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OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
11th session
Agenda item 5

92FUND/EXC.11/6
30 January 2001
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RECORD OF DECISIONS OF THE ELEVENTH SESSION OF THE EXECUTIVE COMMITTEE

(held on 29 and 30 January 2001)

Chairman:	Mr G Sivertsen (Norway)
Vice-Chairman:	Captain Luis Díaz-Monclús (Venezuela)

Opening of the session

Since the Executive Committee's Chairman, Mr G Sivertsen (Norway), was prevented from attending, the session was opened by Captain P San Miguel (Venezuela) who at the Committee's 10th session had been elected Vice-Chairman.

The Venezuelan delegation proposed that Captain P San Miguel should be replaced as Vice-Chairman by Captain Luis Díaz-Monclús (Venezuela). The Executive Committee decided in accordance with the proposal.

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 92FUND/EXC.11/1.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

Algeria	Germany	Netherlands
Australia	Ireland	Norway
Canada	Japan	Singapore
Croatia	Latvia	Vanuatu
France	Marshall Islands	Venezuela

2.2 The Executive Committee took note of the information given by the Director that all the above-mentioned members of the Committee had submitted credentials which were in order.

2.3 The following Member States were represented as observers:

Belgium	Italy	Spain
China (Hong Kong Special Administrative Region)	Liberia	Sweden
	Malta	United Arab Emirates
Cyprus	Mexico	United Kingdom
Denmark	Philippines	Uruguay
Finland	Poland	
Greece	Republic of Korea	

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

States which have deposited instruments of ratification, acceptance, approval or accession to the 1992 Fund Convention:

Argentina	India	Russian Federation
Georgia	Morocco	Trinidad and Tobago

Other States

Cameroon	Côte d'Ivoire	Portugal
Chile	Malaysia	Turkey
Colombia		

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

Intergovernmental organisations:
European Commission
International Oil Pollution Compensation Fund 1971
International Maritime Organization

International non-governmental organisations:
Comité Maritime International
International Chamber of Shipping
International Group of P & I Clubs
International Tanker Owners Pollution Federation Ltd
International Union for the Conservation of Nature and Natural Resources
Oil Companies International Marine Forum

3 *Erika* incident

3.1 The Executive Committee took note of the developments in respect of the *Erika* incident as contained in documents 92FUND/EXC.11/2, 92FUND/EXC.11/2/Add.1 and 92EXC.11/2/Add.2.

3.2 The Executive Committee viewed a video on the *Erika* incident commissioned by the Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual).

3.3 The Committee expressed its appreciation to the Steamship Mutual for having commissioned the video.

Claims for compensation

3.4 The Committee noted the information given on the claims situation as follows:

> A total of 3 543 claims for compensation had been submitted by 24 January 2001 for a total of FFr412 million (£39 million). Of these claims 872 were presented during the months of November 2000 – January 2001.
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> Some 2 090 claims totalling FFr184 million (£18 million) had been assessed at a total of FFr123 million (£12 million). Assessments had therefore been carried out of 59% of the total number received by 24 January 2001 and 79% of the number received by 31 October 2000.
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> One hundred and forty five claims, totalling FFr11 million (£1.1 million), had been rejected. Many of the rejected claims were being reassessed in the light of additional documentation provided by the claimants.
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> Payments had been made by the insurer of the *Erika*, the Steamship Mutual, in respect of 912 claims for a total of FFr36 million (£3.5 million). Most of these payments corresponded to 50% of the approved amounts, but some hardship payments made at an early stage were made in full or at percentages higher than 50%.
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> Approved payments in respect of a further 621 claims, totalling FFr22 million (£2.1 million), had not been made. This was due to the fact that confirmation and acceptance of the assessed amount had not been received in respect of 391 claims, the receipt and release had not been signed in respect of 65 claims and claimants had rejected the assessments in respect of 165 claims of which 152 were undergoing reassessment.
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> A further 1 445 claims, totalling FFr227 million (£21.7 million), were either in the process of being assessed or were awaiting further information from claimants to complete the assessments.

3.5 One delegation stated that the information set out in paragraph 3.4 demonstrated the transparency which that delegation had sought in terms of explaining the claims process and also showed the large number of claims that had been dealt with by the Steamship Mutual, the 1992 Fund and the Claims Handling Office in Lorient. It was further stated by that delegation that it was grateful for the efforts being undertaken by the French Government to assist claimants and explain how the compensation regime works.

3.6 A number of delegations expressed their gratitude to the staff of the Claims Handling Office in Lorient and the various experts for the excellent work they had undertaken, considering the large number of claims they were dealing with.

Claim submitted to the Executive Committee for consideration

3.7 The Committee considered a claim presented by a commune for FFr622 550 (£60 000) for the cost of repairs to four minor roads within a few kilometres of the coast. The Committee noted that according to the commune these roads were damaged as a result of traffic having been diverted from the main coastal road, which had been closed to normal traffic in order to facilitate the clean-up operations.

3.8 The Committee agreed with the Director that the damage to the roads should be considered as damage caused by the clean-up operations and that the cost of the repairs should therefore in principle be admissible for compensation.

3.9 In reply to a question the Director stated that in the assessment of the quantum of the claim deductions would have to be made to reflect any betterment in the condition of the roads.

