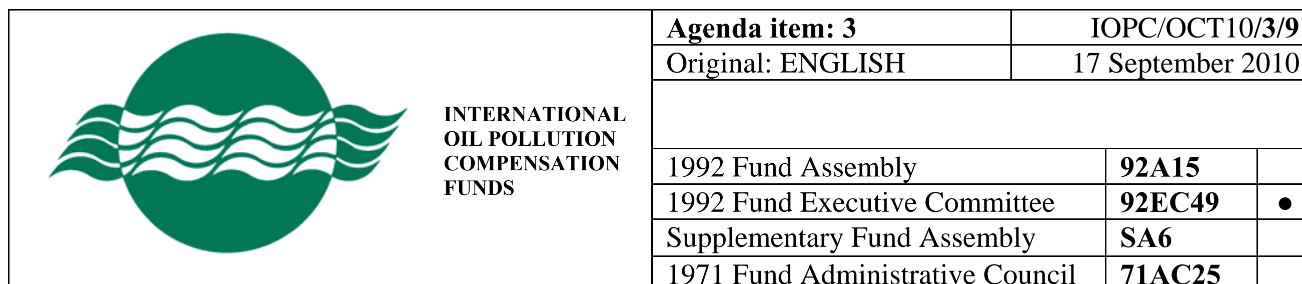


| Agenda item: 3 | IOPC/OCT10/3/9 | |
|---|---|---|
| Original: ENGLISH | 17 September 2010 | |
| 1992 Fund Assembly | 92A15 | |
| 1992 Fund Executive Committee | 92EC49 | ● |
| Supplementary Fund Assembly | SA6 | |
| 1971 Fund Administrative Council | 71AC25 | |

# INCIDENTS INVOLVING THE IOPC FUNDS – 1992 FUND

## VOLGONEFT 139

**Note by the Director**

| | |
|---|---|
| ***Objective of document:*** | To inform the 1992 Fund Executive Committee of the latest developments regarding this incident. |
| ***Summary of the incident so far:*** | On 11 November 2007, the Russian-registered tanker *Volgoneft 139* broke in two in the Kerch Strait which links the Sea of Azov and the Black Sea between the Russian Federation and Ukraine. It is believed that between 1 200 and 2 000 tonnes of fuel oil were spilled at the time of the incident. Some 250 kilometres of shoreline both in the Russian Federation and in Ukraine were affected by the oil.<br><br>The ship was owned by JSC Volgotanker which has since been declared bankrupt by the Commercial Court in Moscow. The shipowner was insured for protection and indemnity by Ingosstrakh (Russian Federation), which does not belong to the International Group of P&I Clubs. It appears that the insurance cover is limited to 3 million SDR (RUB 116.6 million) which is well below the minimum limit under the 1992 Civil Liability Convention (1992 CLC) of 4.51 million SDR. There is therefore an 'insurance gap' of some 1.5 million SDR.<br><br>In February 2008, the Arbitration Court of Saint Petersburg and Leningrad Region issued a ruling declaring that the limitation fund had been constituted by means of a letter of guarantee for 3 million SDR (RUB 116.6 million). The Court of Cassation and the Supreme Court have confirmed that decision, maintaining that Russian Courts should apply the limits as published in the Russian Official Gazette. The 1992 Fund has submitted pleadings asking the Arbitration Court to reconsider its earlier decision on the shipowner's limitation fund, on the basis that the amendments to the 1992 CLC on the increase of the shipowner's liability limit have now been officially published in the Russian Federation.<br><br>The insurer has pleaded before the Arbitration Court of Saint Petersburg and Leningrad Region the defence that the spill resulted from a natural phenomenon of an exceptional, inevitable and irresistible character and that the shipowner and his insurer are therefore not liable for the pollution damage caused by the spill. If this defence were to be successful, the 1992 Fund would be liable to pay compensation to victims of the spill from the outset. |

