a) the vessel involved is laden with 'oil' as defined in Article I(5) of the 1992 CLC; and

(b) the 'maritime transport chain' includes maritime operations or transportation of oil after loading, until final discharge into a port or terminal installation, as defined in Article 1.8 of the 1992 Fund Convention. These maritime operations include STS operations; periods of waiting; storage (excluding those without navigational capability)[<6>]; and anchoring pending final delivery to a port, terminal installation or final consumer/recipient[<7>].

* * *

[<5>] In some cases, cargoes are laden purely for arbitrage or speculative purposes, awaiting an increase in the oil price, and subsequently the ownership of the oil and its final destination may change many times before final delivery.

[<6>] The maritime transport chain terminates at storage facilities without navigational capability and another maritime transport chain begins when the oil is loaded from such storage facilities to a vessel.

[<7>] It could be fuel oil delivered from a ship that is storing it for transfer to a ship that will use it for its engines. In this case, the maritime transport chain would finalise when the oil is transferred to the ship that uses it.

ANNEX III

1992 Fund Resolution N°12

Adopted on 27 April 2016

Measures in respect of outstanding oil reports and outstanding contributions

THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND, 1992 (1992 Fund),

RECALLING that the International Fund for Compensation for Oil Pollution Damage, 1992 (the 1992 Fund) was established by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (the 1992 Fund Convention) in order to ensure that adequate compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of oil from ships,

NOTING the obligation of States Parties pursuant to Article 15 of the 1992 Fund Convention to communicate to the Director of the Fund (the Director), at a time and in the manner provided in the Internal Regulations, the name and address of any person who in respect of those States is liable to contribute to the 1992 Fund pursuant to Article 10 of the 1992 Fund Convention, as well as data on the relevant quantities of contributing oil received by any such person during the preceding calendar year (oil reports),

MINDFUL, in order to secure adequate compensation, of the need to ensure payment of annual contributions to the 1992 Fund as required by Article 10 of the 1992 Fund Convention,

NOTING also the duty of States Parties pursuant to Article 13.2 of the 1992 Fund Convention to ensure that any obligation to contribute to the 1992 Fund arising under the Convention in respect of oil received within the territory of those States is fulfilled and to this end to take appropriate measures under their law,

AWARE THAT, where States Parties are in breach of their obligations under Article 13.2 or Article 15 of the 1992 Fund Convention, then those States Parties bear a responsibility to the 1992 Fund under public international law,

BEARING IN MIND that the 1992 Fund cannot carry out its mandate nor operate effectively unless accurate oil reports and contributions are received in a timely manner,

RECALLING the decision taken in October 2008 by the 1992 Fund Assembly at its 13th session to adopt a policy whereby, in the event that a State is two or more oil reports in arrears, any claim submitted by the Administration of that State or a public authority working directly on the response or recovery from the pollution incident on behalf of that State will be assessed for admissibility but payment will be deferred until the reporting deficiency is rectified,

RECALLING also Resolution N°11—Measures in respect of Contributions (October 2009),

1 **ENDORSES** the current efforts of the Director to follow up on arrears of oil reports and contributions;

2 **CALLS ON** all receivers of contributing oil to discharge their obligations under the 1992 Fund Convention in a timely manner;

3 **URGES** associations representing receivers of contributing oil to engage proactively in ensuring that industry members meet their obligations and to report to the Director on the measures taken in this regard;

4 **FURTHER URGES** all States Parties to fulfil their obligations under Articles 13.2, 15.1 and 15.2 of the 1992 Fund Convention, in particular, to provide oil reports in a timely and accurate manner and to ensure payment of contributions;

5 **REMINDS** States Parties of the option contained in Article 14.1 of the 1992 Fund Convention whereby a State Party may at any time declare that it assumes the obligation to make contributions to the 1992 Fund that are otherwise incumbent on persons pursuant to Article 10.1 of the Convention;

6 **REQUESTS** those State Parties which have outstanding oil reports or which have contributors that are in arrears with their payments to report to the Director on any steps they have taken to redress these situations;

7 **INSTRUCTS** the Director:

(a) in consultation with the Audit Body, to examine the reports referred to in paragraphs 4 and 6 above and to present any recommendations to the 1992 Fund Assembly;
(b) to report at each regular session of the 1992 Fund Assembly the names of those States which have not provided oil reports or which have not taken steps to ensure the timely payment of contributions; and
(c) to include in such reports an account of what actions, if any, have been taken by the States referred to in sub-paragraph (b) in the previous 12 month period in response to any request made by the Director to rectify the situation;

8 **DECIDES** that it shall make a determination as to those States that are responsible for two or more oil reports in arrears, in which event any claim submitted by the Administration of those States, including a claim submitted by a public authority working directly on the response or recovery for the pollution incident on behalf of those States, will be assessed for admissibility, but actual payment will be deferred pending rectification of the reporting deficiency;

9 **DECIDES ALSO** that it shall make a determination as to those States that are found to be in breach of their obligations under Article 13.2 of the 1992 Fund Convention for two or more years, in which event any claim submitted by the Administration of those States, including a claim submitted by a public authority working directly on the response or recovery for the pollution incident on behalf of those States, will be assessed for admissibility, but actual payment will be deferred pending rectification of the breach;

10 **DECIDES FURTHER** that it shall make a determination as to those States that are found to be in breach of their obligations under Articles 13.2, 15.1 or 15.2 of the 1992 Fund Convention, in which event those States shall not be eligible to nominate candidates for membership of the Audit Body nor to be elected as members of the 1992 Fund Executive Committee;

11 **INSTRUCTS** the Director to develop guidelines in relation to implementation by States Parties of their obligations under Articles 13.2, 15.1 and 15.2 of the 1992 Fund Convention;

12 **DIRECTS** the Audit Body to:

(a) monitor the effectiveness of the above actions in respect of outstanding oil reports and outstanding contributions; and
(b) report to the 1992 Fund Assembly on its findings, including recommendations for further measures as may be warranted;

13 **REVOKES** Resolution N°11 of the 1992 Fund Assembly (October 2009) to the extent that it affects the 1992 Fund.