Criticism of the 1992 Fund

3.10 The Committee noted that criticism had continued to be made against the 1992 Fund by cabinet ministers, other politicians and various other bodies and individuals. The Committee noted that the main criticisms were as follows:

> It has been stated that the total amount of compensation of 135 million SDR (FFr1 200 million) fixed in the 1992 Conventions is unacceptably low and that the Fund should take steps to ensure that more money is available. It has been maintained that it is unacceptable that early claimants have their payments pro-rated and that the problem of equal treatment of early and late claimants is for the 1992 Fund to solve. The 1992 Fund has been described as a mutual insurance company of the oil industry and as a body protecting the oil industry. It has been maintained that the claims settlement is far too slow, as evidenced by the very low amount paid. The Fund's policy of requiring claimants to substantiate their losses by supporting documents or other evidence has also been criticised, and it has been argued that the criteria applied by the Fund are too strict.

3.11 The Committee noted that in his contacts with the media the Director had explained the main features of the international regime based on the 1992 Conventions and had pointed out that the 1992 Conventions had been agreed between a number of States, including France, and that the Conventions had been approved by the Assemblée Nationale and the Sénat and formed part of French domestic law. It was further noted that the Director had drawn attention to the fact that Governments had decided the maximum amount available when the Conventions were adopted and that the 1992 Fund had no legal possibility of increasing this amount for the *Erika* incident. It was also noted that he had pointed out that the 1992 Fund had a legal obligation to ensure that, to the extent possible, all claimants were treated equally and that, if the total amount of all established claims exceeded the total amount available for compensation, all claimants had to receive the same percentage of the approved amounts of their respective claims. It was noted that the Director had referred to the fact that pro-rating had been made in a number of previous incidents involving the 1971 Fund and, most recently, by the 1992 Fund in the *Nakhodka* case. The Committee noted that it had been explained that the 1992 Fund was governed by the Governments of Member States and that the oil industry did not take any part in the decisions. It was further noted that the Director had emphasised that the policy of the 1992 Fund had been laid down by the representatives of the Governments of Member States as had the criteria for the admissibility of claims, including the requirement that claimants should substantiate their losses by the production of supporting documents and other evidence.

3.12 The Committee recalled that the IOPC Funds' governing bodies had consistently taken the view that claims could only be admitted if and to the extent that they fulfilled certain criteria and that it followed that the IOPC Funds had to make a thorough examination of each claim. The

Committee recalled that the Claims Manual, which had been adopted by the Assemblies of the IOPC Funds, sets out the following criteria, which applied to all claims.

- any expense/loss must actually have been incurred
- any expense must relate to measures which are deemed reasonable and justifiable
- a claimant's expense/loss or damage is admissible only if and to the extent that it can be considered as caused by contamination
- there must be a link of causation between the expense/loss or damage covered by the claim and the contamination caused by the spill
- a claimant is entitled to compensation only if he has suffered a quantifiable economic loss
- a claimant has to prove the amount of his loss or damage by producing appropriate documents or other evidence.

It was also noted that a claim was thus admissible only to the extent that the amount of the loss or damage was actually demonstrated.

3.13 It was also recalled that at its 9th session, in connection with the consideration of certain claims arising from the *Erika* incident, the Executive Committee had confirmed that the 1992 Fund should consider the admissibility of claims solely on the basis of the criteria for admissibility laid down and the practice developed by the governing bodies of the 1971 Fund and the 1992 Fund over the years (document 92FUND/EXC.9/12, paragraph 3.6.29).

3.14 The Committee noted that the examination of the claims arising from the *Erika* incident had been carried out on the basis of the criteria set out in the Claims Manual.

3.15 A large number of delegations expressed their support for the way claims were handled and expressed their full confidence in the Director. These delegations emphasised that the examination of claims arising from the *Erika* incident should be carried out on the basis of the criteria set out in the Claims Manual which had been adopted by representatives of the Governments of Member States. It was also emphasised that it was necessary to apply these criteria in a uniform manner not only as regards a particular incident but also in respect of incidents in various States. It was stated that the 1992 Fund would always be open to criticism following major incidents but that whilst constructive criticism could lead to an improvement in the functioning of the system, criticism of a political nature was not justified. It was also pointed out that the criticism on a number of points addressed aspects which the 1992 Fund could not influence, for example the maximum amount of compensation available and the obligation to ensure equal treatment of victims. It was considered that the Director's response to the criticism had been logical and reasonable. The point was made that the Fund should not be coerced into accepting claims in response to criticism or pressure. It was stated that the Governments of Member States had an obligation to defend the international compensation regime and to assist in providing correct information on the operation of this regime.

3.16 The Committee endorsed the Director's position that the examination of the claims should be pursued on the basis of the criteria set out in the Claims Manual.

3.17 The Committee noted that it had been maintained in France that it was unacceptable that out of a total amount of FFr1 200 million available for compensation only a very modest amount had been paid. The Committee noted that although only a relatively small amount had been paid so far, the total amount claimed to date was also relatively low. It was further noted that it was the complexity of a claim and the extent to which it was properly documented, not the quantum, which determined the speed with which it was assessed and approved.

3.18 The Committee noted that it had also been suggested that the 1992 Fund's assessments of claims in the *Erika* incident were inconsistent, since some claims were approved for the full amount claimed or close to that amount, whereas other claims were approved for only part of the amount claimed.

3.19 The Committee noted that the main reasons why claims were often assessed at lower amounts than the claimed amounts were as follows:

(a) the claimant had not submitted any documentary evidence supporting the claim;

(b) the claimant had ignored or had been selective in applying financial records of his business for the years preceding the incident;

(c) the claimant had failed to take into account saved costs resulting from the downturn in business;

(d) the claimant had not made a deduction for any substitute income during the period covered by the claim.