| | |
|---|---|
| | The Fund's experts have provisionally concluded that the storm of 11 November 2007, although it may have been irresistible in respect of the *Volgoneft 139*, was neither exceptional nor inevitable, in that there had been sufficient opportunities to avoid the vessel being exposed to the storm in the way it had been.<br><br>Claims totalling RUB 8 529.8 million have been submitted as a result of the incident. |
| ***Recent developments:*** | Substantial progress has been made in the assessment of claims, as set out in section 9. Three claimants have indicated agreement with the assessment. The Fund's experts continue the examination of the documentation provided in support of the various claims.<br><br>A hearing took place at the Arbitration Court of Saint Petersburg and Leningrad Region in August 2010, where the proceedings were divided in two.<br><br>In September 2010 hearings took place in respect of the two proceedings. One of the proceedings dealt with the 'Metodika' claim, the defence of *force majeure* by the shipowner's insurer, and the amount of the CLC limit. The Court issued a judgement rejecting the claim based on 'Metodika'. The Court also decided that the spill did not result from a natural phenomenon of an exceptional nor inevitable character and that the shipowner and his insurer were therefore liable for the pollution damage caused by the spill. The Court further decided to maintain the amount of the established shipowner's liability limitation fund at 3 million SDR. In separate proceedings, a hearing also took place in respect of all the remaining claims, where the Court decided to adjourn the proceedings until late October 2010.<br><br>The 1992 Fund will appeal against the decision to maintain the CLC limit at 3 million SDR.<br><br>The three-year anniversary of the incident is approaching, ie 11 November 2010. In light of this fact, in July 2010 letters about the time-bar issue were sent to the claimants that had not submitted their claims in court and with whom settlements had not been reached by that time. |
| ***Action to be taken:*** | 1992 Fund Executive Committee:<br><br>To take note of the information contained in this document. |

## 1 Summary of incident

| Ship | *Volgoneft 139* |
|---|---|
| Date of incident | 11.11.07 |
| Place of incident | Kerch Strait, between the Sea of Azov and the Black Sea, Russian Federation and Ukraine |
| Cause of incident | Breaking |
| Quantity of oil spilled | Between 1 200 and 2 000 tonnes of fuel oil |
| Area affected | Taman Peninsula, Tuzla Spit and Chushka Spit, Russian Federation and Ukraine |
| Flag State of ship | Russian Federation |
| Gross tonnage (GT) | 3 463 GT |
| P&I insurer | Ingosstrakh |
| P&I cover | 3 million SDR or RUB 116.6 million |
| CLC Limit | 4.51 million SDR or RUB 175.3 million |
| CLC & Fund Limit | 203 million SDR or RUB 7 892.6 million |
| STOPIA/TOPIA applicable | No |
| Claims received so far | RUB 8 529.8 million claimed |
| Claims assessed so far | RUB 117.4 million assessed |

## 2 The incident

2.1 On 11 November 2007, the Russian-registered tanker *Volgoneft 139* (3 463 GT, built in 1978) broke in two in the Kerch Strait linking the Sea of Azov and the Black Sea between the Russian Federation and Ukraine. The tanker was at anchor when a severe storm caused rough seas with heavy swell. The aft part of the vessel remained afloat and using the casualty's own engines, the captain managed to beach it on a nearby sand bank. The crew were then rescued and taken to the nearby port of Kavkaz (Russian Federation). The fore part remained afloat at anchor for a while and then sank.

2.2 The tanker was loaded with 4 077 tonnes of heavy fuel oil. It is understood that between 1 200 and 2 000 tonnes of fuel oil were spilled. Following removal of 913 tonnes of heavy fuel oil, the aft section was towed to Kavkaz. A month after the incident, the fore part was temporarily raised and 1 200 tonnes of a mixture of oil and water from tanks one and two were recovered. In August 2008 the fore part of the wreck was raised again and towed to the port of Kavkaz to prevent further pollution.

## 3 Clean-up operations and response

For details on the clean-up operations and the response to the incident, reference is made to the IOPC Funds' Annual Report 2009, Part 2, pages 24-25.

## 4 1992 Civil Liability and Fund Conventions

The Russian Federation is a Party to the 1992 Civil Liability Convention (1992 CLC) and the 1992 Fund Convention. Ukraine deposited an instrument of accession to the 1992 CLC with the Secretary-General of IMO on 28 November 2007 but this Convention did not enter into force in Ukraine until November 2008 and therefore is not applicable to this incident. Ukraine has not acceded to, or ratified, the 1992 Fund Convention.

