INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
18th session
Agenda item 6

92FUND/EXC.18/14
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RECORD OF DECISIONS OF THE EIGHTEENTH SESSION OF THE EXECUTIVE COMMITTEE

(held on 14 and 18 October 2002)

Chairman: Mr G Sivertsen (Norway)

Vice-Chairman: Dr J Cowley (Vanuatu)

Opening of the session

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 92FUND/EXC.18/1.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

Algeria	Mexico	Spain
Australia	Netherlands	United Kingdom
Italy	Norway	Vanuatu
Japan	Philippines	
Liberia	Republic of Korea	

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.

2.2 The following Member States were represented as observers:

Angola	Denmark	New Zealand
Antigua and Barbuda	Fiji	Panama
Argentina	Finland	Poland
Barbados	France	Russian Federation
Belgium	Germany	Singapore
Cameroon	Greece	Sri Lanka
Canada	Grenada	Sweden
China (Hong Kong Special Administrative Region)	Malta	Turkey
	Marshall Islands	United Arab Emirates
Cyprus	Morocco	Venezuela

2.3 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:

Colombia Qatar

Other States

Brazil	Lebanon	Saudi Arabia
Chile	Malaysia	Syrian Arab Republic

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

Intergovernmental organisations:
1971 Fund
European Commission

International non-governmental organisations:
Comité maritime international (CMI)
Cristal Ltd
European Chemical Industry Council
Oil Companies International Marine Forum (OCIMF)

3 Incidents involving the 1992 Fund

3.1 Overview

The Executive Committee took note of documents 92FUND/EXC.18/2 and 92FUND/EXC.18/2/Add.1 which contained summaries of the situation in respect of all 15 incidents dealt with by the 1992 Fund since the Committee's 14th session, held in October 2001.

3.2 Incident in Germany

3.2.1 The Executive Committee took note of the developments in respect of this incident contained in document 92FUND/EXC.18/3.

3.2.2 The Committee recalled that in July 1998 the Federal Republic of Germany had brought legal actions against the owner of the *Kuzbass*, suspected of having caused oil pollution in Germany in June 1996, and his insurer, claiming compensation for the cost of the clean-up operations for an amount of DM2.6 million (€1.3 million, approximately £845 000) and that the 1992 Fund had been notified of the legal actions. It was also recalled that the shipowner and his insurer

had maintained that the polluting oil did not originate from the *Kuzbass*. It was further recalled that the 1992 Fund had intervened in the proceedings in order to protect its interests.

3.2.3 The Committee noted that in April 2002 the Court had requested all parties to present a summary of their respective positions and that the 1992 Fund's lawyers were preparing a draft summary in consultation with the German authorities.

3.2.4 The Committee also noted that on 14 June 2002 the Federal Republic of Germany had taken legal action against the 1992 Fund in order to prevent its claim against the Fund becoming time barred at the expiry of a period of six years from the date of the incident as set out in Article 6 of the 1992 Fund Convention. It was further noted that the Fund had applied to the Court to stay the proceedings in respect of this action, pending the outcome of the action by the Federal Republic of Germany against the shipowner and his insurer.

3.3 *Nakhodka*

Claims for compensation

3.3.1 The Executive Committee took note of the information concerning the developments in respect of the *Nakhodka* incident contained in document 92FUND/EXC.18/4 (cf document 71FUND/AC.9/13/5). It was noted that 458 claims totalling ¥36 045 million (£192 million) had been received and that all claims had been settled for a total of ¥26 089 892 682 (£139 million).

3.3.2 It was noted that the claims by Japanese government agencies in respect of clean-up operations had been settled on 30 August 2002 for a total of ¥1 887 million (£10 million), and the claims by the Japan Maritime Disaster Prevention Centre (JMDPC) relating to the construction and removal of a causeway had also been settled on 30 August 2002 at the amount approved by the governing bodies of the 1992 Fund and the 1971 Fund at their April/May 2002 sessions plus interest, ie a total of ¥2 048 million (£11 million). It was further noted that the settlement amounts had been paid in full to the Japanese Government and the JMDPC on 10 September 2002, 80% by the 1992 Fund and 20% by the shipowner's P & I insurer, the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited (UK Club).

3.3.3 The Committee also noted that the payments made to claimants by the Funds totalled ¥20 361 million (£111 million) and the payments made by the shipowner and the UK Club amounted to US$5 million (£3.2 million) plus ¥2 867 million (£15 million).

Legal actions in the Japanese Courts

3.3.4 The Committee recalled that, pursuant to the governing bodies' decisions, in November 1999 the IOPC Funds had brought legal actions in the Fukui District Court against the owner of the *Nakhodka* (Prisco Traffic Limited), Prisco's parent company (Primorsk Shipping Corporation), the UK Club and the Russian Maritime Register of Shipping, to recover any amounts paid by the Funds in compensation.

Global solution

3.3.5 It was recalled that, at their April/May 2002 sessions, the governing bodies had approved the following proposal for a global settlement made by the UK Club.

1 The compensation payments would be shared between the UK Club and the IOPC Funds on a 42:58 basis in respect of all settled claims.

2 The IOPC Funds would continue to make payments at a level of 80% in respect of all settled claims.

3 The UK Club would pay the 20% balance due to all claimants.

4 The UK Club would reimburse the IOPC Funds approximately ¥5 200 million (£27.8 million), this being the amount payable by the Club to the Funds after payment by the Club of the 20% balance due to claimants.

5 The joint costs incurred by the UK Club and the IOPC Funds would also be apportioned between them on a 42:58 basis.

6 All legal actions arising from the incident would cease.

7 The IOPC Funds, Prisco Traffic Limited, Primorsk Shipping Corporation and the UK Club should each bear their own legal costs.

3.3.6 It was recalled that the proposed global settlement would result in the IOPC Funds recovering approximately ¥5 203 million (£27.8 million) and making a saving of around ¥2 500 million (£13.3 million) as a result of not having to increase their payments over 80% of the settlement amounts, and that the Funds would get a contribution to joint costs of some £3.9 million.

3.3.7 It was also recalled that the governing bodies had authorised the Director to conclude a Settlement Agreement provided it contained the elements set out in paragraph 3.3.5 above and to agree with the other parties on the details of such an agreement (documents 92FUND/EXC.16/6, paragraph 3.1.36 and 71FUND/AC.7/A/ES.9/14, paragraph 8.4.36). It was further recalled that the governing bodies had decided that the IOPC Funds should withdraw their actions against the Russian Register of Shipping.