3.20 The Committee also noted a difference in this regard between various categories of claims, namely that, for example, in the fishery and mariculture sectors economic loss claims had on average been approved at 59% of the claimed amounts, with a range of 27% to 100%, whereas in the tourism sector the approved amounts corresponded on average to 89% of the amounts claimed, with a range of 62% to 100%.

3.21 The Committee recalled that it was not unusual for claims in the fishery sector to be approved at a fairly low percentage of the amounts claimed and that this had been the case in respect of fishery claims arising from previous incidents, for example in Japan, the Republic of Korea, Spain and the United Kingdom.

Recent difficulties faced by the 1992 Fund in France

3.22 The Executive Committee recalled that in anticipation of a large number of claims the insurer of the *Erika*, the Steamship Mutual, and the 1992 Fund had established a Claims Handling Office in Lorient.

3.23 The Executive Committee recalled the intrusion in the Claims Handling Office in Lorient by some persons on 13 March 2000. It also recalled that four persons had forced themselves into the office of the 1992 Fund's experts in Brest on 9 May 2000, that these persons had threatened the staff in that office and that they had presented documents to the media containing threats against the experts and their families.

3.24 It was recalled that at its 8th session, while understanding the feelings of the people in the area affected by the *Erika* incident, the Executive Committee endorsed the position taken by the Director that attacks, threats or intimidation against the staff at the Claims Handling Office or other persons engaged by the Fund, as well as against their families, were unacceptable (document 92FUND/EXC.8/8, paragraph 3.7).

3.25 The Committee noted that the experts in Brest referred to in paragraph 3.23 had presented a complaint against the intruders to the public prosecutor, but that the prosecutor had decided not to pursue any action against the intruders without giving any reasons for his decision.

3.26 The Committee noted that on 12 December 2000, the first anniversary of the *Erika* incident, a demonstration took place in front of the Claims Handling Office in Lorient in which some 12 persons participated. The Committee noted that although the demonstration was generally peaceful, three individuals splashed the walls and windows of the Office with black paint and climbed on to the roof of the building before being arrested by the police.

3.27 It was noted that one individual had made a formal complaint to the public prosecutor against persons linked with the 1992 Fund's operations in France and in the United Kingdom, and that according to French press reports it had been maintained in the allegations that funds which should be used for payments to victims had been embezzled and that persons in Lorient and elsewhere had a personal interest in delaying payments, since they would profit from interest on the funds. The Committee noted that the Director had given information to the media in France on the operation of the compensation system showing that the allegations were groundless, but that information was not given the same coverage. It was noted that neither the 1992 Fund nor any person linked with the Fund's operations has been formally notified of these complaints.

3.28 The Committee noted that it had also been reported that the individual concerned had filed several complaints with the public prosecutor in Lorient against the persons in charge of the Claims Handling Office. The Committee noted with concern that the latter had received from that individual threats to the effect that further accusations would be made in the media unless compensation was paid for the claim presented by that individual which had been rejected. It was also noted that the individual had also in general made a number of allegations against the Head of the Claims Handling Office, other staff of the Office and the Director and sent abusive and insulting letters to them.

3.29 It was noted that the individual in question had submitted a claim for FFr134 925 (£13 000) in respect of losses allegedly suffered as a result of the *Erika* incident having prevented him running boat cruises for tourists around the Brittany coast. The Committee noted that tourism and maritime experts engaged by the Steamship Mutual and the 1992 Fund had visited the claimant and had found that his boat was unsuitable for the purpose proposed, that the licence to carry out the activity, which had been issued in January 1997, had lapsed after 18 months of inactivity and that the claimant had not applied to have the licence revalidated. The Committee also noted that the claimant had been unable to provide data on which to base an assessment of his losses because the boat had not been used since 1996 and that in the light of these findings, the 1992 Fund and Steamship Mutual decided in August 2000 to reject the claim.

3.30 A number of delegations expressed their serious concern as regards the various actions described in paragraphs 3.23 and 3.26 – 3.28.

3.31 The French delegation stated that the French authorities had taken steps to prevent events of the kind referred to in paragraphs 3.23 and 3.26. That delegation added that in a democratic society it was necessary to strike a balance between measures to this effect and the freedom of expression and the right to peaceful demonstration.

3.32 The Executive Committee reiterated its position that attacks, threats or intimidation against the staff at the Claims Handling Office or other persons engaged by the Fund, as well as against their families, were unacceptable.

Studies carried out within the French Ministry of Economy, Finance and Industry

3.33 The Committee recalled that an extensive study had been carried out within the French Ministry of Economy, Finance and Industry before the Executive Committee's 8th session in July 2000 on the extent of the damage caused by the *Erika* incident in respect of the tourism industry. It was further recalled that the study had found that the estimated total amount of the admissible claims in the tourism industry would fall within the range of FFr800 – 1 500 million (£70 – 144 million).

3.34 It was also recalled that a further study had been carried out within the Ministry of Economy, Finance and Industry in October 2000 and that this study had estimated that the maximum admissible amount of the losses in the tourism sector admissible for compensation would be FFr1 096 million (£105 million).

3.35 It was recalled that, at its 9th session, the Executive Committee had decided that, in view of the continuing uncertainty as to the total amount of the claims arising from the *Erika* incident, the level of payments should be maintained at 50% of the amount of the loss or damage actually suffered by the respective claimants (document 92FUND/EXC.9/12, paragraph 3.6.20).

3.36 The Committee noted that on 24 January 2001, the Director had received a further study ('the January 2001 study') carried out within the Ministry of Economy, Finance and Industry.