## 5 The shipowner and its insurer

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

5.2 The *Volgoneft 139* was insured by Ingosstrakh for 3 million SDR (RUB 116.6 million), ie the minimum limit of liability under the 1992 CLC prior to November 2003. The minimum limit under the 1992 CLC after November 2003 is, however, 4.51 million SDR (RUB 175.3 million). There is therefore an 'insurance gap' of some 1.5 million SDR.

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

## 6 Initial contacts between the Russian authorities and the Secretariat

For details regarding visits to the Russian Federation by the Secretariat and contacts between the Russian authorities and the Secretariat during 2007 and 2008, reference is made to the Annual Report 2008, pages 117-118.

## 7 Limitation proceedings and the 'insurance gap'

7.1 In February 2008, the Fund received a notification from the Arbitration Court of Saint Petersburg and Leningrad Region of proceedings brought by a Russian clean-up contractor against the shipowner, the P&I insurer and the 1992 Fund. A number of other claimants have also brought proceedings in the same court (cf section 9).

7.2 In February 2008, in the context of these proceedings, the Court issued a ruling declaring that the shipowner's limitation fund had been constituted by means of an Ingosstrakh letter of guarantee for RUB 116 636 700 equivalent to 3 million SDR.

7.3 In April 2008, the 1992 Fund appealed against the Court's ruling. In its pleadings the 1992 Fund argued that the current limit of the shipowner's liability under the 1992 CLC is 4.51 million SDR (RUB 175.3 million) and that, under the Russian Constitution, international conventions to which the Russian Federation is party take precedence over Russian internal law and that therefore the Court's ruling establishing the shipowner's limitation fund at only 3 million SDR (RUB 116.6 million) should be amended.

7.4 In May 2008, the Court of Appeal rendered a decision dismissing the 1992 Fund's request and confirming the interim ruling by the Arbitration Court of Saint Petersburg and Leningrad Region.

7.5 The 1992 Fund appealed to the Second Appeal Court (Court of Cassation).

7.6 In September 2008 the Court of Cassation rendered a decision dismissing the 1992 Fund's appeal. In its reasoning, the Court of Cassation considered that, since Russian law still provided that the shipowner's limit of liability under the 1992 CLC was, in the case of the *Volgoneft 139,* RUB 116 636 700 equivalent to 3 million SDR (£3.1 million), it was for Russian courts to apply the limits of liability as published in the Russian Official Gazette.

7.7 The 1992 Fund appealed to the Supreme Court in Moscow, since the Court's decision was in clear contravention of the 1992 CLC as amended with effect from 1 November 2003.

7.8 In December 2008 the Supreme Court confirmed the decision by the Court of Cassation.

7.9 Hearings took place in December 2008 and March, June, September and December 2009 before the Arbitration Court of Saint Petersburg and Leningrad Region where the Court agreed to postpone its consideration of the merits of the claims until the 1992 Fund and the claimants had had time to discuss the merits and quantum of the claims.

7.10 The Fund also used the hearings to ask the Court to reconsider its earlier decision on the shipowner's limitation fund, on the grounds that the amendments to the limits of the amount available under the 1992 CLC and 1992 Fund Convention had been officially published in the Russian Federation in October 2008 and that therefore the amended limits were now officially part of Russian national law. The Court stated that it would take a decision on the issue of the increase of the limitation fund when it rendered its judgement on the merits of the claims.

7.11 A hearing took place in March 2010, at which the Fund was granted more time to continue the assessment of claims. At the hearing the Court decided to bring the Ministry of Transport as a third party into the proceedings since it could assist the Court and the parties to resolve the 'insurance gap' issue.

7.12 Hearings took place in April and June 2010. At a hearing in August 2010 the Court decided to separate some claims and divided the proceedings in two in order to speed up the solution of certain issues.

*Hearings in September 2010*

7.13 Hearings took place in September 2010 in respect of the two separate proceedings.

7.14 One of the proceedings dealt with the issue of the amount of the limitation fund, the defence of *force majeure* by the shipowner's insurer (cf section 8) and the 'Metodika' claim (cf section 10), rendering a judgement in respect of these three issues. With regard to the amount of the limitation fund, the Court decided to maintain the shipowner's limitation fund at only 3 million SDR (RUB 116.6 million) on the grounds that the amendments to the limits available under the 1992 CLC and 1992 Fund Convention had not been published in the Russian Official Gazette at the time of the incident. The Fund will appeal against the decision on the CLC limit on the grounds that, at the time this judgement was rendered, the new limits of the shipowner's liability were officially published and therefore properly incorporated into Russian legislation.