3.3.8 The Committee noted that a Settlement Agreement would be concluded between the IOPC Funds, Prisco Traffic Limited and the UK Club whereby the UK Club would pay the balance of 20% to all claimants except the Japanese government agencies and the JMDPC which had already been paid in full. It was also noted that the Agreement had not yet been signed by the parties since the conditions for the withdrawal of the Funds' action against Primorsk had yet to be fulfilled. It was further noted, however, that the UK Club had already commenced paying the 20% balance to claimants and that it was expected that the UK Club's payment to the Funds would be made by 1 November 2002.

Conversion of the maximum amount payable by the 1971 Fund from SDR to Yen

3.3.9 It was recalled that the 1971 Fund Administrative Council had decided at its July 2002 session that the conversion of the maximum amount payable by the 1971 Fund (58 412 000 SDR) into Japanese Yen should be made using the rate of exchange between the SDR and Japanese Yen on 19 February 1997, the date on which the 1971 Fund Executive Committee had adopted the Record of Decisions of the session at which the Committee took the decision to authorise the Director to make final settlements of claims (cf document 71FUND/AC.8/6, paragraph 3.3.20), and that using this conversion date, the amount payable by the 1971 Fund (58 412 000 SDR) equalled ¥10 022 856 668.

Distribution between the 1971 and 1992 Funds of any amount recovered on the basis of the global settlement

3.3.10 The Committee recalled that at their July 2002 sessions the governing bodies had considered the question as to the basis on which the financial benefits of the global settlement should be shared between the 1992 Fund and the 1971 Fund. It was recalled that the Director had proposed that the financial benefits should be shared between the two Funds in proportion to their maximum liabilities under the respective Conventions, namely 58 412 000 SDR (43.783%) and 75 million SDR (55.217%), respectively.

3.3.11 It was also recalled that a number of delegations, whilst agreeing with the proposal, had expressed concern that its adoption might set a precedent which could result in an inequitable

distribution of recovered amounts in future cases. It was further recalled that some delegations had considered that the financial benefits should be shared on the basis of the actual payments made by the respective Funds rather than their maximum liabilities.

3.3.12 The Committee recalled that the Japanese delegation had referred to the fact that the *Nakhodka* incident had occurred during the transitional period, ie between the date of the entry into force of the 1992 Fund Convention and the date on which the denunciations provided for in Article 31 of the 1992 Protocol to amend the 1971 Fund Convention had taken effect. It was also recalled that the Japanese delegation had maintained that Article 36 *bis* (b) and (c) of the 1992 Fund Convention provided that the 1992 Fund was only required to pay compensation to the extent that claims exceeded the maximum amounts available under the 1969 Civil Liability Convention, the 1971 Fund Convention and, if applicable, the 1992 Civil Liability Convention, and that a natural interpretation of the provisions would lead to the conclusion that any amount recovered relating to an incident occurring during the transitional period should be reimbursed to the 1992 Fund first.

3.3.13 The Committee recalled that another delegation had pointed out that Article 36 *bis* referred only to compensation payments as opposed to the distribution between the two Funds of any amount recovered as a result of a successful recourse action and that a more equitable distribution of amounts recovered would be on the basis of the respective payments made by each Fund.

3.3.14 It was further recalled that the governing bodies had decided to postpone their decisions regarding the distribution of the amounts recovered as a result of the global settlement and had instructed the Director to carry out a further study of the options available and their implications for the two Funds (documents 92FUND/EXC.17/10, paragraph 3.1.23 and 71FUND/AC.8/6, paragraph 3.3.27).

3.3.15 The Executive Committee took note of the information contained in document 92FUND/EXC.18/4/1 (cf document 71FUND/AC.9/13/5/1) submitted by the Japanese delegation reaffirming that delegation's view that any amount recovered in relation to an incident occurring during the transitional period should be reimbursed to the 1992 Fund first. It was noted that in that delegation's view the word ‘distribution’ was inappropriate since the 1992 Fund should be considered as a Fund of last resort in respect of compensation payments, the 1992 Fund being required to make payments only if and to the extent that there were insufficient money available from the 1971 Fund to meet all claims.

3.3.16 The Committee also took note of the Director's analysis as set out in section 6.2 of document 92FUND/EXC.18/4 (cf document 71FUND/AC.9/13/5). The Committee noted the Director's agreement with the statement of one delegation at the July 2002 sessions that Article 36 *bis* referred only to compensation payments as opposed to the distribution between the two Funds of any amount recovered as a result of a successful recourse action and that in his view there were no provisions in the Fund Conventions that were applicable to the question under consideration. The Committee also noted that the Director had proposed that the decision should be such as to ensure a fair distribution between the Funds.

3.3.17 It was noted that the IOPC Funds would, but for the global settlement, have paid up to the maximum amount available under the 1992 Conventions, ie 135 million SDR or ¥23 164 515 000, and that out of that amount the 1971 Fund would have paid ¥10 022 856 668 (43.268%) and the 1992 Fund ¥13 141 658 332 (56.732%). The Committee also noted that, as a result of the global settlement, the IOPC Funds would pay only ¥20 288 915 844, out of which the 1971 Fund had paid ¥10 022 856 668 (49.401%) and the 1992 Fund ¥10 266 059 176 (50.599%).

3.3.18 It was noted that in the Director's view the approach that had been suggested by some delegations set out in paragraph 3.3.11 above was, as a matter of principle, more appropriate than his original proposal and that if the total amount of the established claims arising from the incident were to fall well below 135 million SDR, that approach would clearly be more

equitable than his original proposal. It was however noted that, in the present case, for administrative simplicity the 1992 Fund and the UK Club had agreed that the 1992 Fund should continue to pro-rate payments at 80% and the Club would pay the 20% balance on all settled claims, although strictly speaking, on the basis of the total amount of settled claims, the 1992 Fund should have made pro-rated payments at 88.787% (ie up to the 1992 Fund limit) and the Club should have paid the balance of 11.213%, with the net result that the IOPC Funds would have been reimbursed a greater amount from the Club on the basis of the agreed distribution of liabilities between the UK Club and the Funds (42:58).

3.3.19 The Committee took note of the Director's view that whilst both options referred to in paragraph 3.3.18 above would be fair, his original proposal was preferable in this case, ie that the financial benefits of the global settlement should be distributed in proportion to the respective liabilities of the two Funds, resulting in the 1971 Fund receiving 43.268% and the 1992 Fund 56.732% of these benefits.