Summary of the January 2001 study

3.37 The Committee noted that in comparison with the June and October 2000 studies, further information has been analysed in the January 2001 study, in particular using occupancy surveys for hotels and campsites which had been carried out covering the whole of the tourist season in the year 2000, therefore making the figures fully representative. It was also noted that for hotels, the figures covered the period January to December 2000, whilst for campsites, the figures covered the whole of the tourist season, ie May to September 2000. It was noted that the VAT figures used in the January 2001 study were more significant than those used in the October 2000 study, as they covered the period January to September, with the exception of very small companies which make declarations in April and for which assumptions had been made. The Committee also noted that detailed information had been gathered concerning the domestic refuse collected in communes on the affected coast for 1999 and 2000, allowing an appreciation of any variances in the total number of people staying in the affected area between June and September 2000 across all types of accommodation, ie both non-commercial accommodation (second homes or visiting friends and relatives) and commercial accommodation (hotels, camping and self-catering apartments). It was noted that monitoring of general trends nationally, such as national statistics collected by the Fédération des Entreprises du Commerce et de la Distribution, sales at Post Offices, sales of railway tickets and the sale of flour by wholesalers to bakers' shops, had been used as further indicators of trends in tourism and the economy in general.

3.38 The Committee noted that two independent methods used in the January 2001 study had led to very similar results:

- Accommodation statistics approach: FFr1 158.5 million (£110 million)
- VAT declaration approach: FFR1 083.0 million (£104 million)

3.39 The Committee took note of the statement in the report of the study that, in view of the fact that the two methods had led to very similar results, it was possible to assess the maximum amount of admissible claims for compensation in the tourism sector at between FFr1 100 million and FFr1 200 million.

3.40 The Committee also noted that the January 2001 report concluded that on the basis of the most recent data the level of compensation payments could be increased while still maintaining a safety margin. It further noted the suggestion in the report that, on the assumption that the claims from the sectors other than tourism would amount to FFr300 million (£29 million), and after adding an extra safety margin of FFr100 million (£10 million), the total amount of the admissible claims would reach FFr1 600 million (£150 million), thus allowing the 1992 Fund to increase the level of payments to 75%.

3.41 It was noted by the Committee that the results of the study were based on the assumption that all the reductions in turnover suffered by businesses in the tourism sector were attributable to the *Erika*. It was noted that it was stated in the report that the figures given represented the maximum possible amount that could be claimed. It was further stated by the French delegation that it had been established that a number of businesses in the tourism sector across France had suffered a reduction in turnover during 2000 compared with 1999.

Opinion of the 1992 Fund's experts on the January 2001 study

3.42 The Committee noted that the 1992 Fund's experts had been consulted on the methodology during the Ministry's investigation and that they were very impressed by the depth of the analysis undertaken which they considered had set new standards in the monitoring of tourism industry performance.

3.43 It was noted that the Fund's experts had pointed out that the officials within the Ministry carrying out the study had had access to detailed information outside the public domain, notably up-to-date statistics on tourism demand by month and the tax records held by local tax offices along the Atlantic coast, which had enabled exhaustive research to be undertaken both at macro economic (a 'demand approach') and micro economic ('supply approach') levels. It was also noted that the experts had drawn attention to the fact that in making this latest assessment it had been possible to use actual results for the main tourist season, April to October 2000, and actual tax declarations for the period January - September 2000, thereby minimising the number of assumptions that had to be made. It was further noted that the experts had stated that the January 2001 study went a long way towards answering some specific queries raised by them in respect of the October 2000 study, in particular that the uncertainties raised regarding the impact of the oil spill on non-commercial accommodation, which made a significant contribution to the tourism economy of the French Atlantic coast, had largely been dispelled by exhaustive research into domestic refuse collection. It was also noted that the experts considered that by comparing the data from 1999 and 2000 on refuse collection across a representative sample of local authorities along the affected coast, an accurate measure of the scale of the physical presence of tourists had been produced which allowed reasonable estimates for all accommodation sectors in the affected area to be made.

3.44 The Committee noted that the 1992 Fund's experts broadly agreed with the overall estimate in the January 2001 study of a total of admissible claims in the tourism sector falling within a range of FFr1 100 - FFr1 200 million.

3.45 The Committee noted, however, that the 1992 Fund's experts had mentioned that in assessing the likely maximum level of tourism claims at FFr1 200 million, the January 2001 study had not taken into consideration some other factors, namely the sums spent by tourism institutions or individual businesses on promotional activities in an attempt to mitigate the impact of the *Erika* incident, claims from businesses outside France, claims which may be presented for losses incurred during 2001 due to re-oiling of the coastline and the position which the French courts may take as regards the criteria for the admissibility of claims. It was noted that in the 1992 Fund's expert's view these factors might have led to an under-estimate of the overall level of claims, but that they recognised that this under-estimation might well be offset by a proportion of potential claimants deciding not to claim or not being able to prove their losses.

Other assessment of the total amount of the damage arising from the Erika incident

3.46 The Committee took note of recent reports in the French media of a study carried out by a French consulting firm specialising in accounting (Mazars et Guérard) of the damage resulting from the *Erika* incident, which had been commissioned by l'Association Ouest Littoral Solidaire (a group of three administrative regions: Bretagne, Pays de La Loire and Poitou-Charentes). It was noted that according to the study the total amount of the damage could be estimated to be in the range of FFr5 500 – 6 300 million (£527 – 603 million).