7.15 In separate proceedings, a hearing took place in respect of all the remaining claims. The Court decided to adjourn these proceedings to give more time for the parties to reach an agreement on the assessments. The next hearing on these proceedings is scheduled to take place in late October 2010.

## 8 Cause of the incident

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

8.2 The 1992 Fund appointed a team of experts to examine the weather conditions in the area and the circumstances at the time of the incident to determine the validity of the shipowner's defence. The experts visited the area where the incident took place and inspected the aft part of the wreck in the port of Kavkaz.

*Preliminary conclusions*

8.3 For details regarding the preliminary conclusions reached by the 1992 Fund's experts, reference is made to the Annual Report 2009, Part 2, pages 26-27. In summary, the conclusion of the experts is as follows:

(i) The storm of 11 November 2007 was not exceptional since there are records of similar and comparable storms being experienced in the region four times in the past 20 years.

(ii) It was not inevitable that the *Volgoneft 139* would be caught in the storm since there were timely forecasts of the storm and conditions were accurately predicted, so that there had been sufficient opportunities to avoid the vessel being exposed to the storm in the way it had been.

(iii) The storm of 11 November 2007 was irresistible insofar as the *Volgoneft 139* was concerned as the conditions associated with the storm were in excess of the vessel's design criteria.

*Administrative proceedings before Arbitration Court of Krasnodar*

8.4 Shortly after the incident the Russian authorities imposed an administrative sanction on the shipowner for having caused pollution damage in breach of Russian law and imposed a fine of RUB 40 000. The shipowner appealed against the fine before the Arbitration Court of Krasnodar.

8.5 In February 2008, the Arbitration Court of Krasnodar decided to reject the appeal and confirmed the sanction. In its reasoning the Court stated that no evidence had been provided to the Court that the storm of 11 November 2007 had a special or abnormal character. The Court stated that the incident was not unavoidable and that the Master had not taken all possible measures to avoid the breaking of the vessel and the pollution.

8.6 It can be inferred from this decision that the Court in Krasnodar considered that this was not a case of *force majeure*.

*Conclusion of the 1992 Fund's experts after the visit to the Kerch and Kavkaz VTS*

8.7 To fully understand the circumstances of the incident, the Secretariat and the Fund's experts visited the Kerch Vessel Traffic System (VTS) in Ukraine in November 2009 and the VTS in Kavkaz, Russian Federation, in February 2010.

8.8 On the basis of the additional information made available during the visits, the Fund's experts have broadly confirmed their preliminary conclusions (cf paragraph 8.3) that the storm of 11 November 2007 was not exceptional. They concluded that it was not inevitable that the *Volgoneft 139* would be caught in the storm, since there had been sufficient opportunities to avoid the vessel being exposed to the storm in the way it had been. The experts also confirmed their initial view that the *Volgoneft 139* should not have been in the area at the time of the incident, since the conditions associated with the storm were in excess of the vessel's design criteria.

8.9 However, whereas the Fund's experts' initial view was that the Kerch Strait anchorage was considered as a commercial port, the experts now understand that the Strait is not operated as a port. During the visits to the VTS in Kerch and in Kavkas, the experts learned that none of the Port Authorities had powers to close the anchorage in case of a storm warning or to direct vessels to vacate the anchorage. It is therefore the conclusion of the experts that it was the responsibility of the Master and the shipowner to take action to avoid the casualty.

*Judgement of the Arbitration Court of Saint Petersburg and Leningrad Region*

8.10 At a hearing in September 2010 (cf paragraph 7.14) the Arbitration Court decided that the shipowner and its insurer had not provided evidence that the oil spill resulted from an act of God, exceptional and unavoidable. The Court concluded that the Master, having had all the necessary storm warnings, had not taken all necessary measures to avoid the incident and that therefore the incident was not unavoidable for the vessel. The Court also concluded that the storm was not exceptional since there was data of comparable storms in the area. In its judgement the Court decided that the spill did not result from a natural phenomenon of an exceptional nor inevitable character and that the shipowner and his insurer were therefore liable for the pollution damage caused by the spill.