3.3.20 A number of delegations expressed the view that since the Conventions gave no guidance on how any recovered money should be distributed between the two Funds, it was the Executive Committee's duty to choose the most equitable solution. Those delegations agreed with the Director's proposal on the grounds that all creditors should be treated equally on the basis of the liabilities discharged. However, those delegations also expressed the view that any decision taken in respect of the *Nakhodka* incident should not be taken as a precedent and that future cases would have to be considered on their individual merits.

3.3.21 The delegation which had at the July 2002 session proposed that the financial benefits should be shared on the basis of the actual payments made by the respective Funds agreed that in light of the discussion it was appropriate in this particular case that the money recovered as a result of the global settlement should be distributed in proportion to the respective liabilities of the two Funds.

3.3.22 The Executive Committee noted that the IOPC Funds had incurred costs totalling some £8.9 million relating to the operation of the Claims Handling Office in Kobe, set up jointly by the IOPC Funds and the UK Club, and in general to the claims handling process and that the UK Club had also incurred such costs. It was noted that since these costs were in general joint costs within the meaning of the Memorandum of Understanding signed by the IOPC Funds and the International Group of P & I Clubs, they should, under the global Settlement Agreement, be apportioned between the UK Club and the IOPC Funds on a 42:58 basis. It was also noted that this apportionment would be made as soon as agreement had been reached between the Funds and the Club on the respective amounts of the joint costs. It was further noted that the IOPC Funds and the shipowner/UK Club had incurred considerable expenses in connection with the various legal actions, and that under the global Settlement Agreement each party should bear its own legal costs.

3.3.23 The Committee decided that the financial benefits of the global settlement should be distributed in proportion to the respective liabilities of the two Funds, resulting in the 1971 Fund receiving 43.268% and the 1992 Fund 56.732% of these benefits. The Committee also decided that all costs borne by the Funds should be apportioned between the two Funds on the same basis.

3.3.24 The Committee noted that the 1971 Fund Administrative Council had, at its 9th session, taken the same decision as regards the distribution between the two Funds of the financial benefits of the global settlement (cf document 71FUND/AC.9/20, paragraph 15.6.23).

3.3.25 The Committee considered how the distribution of the financial benefits of joint recourse actions should be made in a similar, hypothetical case involving the 1992 Fund and the proposed Supplementary Fund. It was agreed that the issue of the distribution of the benefits resulting from a joint recourse action taken by the 1992 Fund and the Supplementary Fund as well as the sharing of the financial burden if the action was unsuccessful could be considered by

the respective governing bodies when they decided that recourse action should be taken, in the light of the particular circumstances of the case.

Lessons learned from the Nakhodka incident

3.3.26 The Committee took note of the information contained in document 92FUND/EXC.18/4/2 submitted by the Japanese delegation and document 92FUND/EXC.18/4/Add.2 presented by the Director.

3.3.27 The Committee noted that in its document the Japanese delegation had drawn attention to the need to improve the claims handling and settlement process in the light of the lessons learned from the *Nakhodka* incident. That delegation referred in particular to the need to consider better ways of using surveyors and also proposed that the Claims Manual should contain examples of claims assessments.

3.3.28 The Committee noted that the Director in his document had pointed out that reviews of the lessons learned from incidents were Fund policy and that some of the experiences gained from the *Nakhodka* incident had already been taken into account in the organisation of the handling of the claims arising from the *Erika* incident.

3.3.29 A number of delegations welcomed the proposal by the Japanese delegation since in those delegations' view it was important to speed up the claims handling process so as to reduce the burden on claimants as soon as possible after an incident. Some delegations suggested that the Claims Manual might not be the most appropriate publication for providing advice to claimants and that a less formal document might be useful explaining to claimants how claims were assessed by the Funds and why certain documentation was required in order to enable the Funds to carry out those assessments.

3.3.30 One delegation considered that there was need to produce a compendium of the Funds' experience in dealing with claims, which provided potential claimants with practical guidance on the presentation of claims. That delegation also considered that the issue of speeding up the handling of claims could be considered by the Intersessional Working Group, since one way of achieving this was to implement alternative dispute resolution procedures.

3.3.31 Reference was made to the document that had been prepared by the Secretariat in 1993 to the 7th Intersessional Working Group of the 1971 Fund (document FUND/WGR.7/3), which contained a review of the decisions on the admissibility of claims taken during the period 1979-1993. It was suggested that that document should be updated.

3.3.32 One delegation drew attention to the IMO Manual on Oil Pollution, Section IV, Combating Oil Spills, which gave practical advice on the interface between claims and the workings of the Funds.

3.3.33 The Committee endorsed the proposal by the Director that he should submit a report to the governing bodies at their October 2003 sessions on the points raised by the Japanese delegation and other related issues after a further examination of what lessons could be learned from the *Nakhodka* incident. The Director was also invited to submit a document to the next meeting of the 3rd Intersessional Working Group of the 1992 Fund on issues which could be usefully considered by the Group.

3.4 *Erika*

3.4.1 The Executive Committee took note of the developments in respect of the *Erika* incident as set out in documents 92FUND/EXC.18/5 and 92FUND/EXC.18/5/Add.1.

Claims situation

3.4.2 The Committee took note of the information given on the situation in respect of the claims presented to the Claims Handling Office established by the shipowner's P & I insurer, the Steamship Mutual Underwriting Association (Bermuda) Limited (Steamship Mutual), and the 1992 Fund as follows:

> As at 11 October 2002, 6 333 claims for compensation had been submitted for a total of FFr1 068 million or € 163million (£103 million). Five thousand seven hundred and sixty claims totalling FFr891 million or €136 million (£86 million) had been assessed at a total of FFr461 million or €70 million (£44 million). Assessments had thus been carried out of 91% of the total number of claims received.
>
> Seven hundred and thirty six claims, totalling FFr127 million or €19million (£12 million), had been rejected. One hundred and forty claimants whose claims totalled FFr38 million or €5.7 million (£3.6 million) had contested the rejection and their claims were being reassessed in the light of additional documentation provided by the claimants.
>
> Payments of compensation had been made in respect of 4 650 claims (including interim payments) for a total of FFr316 million or €48 million (£30 million), out of which the Steamship Mutual had paid FFr84 million or €13 million (£8 million) and the 1992 Fund FFr232 million or €35 million (£22 million). Payments had thus been made in respect of 73% of all claims.
>
> Five hundred and seventy three claims totalling FFr177 million or €27 million (£17 million) were either in the process of being assessed or were awaiting claimants providing further information necessary for the completion of the assessment.