* * *

ANNEX IV

Supplementary Fund Resolution N°3
Adopted on 27 April 2016

Measures in respect of outstanding contributions

THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION SUPPLEMENTARY FUND, 2003 (Supplementary Fund),

RECALLING that the International Oil Pollution Compensation Supplementary Fund, 2003 (the Supplementary Fund) was established by the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (the Supplementary Fund Protocol) in order to ensure that victims of oil pollution damage are compensated in full for their loss or damage in cases where there is a risk that the amount of compensation available under the International Convention on Civil Liability for Oil Pollution Damage, 1992 and the International Convention on the Establishment of an International Fund for Oil Pollution Damage, 1992 (the 1992 Fund Convention) will be insufficient,

MINDFUL, in order to secure full compensation, of the need to ensure payment of annual contributions to the Supplementary Fund as required by Article 10 of the Supplementary Fund Protocol,

NOTING the duty of States Parties pursuant to Article 12.1 of the Supplementary Fund Protocol to ensure that any obligation to contribute to the Supplementary Fund arising under the Protocol in respect of oil received within the territory of those States is fulfilled and to this end to take appropriate measures under their law,

AWARE that, where States Parties are in breach of their obligations under Article 12.1 of the Supplementary Fund Protocol, then those States Parties bear a responsibility to the Supplementary Fund under public international law,

BEARING IN MIND that the Supplementary Fund cannot carry out its mandate nor operate effectively unless contributions are received in a timely manner,

RECALLING Supplementary Fund Resolution N°2—Measures in respect of Contributions (October 2009),

RECALLING FURTHER 1992 Fund Resolution N°11—Measures in respect of Contributions (October 2009) [1],

1 **ENDORSES** the current efforts of the Director of the Supplementary Fund (the Director) to follow up on arrears of contributions;

2 **CALLS ON** all receivers of contributing oil to discharge their obligations under the Supplementary Fund Protocol in a timely manner;

3 **URGES** associations representing receivers of contributing oil to engage proactively in ensuring that industry members meet their obligations and to report to the Director on the measures taken in this regard;

4 **FURTHER URGES** all States Parties to fulfil their obligations under Article 12.1 of the Supplementary Fund Protocol, in particular, to ensure payment of contributions;

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[1] It is necessary in this Resolution of the Supplementary Fund Assembly to make reference to Resolution N°11 because, as is apparent from a reading of the Record of Decisions of the governing bodies (October 2009), only Resolution N°11 was actually considered and adopted, respectively, by the governing body of each Fund.

Resolution N°11 was, after the event, and for the purposes of listing separately as a Resolution of the Supplementary Fund Assembly, renumbered and reproduced as Resolution N°2 of the Supplementary Fund Assembly.

Similar considerations apply to operative paragraph 11 below.

5 **REMINDS** States Parties of the option contained in Article 12.2 of the Supplementary Fund Protocol whereby a State Party may at any time declare that it assumes the obligation to make contributions to the Supplementary Fund that are otherwise incumbent on persons pursuant to Article 10.1 of the Protocol;

6 **REQUESTS** those State Parties which have contributors that are in arrears with their payments to report to the Director on any steps they have taken to redress the situation;

7 **INSTRUCTS** the Director:

(a) in consultation with the Audit Body, to examine the reports referred to in paragraph 6 above and to present any recommendations to the Supplementary Fund Assembly;
(b) to report at each regular session of the Supplementary Fund Assembly the names of those States which have not taken steps to ensure the timely payment of contributions; and
(c) to include in such reports an account of what actions, if any, have been taken by the States referred to in sub-paragraph (b) in the previous 12 month period in response to any request made by the Director to rectify the situation;

8 **DECIDES** that it shall make a determination as to those States that are found to be in breach of their obligations under Article 12.1 of the Supplementary Fund Protocol for two or more years, in which event any claim submitted by the Administration of those States or public authority working directly on the response or recovery for the pollution incident on behalf of those States will be assessed for admissibility, but actual payment will be deferred pending rectification of the breach;

9 **INSTRUCTS** the Director to develop guidelines in relation to implementation by States Parties of their obligations under Article 12.1 of the Supplementary Fund Protocol;

10 **DIRECTS** the Audit Body to:

(a) monitor the effectiveness of the above actions in respect of outstanding contributions; and
(b) report to the Supplementary Fund Assembly on its findings, including recommendations for further measures as may be warranted;

11 **REVOKES** Supplementary Fund Resolution N°2 and 1992 Fund Resolution N°11 (October 2009) to the extent that these Resolutions affect the Supplementary Fund.