8.11 It is not known whether Ingosstrakh will appeal against this judgement.

## 9 Claims for compensation

9.1 The table below summarises the claims situation as at 17 September 2010:

| Category | Claimant | Claim RUB | Assessed RUB | Status |
|---|---|---|---|---|
| Clean up | Ministry of Emergencies | 4.3 million | - | No supporting documentation submitted. |
| Clean up | Regional Government | 112.2 million | 60.9 million | Preliminary assessment. Advanced assessment is being completed. No documentation provided in respect of one of the claims. |
| Clean up | Local Government | 408.1 million | 1.9 million | Agreement reached with one claimant. Proposal letter sent to one claimant. One claim being assessed. No documentation provided in support of two claims. Two fisheries claims by individual claimants have now been included in the local authority claims. |
| Clean-up | Port of Kerch (Ukraine) | 9.2 million | 1.0 million | Proposal letter with preliminary assessment sent to claimant. Ukraine was not a Party to 1992 CLC at the time of the incident and not a Party to the 1992 Fund Convention. Preventive measures carried out in Ukraine for the purpose of preventing pollution damage in the Russian Federation would be admissible. |
| Clean up | Contractor | 63.9 million | 50.8 million | Proposal letter sent to claimant and claimant has agreed with the assessment. |
| Clean up | Shipowner | 27.7 million | - | Further documentation and increased revised claim provided. Under consideration by expert. |
| Clean up | Charterer | 9.4 million | 2.3 million | Claimant agrees with the assessment. |
| Fisheries | Private Industry | 4.5 million | - | One claim being assessed. No supporting documentation provided in respect of the other claim. Two fisheries claims have now been included in the local authority claim. |
| Tourism | Private Industry | 21.5 million | - | With expert. |
| Environmental restoration | Regional Government | 1 819.6 million | - | Letter sent to claimant asking for more information. |
| Environmental monitoring | Federal Agency | 0.8 million | 0.5 million | Proposal letter sent to claimant. |
| Environmental damage | Federal Agency | 6 048.6 million | Rejected | No supporting documentation submitted. Claim calculated on basis of 'Metodika'. |
| **TOTAL RUB** | | **8 529.8 million** | **117.4 million** | |

9.2 The Regional Government has submitted claims for costs incurred in clean-up operations (RUB 112.2 million) and environmental restoration (RUB 1 819.6 million). Some of these claims for clean-up operations have been provisionally assessed at RUB 60.9 million but are being re-assessed on the basis of additional supporting documentation provided to the Fund. No supporting information has been submitted in respect of one of the clean-up claims. The claim for environmental restoration lacks the information necessary for its assessment and a letter containing the Fund's queries has been sent to the claimant.

9.3 A claim submitted by a local authority in the affected area, totalling RUB 1.1 million, has been assessed as claimed. Another claim submitted by the same local authority, totalling RUB 853 560 in relation to clean-up costs, has been assessed at RUB 805 618. A letter explaining the assessment has been sent to the claimant. The local authority has submitted a further claim against the shipowner/its insurer and the Fund, totalling some RUB 405.8 million, in connection with costs incurred in clean up and preventive measures and including two fishery claims from individual claimants. The Fund's experts are studying the documentation submitted in support of this claim.

9.4 The Port of Kerch in Ukraine submitted a claim, totalling RUB 9 170 697 for the costs incurred in clean-up and preventive measures. Ukraine was not a Party to the 1992 CLC at the time of the incident and is not a Member of the 1992 Fund. In the assessment of the claim at RUB 1 049 183, only a proportion of the costs for preventive measures carried out in Ukraine for the purpose of preventing pollution damage in the Russian Federation have been taken into consideration.

9.5 A Russian clean-up contractor has submitted a claim for the amount of RUB 63.9 million for the cost of clean-up operations, discharging oil from the aft part of the tanker, towage of the aft part to Kavkaz (Russian Federation) and removal of the oil from the sunken fore part. The claim has been assessed at the amount of RUB 50.8 million and the claimant has agreed with the assessment.