3.4.3 It was noted that claims totalling FFr124 million or €19 million (£12 million) had been lodged against the shipowner's limitation fund constituted by Steamship Mutual and that some 30 of these claims, totalling FFr46 million or €7 million (£4.5 million), had not been presented to the Claims Handling Office. It was also noted that the remaining claims lodged against the limitation fund, totalling FFr78 million or €12 million (£8 million), had also been submitted to the Claims Handling Office, but for a lesser amount (FFr44 million or €6.7 million (£4.3 million). The Committee noted, however, that most of the claims in this latter group had been settled, and that it appeared therefore that these claims should be withdrawn against the limitation fund to the extent that they related to the same loss or damage.

3.4.4 It was noted that a number of communes and other public bodies had made requests to various courts that court surveys ('expertises judiciaires') should be carried out to establish the damage suffered by them and that it was not possible to ascertain the amounts which would be assessed as a result of these surveys. It was further noted that some 70 claimants, almost all of which were public bodies, had presented claims for alleged loss or damage in various courts in the context of these court surveys and that these claims, totalling FFr135 million or €21 million (£13 million), including one for FFr59 million or €9 million (£5.8 million) for damage to the environment, had neither been presented to the Claims Handling Office nor in the limitation proceedings.

3.4.5 The Committee further noted that ten claimants had brought legal actions against the 1992 Fund for claims totalling €2 150 000 (£1 365 000), eight of them in the tourism sector and two in the fisheries sector, and that these claims had been rejected by the 1992 Fund either because the claims were not admissible in principle or because the claimants had not proved that they had suffered losses as a result of the *Erika* incident.

3.4.6 The Committee also noted that it was expected that a number of claims would be submitted to the Claims Handling Office or filed in court during the period up to 12 December 2002.

Time bar

3.4.7 The Committee recalled that under the 1992 Civil Liability Convention, rights to compensation from the shipowner and his insurer were extinguished unless legal action was brought within three years of the date when the damage occurred (Article VIII). It was also recalled that as regards the 1992 Fund Convention, rights to compensation from the 1992 Fund were extinguished unless the claimant either brought legal action against the Fund within this three-year period or notified the Fund within that period of an action against the shipowner or his insurer (Article 6). It was further recalled that both Conventions also provided that in no case should legal actions be brought after six years from the date of the incident.

3.4.8 It was noted that during September 2002 the 1992 Fund had informed individually all those who had submitted claims to the Claims Handling Office and with whom settlements had not been reached by that time about the time bar issue. It was also noted that it might be uncertain as to the date from which the three year time bar period would start to run for the individual claimant (ie the date when the respective claimant's damage or loss occurred) and that in view of the uncertainty as to the starting point of the time bar period, the Director had suggested that the claimants should assume that the time bar period commenced on the date of the incident (ie 12 December 1999), in order to avoid any risk of the claims becoming time-barred.

Level of payments

3.4.9 It was recalled that the Executive Committee had decided at its 13th session, held in June 2001, to increase the level of payments from 60% to 80% of the amount of the loss or damage actually suffered by the respective claimants (document 92FUND/EXC.13/7, paragraph 3.2.42). It was also recalled that at its October 2001, April/May 2002 and July 2002 sessions the Executive Committee had decided that in the light of the uncertainties that remained as to the level of admissible claims arising out of the *Erika* incident, the level of payments should be maintained at 80% (documents 92FUND/EXC.14/12, paragraph 3.4.49, 92FUND/EXC.16/6, paragraph 3.2.25 and 92FUND/EXC.17/10, paragraphs 3.2.31-3.2.34).

3.4.10 The Committee noted that it had again to consider how 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.

3.4.11 The Executive Committee recalled that the claims by Total Fina and the French Government could be disregarded for the purpose of the 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.

3.4.12 It was noted that although the uncertainties inherent in the estimates of admissible losses from the tourism sector had been reduced considerably, there still remained in the Director's view some uncertainties as to the total amount of admissible claims from that sector. It was also noted that only 21% of the businesses in the affected departments that were known to have sustained a reduction in turnover on the basis of VAT declarations had submitted claims.

3.4.13 The Committee noted that, on the basis of the claims submitted to the Claims Handling Office, the Director estimated that the total amount of the admissible claims in the tourism sector would be in the region of FFr550 – 600 million or €84 - 91 million (£53 – 58 million) and that an additional FFr50 million or €8 million (£5 million) should be allowed for marketing campaigns. It was also noted that the total amount of the admissible claims in sectors other than tourism was estimated at FFr250 - 300 million or €38 – 46 million (£24 - 29 million) and that based on these estimates, the total of the admissible claims would be in the region of FFr950 million or €145 million (£92 million). The Committee further noted that the total amount available for

compensation was FFr1 211 966 811 or €184 763 149 (£117 million) and that on that basis there would, in the Director's view, be a sufficient safety margin to enable the 1992 Fund to increase the level of payments to 100%.

3.4.14 The Committee noted the Director's view that there were, however, other factors that gave rise to uncertainties. It was noted that claims which had not been presented to the Claims Handling Office had been lodged against the shipowner's limitation fund for some FFr46 million or €7 million (£4.5 million), that the outcome of the court surveys might result in further claims and that account should be taken of the actions against the 1992 Fund in various courts where the claims totalled FFr135 million or €21 million (£13 million). The Committee also noted that the French courts might adopt a more flexible approach in their interpretations of 'pollution damage' than an interpretation based on the criteria for admissibility applied by the 1992 Fund. It was further noted that there was still some time before the expiry of the time bar period and that it was possible that a significant number of new claims would emerge before the expiry of that period. The Committee took note of the Director's proposal that in view of these uncertainties the level of payments should be maintained at 80% of the amount of the damage actually suffered by the respective claimants as assessed by the experts engaged by the 1992 Fund and the Steamship Mutual and that the level of payments should be reviewed at the Committee's 20th session, to be held in early 2003.

3.4.15 The French observer delegation reiterated its position at the July 2002 session of the Executive Committee and stated that whilst there was a need to be cautious to avoid overpayment, there was also a need to avoid being overcautious. In this regard that delegation pointed out that more than 5 700 claims, ie 91% of claims submitted, had been assessed for less than FFr500 million leaving for the remaining claims, which stood at about 500, an amount of more than FFr700 million. That delegation stated that the number of new claims submitted had decreased considerably and that as regards certain types of claims there were duplications. The French delegation concluded that there was already a sufficient safety margin to allow an increase of the level of payments to 100%.

3.4.16 A number of delegations expressed sympathy with the views expressed by the French delegation, but considered that in view of the remaining uncertainties regarding the claims situation mentioned by the Director, and since the three year time bar period would expire in December 2002, it would be prudent to defer any decision to increase the level of payments to early in 2003.