3.47 It was noted that the Director had not been able to get access to the study. The Committee noted the Director's observations on the assessment referred to in paragraph 3.46 above based on press reports as set out in paragraph 1.4.3 of document 92FUND/EXC.11/2/Add.2.

3.48 One delegation mentioned that a study of the total losses had been carried out in respect of the *Sea Empress* incident and that the predicted losses proved to be highly over-estimated.

Consideration by the Executive Committee of the level of the 1992 Fund's payments

3.49 The Executive Committee recalled that the Assembly had taken the view that - like the 1971 Fund - the 1992 Fund should exercise caution in the payment of claims if there was a risk that the total amount of the claims arising out of a particular incident might exceed the total amount of compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention, since under Article 4.5 of the 1992 Fund Convention all claimants had to be given equal treatment. The Committee further recalled that the Assembly had expressed the view that it was necessary to strike a balance between the importance of the 1992 Fund's paying compensation as promptly as possible to victims of oil pollution damage and the need to avoid an over-payment situation.

3.50 It was recalled that the claims by TotalFina and the French Government could be disregarded for the purpose of the Executive Committee's consideration of the level of payments, since these claims would be pursued only if and to the extent that all other claims had been paid in full.

3.51 The Executive Committee noted that in the Director's view there remained some significant uncertainties in the estimates contained in the report of the January 2001 study and as indicated by the 1992 Fund's experts. It was noted that in the January 2001 study no allowance had been made for publicity campaigns. It was also noted that although the January 2001 study was based on the criteria for admissibility applied by the 1992 Fund, the Director had been advised that the French courts might take a more extensive approach in their interpretation of the notion of 'pollution damage', and that it was not possible to predict the consequences of such an approach. It was further noted that the Director had maintained that there was a risk that re-oiling of the coastline would take place as a result of storms and high tides during the winter months, which could cause further losses in particular in the fishery and mariculture sectors. It was noted, however, that in the Director's view this risk has decreased considerably, and that it was in any event unlikely that there would be a massive re-oiling.

3.52 It was noted that the claims in the sectors other than tourism had been estimated by the 1992 Fund's experts at some FFr300 million and that the Director considered that it was necessary to take into account also costs for marketing campaigns of some FFr100 million. It was further noted that the Director considered it prudent to add a safety margin of FFr200 million instead of the FFr100 million suggested in the report of the January 2001 study. It was also noted that on this basis the estimated total admissible claims would be in the region of FFr1 800 million. The Committee noted the Director's conclusion that the level of the 1992 Fund's payments could be increased to 60% of the proven loss or damage suffered by the individual claimants, and his proposal that the Committee should take a decision to this effect.

3.53 Several delegations expressed concern over the large difference in the estimated claims exposure in the tourism sector between studies by the French consulting firm and by the Ministry of Economy, Finance and Industry. The Director stated that the information that the 1992 Fund had obtained on the consulting firm's study was from press reports, but that it appeared that the estimates, which included losses for 2001 and 2002 as well as for 2000, were based on reduction in turnover rather than loss of profit. He pointed out that profit margins varied with different activities, but that these margins obviously never reached 100% of the turnover.

3.54 A number of delegations expressed concern over the possible impact of the more extensive approach that might be taken by the French courts in their interpretation of the notion of 'pollution damage'.

3.55 One delegation noted that great emphasis had been placed on tourism claims and considered that other claim sectors ought to be taken into account. The Director pointed out that the 1992 Fund had a clearer picture of other types of claims. He mentioned that, for example, the clean-up was virtually completed and that the extent of the Fund's exposure in this sector, which was largely limited to claims for the fixed costs of public bodies, could be assessed with some accuracy. He

pointed out that it was unlikely that there would be further significant claims for property damage at this late stage and that the impact on fishing and mariculture had not been as severe as in previous incidents such as the *Braer* and *Sea Empress*. He added that although the oyster fishery had been affected by harvesting bans, most of the bans had now been lifted and that the rate at which claims from this sector were being presented had decreased.

3.56 One delegation asked what level of reassurance could be obtained from the statement in the report by the Ministry of Economy, Finance and Industry that the results ignored the fact that losses in turnover of businesses or decreases in the number of visitors to certain locations might be due to factors other than the *Erika* oil pollution. The French delegation pointed out that the estimated exposure of the 1992 Fund represented a worst case scenario by assuming that all losses were attributable to the *Erika*, whereas in reality this was unlikely to be the case, as evidenced by reductions in turnover during 2000 in other regions of France.

3.57 Most delegations agreed that in spite of the difficulty in estimating the claims exposure, the results of the study by the French Government appeared reliable enough to justify an increase in the level of payments to 60%.

3.58 In the light of the foregoing the Executive Committee decided to increase the level of the 1992 Fund's payments to 60% of the amount of the damage actually suffered by the respective claimants. It was agreed that the level of payments should be reviewed again at the Committee's 12th session.

3.59 The French delegation expressed its satisfaction at the Executive Committee's decision to increase the level of payments and stated that the decision was an important indication by the 1992 Fund of its willingness to compensate victims within the limits of the 1992 Conventions.