9.6 The charterer of the *Volgoneft 139*, a subsidiary company of the shipowner, has presented a claim for RUB 9.4 million for the cost of cleaning the aft section of the *Volgoneft 139* and for disposal of part of the oil collected from the wreck. The claim has been assessed at RUB 2.3 million and the claimant has agreed with the assessed amount.

9.7 The Federal Service on the Supervision in the Sphere of the use of Nature (Rosprirodnadzor) has submitted a claim, totalling RUB 753 332, for costs incurred in environmental monitoring, which has been provisionally assessed at RUB 515 092. The experts are studying further information provided in respect of that claim. Rosprirodnadzor has also submitted a claim, totalling RUB 6 048.6 million, for environmental damage based on an abstract model ('Metodika') (cf section 10), not admissible under the 1992 Conventions. At a hearing in September 2010 the Arbitration Court of Saint Petersburg and Leningrad Region issued a judgement rejecting the 'Metodika' claim.

9.8 Assessment is progressing in respect of the other claims submitted where supporting documentation is available.

## 10 'Metodika' claim

10.1 Rosprirodnadzor has submitted a claim for environmental damage for some RUB 6 048.6 million. This claim is based on the quantity of oil spilled, multiplied by an amount of Roubles per ton ('Metodika'). The Secretariat informed the Russian authorities that a claim based on an abstract quantification of damages calculated in accordance with a theoretical model was in contravention of Article I.6 of the 1992 CLC and therefore not admissible for compensation, but that the 1992 Fund was prepared to examine the activities undertaken by Rosprirodnadzor to determine if and to what extent they qualified for compensation under the 1992 Conventions.

10.2 It appears from discussions with the Russian authorities that the claim for environmental damage has been submitted in court to comply with national legislation and cannot be withdrawn without prior authorisation from the Ministry of Natural Resources. However, the claimants accept that the claim is not admissible under the 1992 Conventions and that it is likely to be rejected by the Court. The Russian central Government has, upon a petition by the Ministry of Transport, requested the Ministry of Natural Resources to withdraw the 'Metodika' claim.

*Judgement of the Arbitration Court of Saint Petersburg and Leningrad Region*

10.3 At a hearing in September 2010 (cf paragraph 7.14) the Arbitration Court of Saint Petersburg and Leningrad Region issued a judgement rejecting the 'Metodika' claim. In its judgement the Court noted that, under Article I.6 of the 1992 CLC, compensation for damage to the environment, other than loss of benefit caused by such damage, should be limited to the expenses for the reasonable reinstatement measures, as well as the expenses for the preventive measures and subsequent damage caused by such measures. The Court also noted that the expenses included in the other claims arising from the incident covered any preventive and reinstatement measures actually taken as a result of the incident.

10.4 It is not know whether Rosprirodnadzor will appeal against the judgement.

## 11 Meetings between the Russian authorities and the Secretariat

11.1 During 2009, a number of meetings were held in London and Moscow between the Russian authorities, the Secretariat and the Fund's experts to facilitate the exchange of information and to monitor the progress of claims. For details on the meetings in Moscow and Krasnodar in August 2009 reference is made to document IOPC/OCT09/3/7, section 11.

11.2 The Secretariat and the Fund's experts visited Moscow, Krasnodar and the VTS in Kavkaz in February 2010, where they held meetings with the Ministry of Transport, a representative of the owner and the charterer of the *Volgoneft 139,* several local authorities in the Krasnodar area, the VTS in Kavkaz and a claimant in the tourism sector. For details on the meetings in Moscow and Krasnodar in February 2010 reference is made to document IOPC/JUN10/3/4, section 11.

## 12 Time bar

12.1 Under the 1992 CLC, rights to compensation from the shipowner and his insurer are extinguished unless legal action is brought within three years of the date when the damage occurred (Article VIII). As regards the 1992 Fund Convention, rights to compensation from the 1992 Fund are extinguished unless the claimant either brings legal action against the Fund within this three-year period or notifies the Fund within that period of an action against the shipowner or his insurer (Article 6). Both Conventions also provide that in no case shall legal actions be brought after six years from the date of the incident.

12.2 In July 2010, letters about the time-bar issue were sent to the claimants that have not submitted their claims in court and with whom settlements had not been reached by that time. Since the *Volgoneft 139* incident occurred on 11 November 2007, although the date of the damage may be different for each claimant, the letters recommend that date as a point of reference, in which case the three-year time-bar period would end on 11 November 2010.