3.4.17 The Committee noted that the Director believed that the situation would be much clearer after the expiry of the three year period and that he hoped it would be possible to increase the level of payments to 100% at the Committee's February 2003 session.

3.4.18 The Executive Committee decided that in the light of the uncertainties that remained as to the level of admissible claims arising out of the *Erika* incident, the level of payments should be maintained at 80% of the amount of the damage actually suffered by the respective claimants as assessed by the experts engaged by the 1992 Fund and Steamship Mutual. It was also decided that the level of payments should be reviewed at the Committee's 20th session.

Recourse action

3.4.19 The Committee took note of the information contained in document 92FUND/EXC.18/5/Add.2.

3.4.20 The Committee recalled that the IOPC Funds' policy in respect of recourse actions as laid down by the governing bodies could be summarised as follows:

> The policy of the Funds is to take recourse action whenever appropriate. The Funds should in each case consider whether it would be possible to recover any amounts paid by them to victims from the shipowner or from other parties on the basis of the applicable national law. If matters of principle are involved, the question of costs

should not be the decisive factor for the Funds when considering whether to take legal action. The Funds' decision as to whether or not to take such action should be made on a case-by-case basis, in the light of the prospect of success within the legal system in question.

3.4.21 The Committee recalled that a criminal investigation into the cause of the incident was being carried out by an examining magistrate in Paris and that during 2000 charges had been brought against the master of the *Erika*, the representative of the registered owner (Tevere Shipping), the president of the management company (Panship Management and Services Srl), the management company itself, the deputy manager of the Centre Régional Opérational de Surveillance et de Sauvatage (CROSS), three officers of the French Navy who were responsible for controlling traffic off the coast of Brittany, the classification society (RINA) and one of RINA's managers. It was also recalled that in December 2001 charges had been brought against Total Fina and some of its senior staff on the basis of a report by an expert appointed by the magistrate. It was noted that the criminal investigation had not been completed.

3.4.22 It was noted that, at the request of a number of parties, the Commercial Court (Tribunal de Commerce) in Dunkirk had appointed a panel of four experts to investigate the cause of the incident ('expertise judiciaire') and that the 1992 Fund was following the investigations carried out by the Court through its French lawyers and technical experts.

3.4.23 The Committee noted that a number of public and private bodies had brought legal actions in various courts in France against the following parties and had requested that the courts should hold the defendants jointly and severally liable for any damage not covered by the 1992 Civil Liability Convention:

Total Fina SA
Total Raffinage Distribution SA
Total International Ltd
Total Transport Corporation
Tevere Shipping Co Ltd
Steamship Mutual
Panship Management and Services Srl
RINA (Registro Italiano Navale)

3.4.24 It was noted that, in the Director's view, it was not possible for the 1992 Fund to take a final position as to whether the Fund should take recourse actions and, if so, against which parties, until the investigations into the cause of the incident had been completed. It was noted, however, that the Director considered that the 1992 Fund should take such actions as were necessary to prevent its rights becoming time-barred.

3.4.25 The Committee noted the Director's view that pending the outcome of the ongoing investigations, the 1992 Fund should in any event challenge the shipowner's right to limit his liability, since the investigations carried out by the Malta Maritime Authority and the French Permanent Commission of Enquiry into Accidents at Sea gave rise to doubts as to the quality of the ship at the time of the incident (cf document 92FUND/EXC.14/5/Add.1). It was further noted that under Article V.2 of the 1992 Civil Liability Convention the shipowner was deprived of the right to limit his liability if it was proved that the pollution damage resulted from his personal act or omission, committed with intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

3.4.26 The Committee noted that under French law, the general time bar period in commercial matters was, subject to many exceptions, 10 years, but that pursuant to Article VIII of the 1992 Civil Liability Convention, rights to compensation under that Convention were extinguished unless an action was brought within three years from the date when the damage occurred. It was noted that a recourse action against Tevere Shipping Co Ltd (the registered owner of the *Erika)*

would, in the Director's view, constitute an action under the 1992 Civil Liability Convention, and that this might also be the case in respect of Panship Management and Services Srl (manager of the *Erika*), Selmont International Inc (time charterer of the *Erika*) and Total Transport Corporation (voyage charterer of the *Erika*). It was also noted that actions against other companies belonging to the Total group would probably be subject to a time bar period of 10 years, but that it would in the Director's view be preferable to take actions against all companies belonging to the same group at the same time.

3.4.27 It was noted that in order to pursue successfully recourse actions against Panship Management and Services Srl, Selmont International Inc and Total Transport Corporation, the 1992 Fund would have to prove that the pollution damage resulted from their personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that damage would probably result, since they might otherwise be entitled to the protection laid down in Article III.4 of the 1992 Civil Liability Convention.

3.4.28 The Committee noted that under Article VII.8 of the 1992 Civil Liability Convention an action for pollution damage may be brought directly against the insurer, but that the insurer was entitled to limit his liability to the amount prescribed in Article V.2 even if the shipowner was deprived of his right of limitation, and that the insurer would be entitled to invoke the defence that the pollution damage resulted from the wilful misconduct of the shipowner. It was further noted that an action against the *Erika's* insurer, the Steamship Mutual, might also be subject to a three-year time bar.

3.4.29 It was suggested that it might be difficult to deprive the shipowner of his right of limitation of liability since the 1992 Fund had to prove that the pollution damage resulted from the shipowner's personal act or omission, committed with intent to cause damage, or recklessly and with the knowledge that such damage would probably result.

3.4.30 The Executive Committee nevertheless decided to authorise the Director to challenge the shipowner's right to limit his liability under the 1992 Civil Liability Convention and to take recourse actions, as a protective measure, before the expiry of the three-year period against the following parties:

Tevere Shipping Co Ltd (registered owner of the *Erika)*
Steamship Mutual (P & I insurer of the *Erika*)
Panship Management and Services Srl (manager of the *Erika)*
Selmont International Inc (time charterer of the *Erika*)
Total Fina Elf SA (previously Total Fina SA) (holding company)
Total Raffinage Distribution SA (shipper)
Total International Ltd (seller of cargo)
Total Transport Corporation (voyage charterer of the *Erika)*

3.4.31 The Committee noted that the results of the investigations into the cause of the incident might give grounds for the 1992 Fund to take recourse action against parties other than those referred to above, but that the Director considered that no decision was required in this regard at this stage, since the three-year time bar period did not apply to such other parties.

3.4.32 The Committee recalled that the 1992 Fund had taken legal action against the classification societies RINA SpA and Registro Italiano Navale in the Commercial Courts in Nantes, Vannes, La Roche sur Yon and Lorient. The Committee decided that in light of its having authorised the Director to take recourse action against the parties listed in paragraph 3.4.30 above, actions against RINA SpA and Registro Italiano should be taken in the same court as the actions against those parties.