3.60 That delegation also stated that in document 92FUND/EXC.11/2/Add.1 there was a mixture of criticism of very different natures. It was mentioned that the French Government, since the beginning of the *Erika* incident, had co-operated closely with the 1992 Fund to guarantee maximum compensation to victims as promptly as possible. The delegation mentioned that the French Government had paid in excess of FFr1 000 million (£100 million) as a result of the incident and that this amount would most likely not be recovered, since the French Government had declared that it would only pursue its claim for recovery if all other claimants (except TotalFina) were paid in full. That delegation added that the French Government had always acted with total transparency *vis-à-vis* the 1992 Fund in the evaluation of the potential losses, especially within the tourism sector, and that for more than a year had provided as much information as possible to the 1992 Fund to make it possible to determine the level of payments. The delegation drew attention to the fact that the French Government had assisted the victims in order to ensure that they received full compensation and would continue to assist them with the presentation of their claims in order to secure a rapid claims handling.

3.61 The French delegation also stated that France had made proposals to modify the compensation system established by the 1992 Conventions and that some of these proposals had already been adopted by the Legal Committee of the International Maritime Organization in order to ensure that the compensation regime fulfilled its role to ensure full and prompt compensation. That delegation also drew attention to the proposals by the European Commission to increase the maximum amount available for compensation to victims in European Union Member States to 1 000 million Euros (£650 million). It was recalled that the 1992 Fund Assembly had in October 2000 agreed that the compensation regime established by the 1992 Conventions should be adapted in the light of developments and that for this reason a Working Group had been set up within which France would submit proposals for amendments of the Conventions.

3.62 The French delegation recognised that strong criticism had been made locally and in the French press both against the 1992 Fund and against the French Government but that it was not surprising that such criticism was made in view of the magnitude of the oil spill. In the view of that

delegation the best way to stop this criticism was by providing prompt and full compensation to victims within the system established by the 1992 Conventions. The French delegation referred to the fact that due to the number and complexity of the claims the compensation process was difficult and slow. That delegation also stated that it understood the explanation given by the Director in respect of the difference between the FFr412 million claimed and the FFr36 million paid but pointed out that victims, who had no expert knowledge of the Conventions, would find it difficult to understand the difference.

3.63 The French delegation stated that, in spite of the efforts made by all those involved, delays in claims handling might exist at various stages of the process and that the French Government was prepared to examine with the Director the entire claims procedure in order to improve the compensation process.

3.64 Another delegation, which confirmed its solidarity with the 1992 Fund but also its solidarity with the victims, informed the Committee that it would also submit proposals to the Working Group for amendments to the 1992 Conventions to ensure prompt and significant interim payments of compensation.

3.65 The French delegation stated that the studies within the Ministry of Finance, Economy and Industry of the losses in the tourism sector would continue.

3.66 Several delegations stated that when informing claimants and the press about the increase in the level of payments the Director should emphasise the need for claimants to substantiate their claims.

3.67 The Director stated that, in view of the considerable administrative work involved, the additional payments to be made to claimants who had received payments at 50% of their established losses would have to be made over a period of time.

3.68 The French delegation stated that no additional payments would have to be made to those claimants who had already received payments of 50% of their losses under the scheme set up by the French Government to provide emergency payments in the fishery and mariculture sector through OFIMER. That delegation mentioned that the payments made under that scheme would be presented by the Government as a subrogated claim against the 1992 Fund but that this claim would be pursued only if and to the extent all other claimants (except TotalFina) had been paid in full.

Cause of the incident

3.69 The Committee recalled that the French Permanent Enquiry Commission for Incidents at Sea (Commission Permanente d'enquête sur les événements de Mer) had carried out an investigation into the cause of the *Erika* incident and that a preliminary report had been published on 13 January 2000.

3.70 The Committee noted that the Commission's final report was published on 18 December 2000.

3.71 It was noted that the Maltese authorities had also carried out an investigation into the cause of the incident which had been published in October 2000.

3.72 The Committee noted that the 1992 Fund's lawyers and technical experts were studying the report by the French Enquiry Commission and the report by the Maltese authorities.

Court proceedings

3.73 The Committee took note of the developments in the various court proceedings.

4 Any other business

4.1 *Nakhodka* incident

4.1.1 The Executive Committee took note of developments in respect of this incident contained in document 92FUND/EXC.11/3 (cf 71FUND/A/ES.6/4).

4.1.2 The Committee noted that as at 25 January 2001 the total payments made to claimants amounted to ¥14 352 million (£75 million), including the payments made by the shipowner and his P & I insurer totalling ¥66 million (£400 000) plus US$4.6 million (£3 million).

4.1.3 It was recalled that at their April 2000 sessions the IOPC Funds' governing bodies decided to increase the level of the IOPC Funds' payments from 60% to 70% of the amount of the damage actually suffered by the respective claimants (documents 92FUND/EXC.7/5, paragraph 3.1.12 and 71FUND/AC.1/EXC.63/11, paragraph 3.6.12).

4.1.4 The Committee also recalled that the Director had informed the governing bodies of the IOPC Funds at their October 2000 sessions that he estimated the total exposure of the Funds at some ¥28 468 million (£164 million). The Committee further recalled that the governing bodies had decided to authorise the Director to increase the level of payments to 80% of the amount of the damage actually suffered by the individual claimants when the total amount of the settled and pending claims fell below ¥27 800 million (documents 92FUND/EXC.9/12, paragraph 3.3.8 and 71FUND/AC.2/A.23/22, paragraph 17.8.8).

4.1.5 The Committee noted that the Director had estimated that as at 22 January 2001 the total exposure of the IOPC Funds was some ¥27 780 million. The Committee further noted that in the light of the developments the Director had decided, as authorised by the governing bodies, to increase the level of payments to 80% of the amount of the damage actually suffered by the individual claimants. The Committee noted that as a result it was expected that the 1992 Fund would make additional payments totalling ¥2 000 million (£11.5 million) shortly.