## 13 Action to be taken

1992 Fund Executive Committee

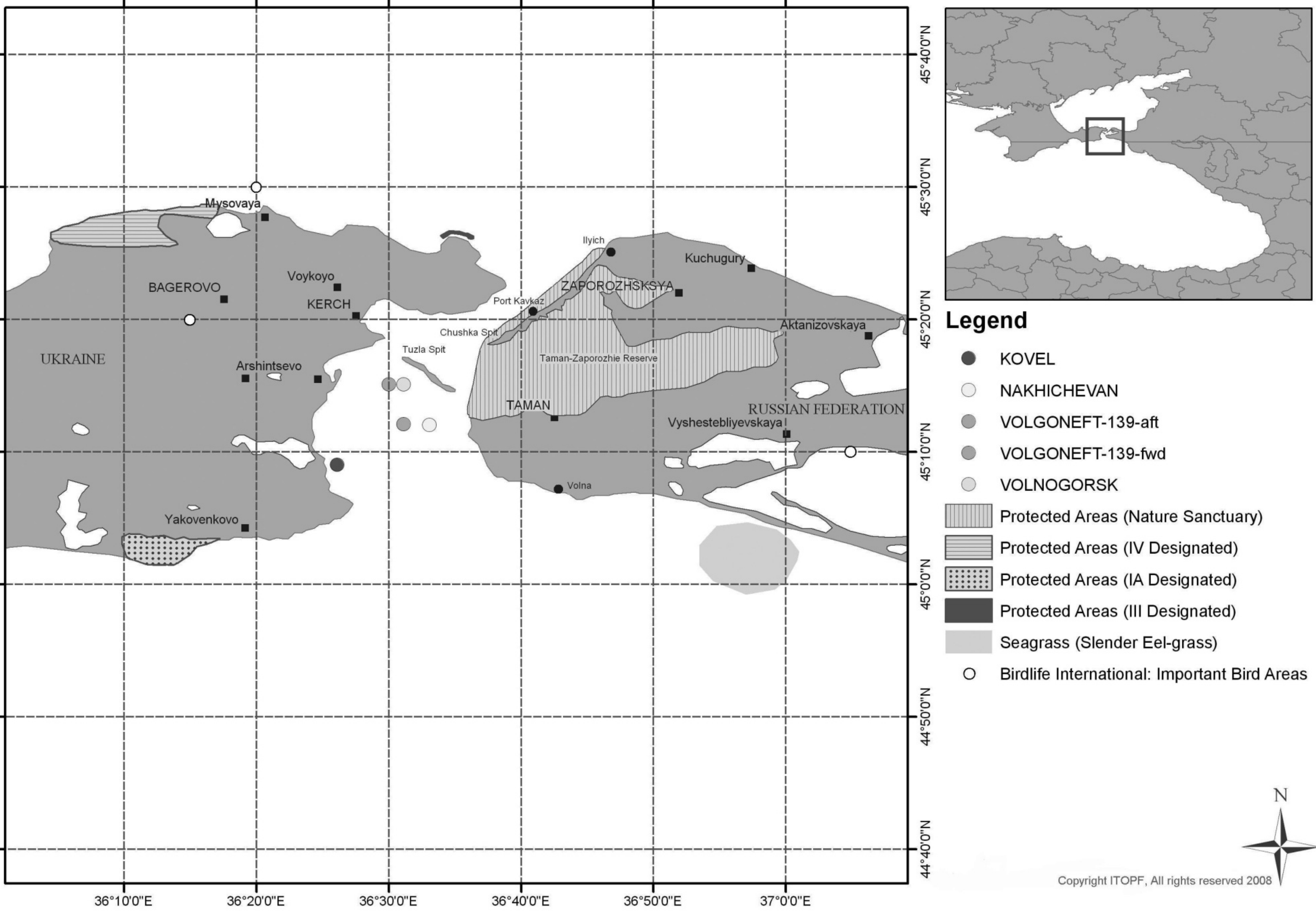
The 1992 Fund Executive Committee is invited:

(a) to take note of the information contained in this document; and

(b) to give the Director such instructions in respect of the handling of this incident as it may deem appropriate.

* * *

# ANNEX

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