3.5 *Al Jaziah 1*

3.5.1 The Executive Committee took note of the information contained in document 92FUND/EXC.18/6 (cf document 71FUND/AC.9/13/9) concerning the *Al Jaziah 1* incident.

Claims for compensation

3.5.2 The Committee noted that claims in respect of pollution prevention operations had been settled for US$595 000 (£385 000) and that claims totalling US$1.4 million (£893 000) had been provisionally assessed at US$621 000 (£402 000).

Possible recourse action by the IOPC Funds

3.5.3 The Committee recalled that criminal proceedings had been brought against the master of the *Al Jaziah 1* by the Abu Dhabi Public Prosecutor. It was also recalled that in a statement given to the Public Prosecutor the master had stated that the vessel was designed as a water carrier and was in a dangerous condition and badly maintained. The Committee further recalled that the Court had held, *inter alia*, that the vessel had caused damage to the environment and that it did not fulfil basic safety requirements, was not fit to sail, had many holes in the bottom and had not been authorised by the UAE Ministry of Communications to carry oil. It was further recalled that the Court had concluded that the sinking of the vessel was due to these deficiencies and that the master had been fined Dhs 5 000 (£890) for causing damage to the environment.

3.5.4 It was recalled that the Funds' lawyers in the UAE had expressed the view that the findings of the criminal court regarding the vessel's unseaworthiness would be persuasive in any civil action filed against the shipowner in the UAE. It was also recalled that the Director had concurred with the Funds' lawyers. It was further recalled that the Director had expressed the view that the shipowner must have known or ought to have known that the ship was unseaworthy, that the sinking of the vessel was due to the fault or privity of the shipowner and that pursuant to Article V.2 of the 1969 Civil Liability Convention the shipowner was not therefore entitled to limit his liability and that any attempt by the shipowner to limit his liability should be opposed by the Funds.

3.5.5 The Committee further recalled that the governing bodies had decided, at their July 2002 sessions, that if investigations by the Funds' lawyers revealed that the entity registered as the owner of the *Al Jaziah 1* or the individual (a UAE national) owning that entity at the time of the incident had significant assets, the Funds should take recourse action against them (documents 92FUND/EXC.16/6 paragraph 3.3.7 and 71FUND/AC.7/A/ES.9/14, paragraph 8.5.7).

3.5.6 The Committee noted that the UAE national referred to in paragraph 3.5.5 above worked for the Abu Dhabi National Oil Co. in its Administration Department and that this person had ownership of or substantial shares in four separate companies. It was noted that three of these companies either did not have valid trading licences or their trading records were unreliable. It was also noted that the fourth company was a limited liability company engaged in the storage and transportation of oil and that the person was reported to hold 50% of the shares. The Committee further noted that the Funds' lawyers had indicated that in the event of the IOPC Funds obtaining a judgement against the person in question, the Funds might be able to execute it against the dividends payable from his 50% share holding in the company or by obtaining a judicial sale of the shares under the UAE Commercial Companies Law. It was noted, however, that the Funds' lawyers had been unable to establish whether these assets would be sufficient to satisfy the amount which the Funds may be awarded in a final judgement, that the value of the shares in the company in question was uncertain and that it would not be possible to prevent the disposal of the company's assets during the litigation period.

3.5.7 The Committee noted that the Director had been advised by the Funds' UAE lawyers that there were reasonably good prospects for the Fund to obtain a favourable judgement against the person in question and that it was likely that he would not be entitled to limit his liability. It

was noted, however, that the Funds' lawyers had also advised the Director that the Fund might encounter considerable difficulties in enforcing a judgement against the assets of the defendant and that it was in any event uncertain whether the defendant would have sufficient assets to enable the Funds to recover any substantial amount.

3.5.8 Most delegations expressed the view that the question of whether or not to pursue a recourse action against the shipowner raised an important issue of principle and that the IOPC Funds should play a part in discouraging the operation of sub-standard ships and enforcing the 'polluter pays principle'. In recommending that the IOPC Funds should pursue a recourse action those delegations recognised that the prospects of enforcing a favourable judgement were limited, but that it was in their view nevertheless important for the Funds to take a stand. Some delegations considered, however, that the Funds should be realistic and not pursue a recourse action if the shipowner had no assets.

3.5.9 The Committee decided that the 1992 Fund should pursue recourse action against the shipowner.

3.5.10 The Committee noted that the 1971 Fund Administrative Council had, at its 9th meeting, decided that the 1971 Fund should pursue recourse action against the shipowner (cf document 71FUND/AC.9/20, paragraph 15.10.9).

3.5.11 The Committee recognised that the decision to pursue a recourse action in this particular case represented a deviation from the Funds' policy of basing their decisions in part on the prospects of recovery in the event of a favourable judgement.

3.6 *Slops*

3.6.1 The Executive Committee took note of the information contained in document 92FUND/EXC.18/7 concerning the *Slops* incident.

3.6.2 The Committee recalled that at its 8th session, held in July 2000, it had decided that the *Slops* should not be considered a 'ship' for the purpose of the 1992 Civil Liability Convention and the 1992 Fund Convention and that therefore these Conventions did not apply to this incident (document 92FUND/EXC.8/8, paragraph 4.3.8).

3.6.3 It was recalled that in February 2002 two Greek companies had taken legal actions against the 1992 Fund in the Court of first instance in Piraeus claiming compensation for the cost of clean-up and pollution prevention for US$1.7 million (£1.1 million) and US$859 000 (£550 000) respectively. The Committee noted that in their pleadings the companies had stated that the *Slops* had been constructed exclusively to carry oil by sea (ie was constructed as a tanker), that it had a nationality certificate as a vessel and that it was still registered as a tanker with the Piraeus Ship's Registry. The Committee further noted that the companies had maintained that even when the *Slops* operated as an oil separation unit (a slops handling unit), it floated at sea and its only purpose was to carry oil in its hull. It was noted that the *Slops* did not have any liability insurance under the 1992 Civil Liability Convention.

3.6.4 The Committee noted the statement made by the companies that the registered owner had no assets apart from the *Slops* which had been destroyed by fire and did not even have scrap value, that they had taken all reasonable measures against the owner of the *Slops*, namely legal action against the owner, investigation into the owner's financial situation, requesting the court to arrest the assets belonging to the owner and that the owner should be declared bankrupt and that, since the owner was manifestly incapable of satisfying their claims, they were entitled to compensation from the 1992 Fund for their costs.