4.1.6 The Japanese delegation endorsed the content of document 92FUND/EXC.11/3 and encouraged the Secretariat to continue their utmost efforts to provide prompt compensation to the victims.

4.2 *Dolly* incident

4.2.1 The Executive Committee took note of the information contained in document 92FUND/EXC.11/4 in respect of the *Dolly* incident, which had occurred on 5 November 1999 off Martinique (France).

4.2.2 The Committee recalled that the *Dolly* had sunk in Robert Bay, Martinique, while carrying some 200 tonnes of bitumen and that so far no cargo had escaped. It was also noted that there was a national park, a coral reef and mariculture near the grounding site, that artisanal fishing was carried out in the area and that there were fears that the fishery and mariculture would be affected if the bitumen were to escape.

The definition of 'ship'

4.2.3 The Committee noted that the *Dolly* had been built in 1951 as a general cargo vessel and had been listed as such in Lloyds Register (1998-99). It was further noted that at some later date three tanks had been installed in the hold and the opening of the hatch had been closed with steel plates. The Committee also noted that the sketches available to the 1992 Fund had shown that the tanks were not part of the ship's structure but were secured within its hold by chains and surrounded with insulation material.

4.2.4 The Committee also took note of the 1992 Fund's technical experts having expressed the opinion, and the Director having concurred, that the *Dolly* had been adapted for the carriage of oil in bulk

as cargo and that it therefore fell within the definition of 'ship' laid down in the 1992 Civil Liability Convention.

4.2.5 The Committee endorsed the Director's view that the *Dolly* fell within the definition of 'ship' as laid down in the 1992 Civil Liability Convention.

Measures to prevent pollution

4.2.6 The Committee noted that, since the shipowner did not take any measures to prevent pollution, the French authorities had arranged for the removal of 3.5 tonnes of bunker fuel and had requested three international salvage companies to investigate what measures could be taken to eliminate the threat of pollution by bitumen. The Committee noted that these companies had submitted their proposals on the basis of diving inspections carried out in October and November 2000 and that the French authorities had recently provided the 1992 Fund with copies of the proposals.

4.2.7 The Committee noted that two of the salvage companies had proposed removing the bitumen tanks intact while leaving the wreck in its current position, and that both companies had estimated the cost of such an operation to be the region of US$1.5 million (£900 000).

4.2.8 It was noted that the third salvage company had proposed righting the wreck and refloating it with the cargo on board, following which the bitumen would be removed and the wreck scuttled in deep water. The Committee noted that the cost of this method was estimated to be in the region of US$950 000 (£638 000). The Committee also noted that the French authorities had studied a variation of this method, whereby the wreck would be broken up onshore after the removal of the bitumen.

4.2.9 One delegation drew attention to the nature of bitumen, which required heating to high temperatures in order for it to flow. That delegation considered that the product would remain solid at ambient sea temperatures and questioned therefore whether the bitumen in the tanks represented a pollution risk.

4.2.10 The Head of the Claims Department stated that in view of the shallow depth in which the wreck was located, rapid corrosion of the tanks was likely, which could lead to the escape of bitumen. He indicated that even in a solid or highly viscous form the product could roll on the seabed and cause pollution damage to nearby coral.

4.2.11 The Committee concurred with the Director's view that, in view of the location of the wreck in an environmentally sensitive area, an operation to remove the threat of pollution by bitumen would in principle constitute 'preventive measures' as defined in the 1992 Conventions.

4.2.12 One delegation stated that, whilst the early involvement of the 1992 Fund in any proposals for preventive measures was to be welcomed, it was important for the sake of consistency that the Fund did not take decisions as to what method should be used and which contractor should be engaged. In was also important in that delegation's view that the 1992 Fund did not guarantee to pay the costs of any such operations, but that these costs were presented as a claim for compensation, which would be subject to an assessment as to its admissibility on the basis of the criteria laid down by the Assembly and Executive Committee.

4.2.13 The Committee instructed the Director to examine with the 1992 Fund's experts and the French authorities the proposed measures to remove the bitumen.

4.2.14 The Committee also instructed the Director to investigate the financial position of the shipowner.

4.3 *Slops* incident

4.3.1 The Executive Committee took note of the information in respect of the *Slops* incident as contained in document 92FUND/EXC.11/5.

Previous consideration by the Executive Committee

4.3.2 The Committee recalled that the Greek-registered waste oil reception facility *Slops* (10 815 GT) had suffered a fire and explosion at an anchorage in the port of Piraeus (Greece) and that an unknown but substantial quantity of oil was spilled. The Committee also recalled that a local contractor had been engaged by the owner of the *Slops* to undertake clean-up operations at sea in conjunction with the Hellenic Coastguard and that the same contractor had also undertaken shoreline clean-up operations.

4.3.3 The Committee recalled that at its 8th session it had decided that the *Slops* should not be considered as a 'ship' for the purpose of the 1992 Civil Liability Convention and the 1992 Fund Convention and that these Conventions did not apply to this incident (document 92FUND/EXC.8/8, paragraph 4.3.8).