3.6.5 It was recalled that at its 17th session, held in July 2002, the Executive Committee had decided that the companies had not provided any information in their pleadings which would modify the Committee's position that the *Slops* should not be considered a 'ship' for the purpose of the 1992

Fund Convention and had accordingly instructed the Director to oppose the actions (document 92FUND/EXC.17/10, paragraph 3.5.10). It was noted that the Director had instructed the 1992 Fund's Greek lawyer in accordance with the Committee's decision, that a hearing had been held on 8 October 2002 and that the Court was expected to render its decision before the end of 2002.

3.7 Incident in Sweden

3.7.1 The Executive Committee took note of the information contained in document 92FUND/EXC.18/8 concerning this incident.

3.7.2 The Committee recalled that on 23 September 2000 persistent oil had landed on the shores of two islands to the north of Gotland in the Baltic Sea and on several islands in the Stockholm archipelago and that the Swedish Coastguard, the Swedish Rescue Service Agency and local authorities had undertaken clean-up operations.

3.7.3 The Committee recalled that investigations by the Swedish authorities had indicated that the oil could have been discharged on 3 September 2000 within the Swedish Exclusive Economic Zone to the east of Gotland, possibly from the Maltese tanker *Alambra*, which had passed the area at the assumed time of the oil spill on a ballast voyage to Tallinn (Estonia). It was noted that according to the Coastguard, analyses of oil samples from the polluted islands matched those taken from the *Alambra*. The Committee further noted that the shipowner and his insurer had maintained that the oil did not originate from the *Alambra*.

3.7.4 It was noted that the Swedish Coastguard had incurred costs in respect of clean-up operations totalling SEK 1.1 million (£75 000), that the Rescue Service Agency, together with local authorities, had incurred clean-up costs totalling SEK 4.1 million (£280 000) and that therefore the aggregate amount of the claims would fall well below the limitation amount applicable to the *Alambra*, 3 684 760 SDR (£23 million).

3.7.5 The Committee noted that the Swedish authorities intended to submit their claims for compensation to the owner in the autumn of 2002 and that in the event that they were unsuccessful in receiving compensation from the shipowner, they would consider claiming against the 1992 Fund. It was noted however that, in order to be able to obtain compensation from the 1992 Fund, the authorities would have to prove that the damage resulted from an incident involving a 'ship' as defined in the 1992 Civil Liability Convention.

3.7.6 The Committee further noted that the Swedish authorities had made available to the 1992 Fund the results of an analysis of samples of oil carried on board the *Alambra* and of samples of oil found on several Swedish islands and that the documents provided by the Swedish authorities were being examined by the Fund.

3.8 *Natuna Sea*

3.8.1 The Executive Committee took note of the information contained in document 92FUND/EXC.18/9 (cf document 71/FUND/AC.9/13/11) concerning the *Natuna Sea* incident, which occurred in October 2000 in the Singapore Strait off Batu Behanti (Indonesia) and had affected Indonesia, Malaysia and Singapore.

3.8.2 The Committee recalled that Singapore was a Party to the 1992 Civil Liability Convention and to the 1992 Fund Convention, that Indonesia was a Party to the 1992 Civil Liability Convention but not to the 1992 Fund Convention and that Malaysia was a Party to the 1969 Civil Liability Convention and the 1971 Fund Convention, but not to the 1992 Conventions.

3.8.3 It was noted that there remained a possibility that the total amount of the admissible claims for pollution damage in Singapore and Indonesia would exceed the limitation amount applicable to the *Natuna Sea* under the 1992 Civil Liability Convention, 22.4 million SDR (£19 million), and

that the 1992 Fund might be called upon to make payments in respect of pollution damage in Singapore.

3.9 *Baltic Carrier*

3.9.1 The Executive Committee took note of the information contained in document 92FUND/EXC.18/10 concerning the *Baltic Carrier* incident.

3.9.2 The Committee recalled that the *Baltic Carrier* had collided with a bulk carrier, the *Tern*, some 30 miles north-east of Rostock (Germany), resulting in a spill of some 2 500 tonnes from the *Baltic Carrier*, some of which entered the damaged forepeak of the *Tern*. It was further recalled that both vessels were entered in Assuranceforeningen Gard (the Gard Club).

Oil pollution in Denmark

3.9.3 The Committee noted that claims had been settled for a total of DKr 70.2 million (£6.1 million) in respect of clean-up and disposal of oily waste had been settled for DKr 33.3 million (£2.9 million) and that claims in respect of property damage, economic losses in the fisheries and aquaculture sector and environmental monitoring had been settled for a total of DKr 36.9 million (£3.2 million). It was noted that further claims totalling DKr 42.6 million (£3.6 million) in respect of clean-up at sea and on shore were being assessed.

3.9.4 The Committee also noted that in July 2002, whilst renovation work was being carried out on a causeway in the area affected by the oil spill it had been discovered that oil that had become trapped within the underlying boulders of the causeway was being released into the sea. It was also noted that the local authorities and the contractors involved in the renovation work had considered two options for dealing with the problem. The Committee noted that the option adopted was to leave the oily boulders undisturbed and to lay fresh material on top. The Committee further noted that the contractor had estimated that this would lead to an increase in the costs of the renovation project by some DKr 1.8 million (£154 000).

Oil pollution in Rostock and Ventspils

3.9.5 It was recalled that following the collision the *Tern* had proceeded to Rostock (Germany) where a small spill of *Baltic Carrier* oil contained in the *Tern's* damaged forepeak had occurred. It was noted that clean-up operations had been undertaken by the local fire brigade at a cost of DM 600 (£190).

3.9.6 It was also recalled that the *Tern* had subsequently proceeded to Ventspils (Latvia) to discharge its cargo, and that further spillage of *Baltic Carrier* oil had occurred in Ventspils. The Committee noted that the Gard Club had settled all claims for pollution damage in Ventspils without consultation with the 1992 Fund but that the Gard Club had not indicated whether it intended to maintain that the claims for pollution damage in Ventspils fell within the scope of application of the 1992 Civil Liability Convention as regards the *Baltic Carrier* incident.

3.9.7 The Committee further recalled that at its 13th session, held in June 2001, it had considered the question as to whether the spills of *Baltic Carrier* oil from the *Tern* fell within the scope of application of the 1992 Conventions.

3.9.8 It was recalled that, as regards the spill in Rostock, the costs for clean-up were insignificant, that the German authorities did not intend to carry out any investigation into the circumstances surrounding the spill in Rostock and that the Committee therefore had decided not to give the matter any further consideration.