4.3.4 The Committee recalled that in reaching its decision it had taken into account the decision of the 1992 Fund Assembly at its 4th session that offshore craft, namely floating storage units (FSUs) and floating production, storage and offloading units (FPSOs), should be regarded as ships only when they carry oil as cargo on a voyage to or from a port or terminal outside the oil field in which they normally operate (document 92FUND/A.4/32, paragraph 24.3). The Committee recalled that this decision had been taken on the basis of the conclusions of the Second Intersessional Working Group that had been set up by the Assembly to study this issue. The Committee also recalled that in its consideration of the *Slops* it had concluded that although the Working Group mainly considered the applicability of the 1992 Conventions in respect of craft in the offshore oil industry, there was no significant difference between the storage and processing of crude oil in the offshore industry and the storage and processing of waste oils derived from shipping. The Committee recalled that it had also noted that the Working Group had taken the view that in order to be regarded as a ship under the 1992 Conventions, an offshore craft should *inter alia* have persistent oil on board as cargo or as bunkers (document 92FUND/A.4/21, paragraph 8.4.2).

4.3.5 The Committee also recalled that a number of delegations had expressed the view that since the *Slops* was not engaged in the carriage of oil in bulk as cargo it could not be regarded as a 'ship' for the purpose of the 1992 Conventions and that this was supported by the fact that the Greek authorities had exempted the craft from the need to carry liability insurance in accordance with Article VII.I of the 1992 Civil Liability Convention.

Claim by a Greek clean-up contractor

4.3.6 The Committee noted that London-based lawyers acting for the contractor which had undertaken the clean-up operations had contacted the 1992 Fund requesting the Executive Committee to reverse its decision and accept that the *Slops* was a 'ship' for the purpose of the 1992 Civil Liability Convention. It was further noted that in support of the claimant's contention the lawyers had placed emphasis on the first part of the definition of 'ship', ie 'any seagoing vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo'. It was also noted that the claimants had argued that the proviso in the definition requiring a ship to be 'actually carrying oil in bulk as cargo' related to combination carriers, ie ore/bulk/oil ships (OBOs).

4.3.7 The Committee noted that the Director had referred the claimant and his lawyers to the Records of Decisions of the 4th session of the 1992 Fund Assembly and the 8th session of the 1992 Fund Executive Committee regarding the applicability of the 1992 Civil Liability Convention and the 1992 Fund Convention to offshore craft in general and to the *Slops* incident respectively (cf paragraphs 4.3.4 - 4.3.6 above). As regards the proviso in the definition of 'ship' in Article 1.1 of the 1992 Civil Liability Convention the Committee noted that the Director had referred the claimant and his lawyer to the conclusions of the Intersessional Working Group when it had reconvened in April 2000, and which had later been endorsed by the 1992 Assembly at its

5th session, that the proviso in Article 1.1 should apply to all tankers and not only to OBOs. The Committee noted that the Director had informed the claimant that for these reasons he was not prepared to submit the claim to the Executive Committee for further consideration.

Request to submit the claim to arbitration

4.3.8 The Committee noted that the claimant's lawyer had recently indicated that the claimant remained of the view that the *Slops* fell within the definition of 'ship' in the 1992 Civil Liability Convention and that they had requested the 1992 Fund to submit the claim to binding arbitration as provided in Internal Regulation 7.3 of the Fund.

4.3.9 The Committee took note of the argument put forward by the claimant that the question of whether the *Slops* fell within the definition of 'ship' in the 1992 Conventions was one of interpretation of the wording of the definition. It was also noted that as regards the conclusions of the Intersessional Working Group, the claimant had made the point that the issue of whether floating storage units fell within the scope of application of the 1992 Conventions had never been considered when the Conventions were drafted and that the deliberations by the Second Intersessional Working Group represented a later attempt to define what was covered by the Conventions. It was further noted that the claimant had also pointed out that it had been recognised by the Assembly that the final decision regarding the applicability of the 1992 Conventions to offshore craft was a matter for national courts. The Committee noted that the claimant had expressed the view that the dispute could be settled more cheaply and speedily by arbitration.

4.3.10 The Committee recalled that the question of whether alternative settlement procedures could be used within the international compensation system established by the 1992 Conventions had been considered by the First Intersessional Working Group and that the report of the Working Group (document 92FUND/A.2/18) had been considered by the Assembly at its 2nd session. It was also recalled that one of the options considered was that of arbitration and that during the discussions in the Assembly it was recognised that the scope for the 1992 Fund to submit claims to arbitration would be limited, since a claim was admissible only if it fell within the definitions of 'pollution damage' and 'preventive measures' laid down in the 1992 Conventions as interpreted by the IOPC Funds' governing bodies (document 92FUND/A.2/29, paragraph 20.10).

4.3.11 The Executive Committee noted the Director's view that it would be appropriate to submit individual claims to arbitration for example if the dispute related to the quantum of the claim, but that in the case under consideration the 1992 Fund's governing bodies, composed of representatives of Governments of Fund Member States, had taken decisions on the interpretation of a definition in the 1992 Conventions, ie the definition of 'ship', and that it would therefore be inappropriate to submit to arbitration the question of whether the governing bodies' interpretation of the definition was correct.

4.3.12 During the discussion a number of delegations expressed the view that it could be appropriate for the 1992 Fund to submit a claim to binding arbitration if the dispute concerned facts of the quantum of a claim which was admissible in principle but not when the dispute related to the interpretation of the 1992 Conventions or questions of principle.

4.3.13 The Committee endorsed the Director's view that it would not be appropriate to submit to arbitration the question of whether the governing bodies' interpretation of the definition was correct.

4.3.14 The Committee expressed the view that if the claimant did not accept the Executive Committee's position in this regard, he should follow the procedure for solving disputes laid down in the 1992 Conventions, ie to take legal action against the shipowner and the 1992 Fund through the competent national court.

5 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.11/WP.1, was adopted, subject to certain amendments.