3.9.9 The Committee noted that, if the total amount paid by the Gard Club in compensation (including payments in respect of pollution damage in Ventspils) were to exceed the limitation

amount applicable to the *Baltic Carrier* under the 1992 Civil Liability Conventions, the Club might seek reimbursement from the 1992 Fund of the sum paid in excess of that amount.

3.9.10 The Executive Committee also noted that the Director had been unable to obtain any further information regarding the cause of the spill in Ventspils but that he considered that, until more details were available as to the events leading to the spill, and until the Gard Club had decided whether or not to maintain that its subrogated claims for pollution damage in Ventspils should be paid from the limitation amount applicable to the *Baltic Carrier*, it was premature for the Committee to take a decision as to whether the spill fell within the scope of application of the 1992 Conventions.

1992 Fund's involvement

3.9.11 It was noted that it was not yet possible to make an evaluation of the total amount of the established claims for compensation and that it was therefore not possible to determine whether the limitation amount applicable to the *Baltic Carrier*, DKr 118 million (£10 million), would be exceeded and whether the 1992 Fund would be called upon to pay compensation.

3.10 *Zeinab*

The Committee took note of the developments in respect of the *Zeinab* incident, as contained in document 92FUND/EXC.18/11 (cf document 71FUND/AC.9/13/12).

3.11 Other incidents

3.11.1 The Executive Committee noted the information contained in document 92FUND/EXC.18/12 in respect of the following incidents: *Mary Anne*, *Dolly* and *Neptank VII*.

Mary Anne

3.11.2 The Committed recalled that the *Mary Anne* sank in Manila Bay (Philippines) in July 1999, causing a small spill of intermediate fuel oil.

3.11.3 The Committee noted that in September 2002 the shipowner's limited liability insurer, Terra Nova Insurance Company Limited (Terra Nova), had informed the 1992 Fund that Terra Nova and two other parties had commenced proceedings in the Philippines against the Fund. It was also noted that the 1992 Fund had not been served with any action in the Philippines, but had sought clarification from Terra Nova on the identity of the claimants, the claimed amounts and the bases of the claims. It was noted that claims against the 1992 Fund had become time-barred on or shortly after 22 July 2002. It was further noted that Terra Nova had informed the 1992 Fund that it intended to abandon its action against the Fund without prejudice to its position that it was entitled to claim recovery from the Fund.

Dolly

3.11.4 The Committee recalled that the *Dolly* sank off Martinique in September 1999 with a cargo of bitumen on board.

3.11.5 The Committee noted that in view of the anticipated costs of removing the bitumen cargo from the wreck of the *Dolly*, the French authorities had sought for tenders through the Official Journal of the European Communities. It was further noted that the operations were expected to commence towards the end of 2002 after the hurricane season.

Neptank VII

3.11.6 The Committee recalled that in June 2002 the *Neptank VII* had collided with a general cargo ship in the port of Singapore spilling about 300 tonnes of heavy fuel oil.

3.11.7 The Committee noted that claims had been submitted to the owner of the *Neptank VII* and his insurer in respect of the costs of clean-up undertaken in Singapore, but that since these costs were well below the limitation amount applicable to the ship under the 1992 Civil Liability Convention it was very unlikely that the 1992 Fund would be called upon to make compensation payments.

3.12 Incidents in Spain, Guadeloupe and United Kingdom

3.12.1 The Executive Committee took note of the information contained in document 92FUND/EXC.18/13.

Incident in Spain

3.12.2 The Committee noted that in September 2000 several beaches in north Galicia (Spain) were polluted by oil, which had necessitated clean-up by two local authorities. It was noted that investigations by the Spanish authorities had indicated that the oil could have been discharged within the Spanish Exclusive Economic Zone from the Maltese tanker *Concordia I* (159 147 GT), which had passed through the area at the assumed time of the oil spill on a ballast voyage from Rotterdam (Netherlands) to Sidi Kerir (Egypt).

3.12.3 The Committee noted that the *Concordia I* was entered with the Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Ltd (Standard Club). It was also noted that the shipowner had maintained that the oil did not originate from the *Concordia I.*

3.12.4 The Executive Committee noted that the Spanish authorities had boarded the *Concordia I* in Algeciras (Spain) and taken oil samples from various tanks. It was further noted that on the basis of analyses undertaken by the authorities they had concluded that the oil from the vessel's slops tanks matched the oil taken from the polluted beaches. It was further noted that having examined the analytical data provided by the Spanish authorities to the 1992 Fund the Director had concurred with their conclusions and had informed the Standard Club and the Spanish authorities accordingly.

3.12.5 It was noted that the local authorities involved in the clean-up operations had submitted claims totalling Ptas 1 006 500 (€6 050 or £3 800) to the Standard Club and the 1992 Fund.

Incident in Guadeloupe

3.12.6 The Committee noted that in July 2002 the Mayor of Petit-Bourg (Guadeloupe) had informed the 1992 Fund of a pollution incident, allegedly an illegal discharge of oil at sea. It was noted that the oil had affected the coast of the town, which had necessitated the closure of a bathing beach whilst the clean-up was undertaken by the authorities and the imposition of a ban on foot fishing. It was also noted that the authorities were trying to identify the ship responsible for the pollution and had sent samples of the polluting oil for analysis in France.

3.12.7 It was noted that the costs of clean-up operations had been estimated at €340 000 (£220 000) and that the Mayor had indicated that he intended to submit claims for compensation to the 1992 Fund in the event that he would be unable to identify a ship responsible for the illegal discharge.

Incident in the United Kingdom

3.12.8 The Committee noted that in September 2002 an unknown quantity of oil had stranded on a 3 km stretch of shoreline near Hythe, Kent (United Kingdom) necessitating clean-up by two local authorities at an estimated total cost of around £7 000. It was noted that analyses of the pollution samples had led to the conclusion that the oil residues were most likely to have originated from a spillage of heavy Middle Eastern crude oil and that the Director concurred with this conclusion.

3.12.9 It was noted that there were no refineries or pipelines in the vicinity of Hythe and that the Director was of the view that the oil most probably originated from an oil tanker, ie a 'ship' as defined in the 1992 Civil Liability Convention.

Consideration by the Executive Committee

3.12.10 One delegation questioned the liability of the 1992 Fund to pay compensation in the event that the ship from which the oil originated had not been identified. Whilst agreeing with the logic of the Director in concluding that the incident in the United Kingdom was probably caused by a 'ship' as defined in the 1992 Civil Liability Convention, that delegation was of the view that under Article 4.1 (a) of the 1992 Fund Convention the 1992 Fund was only liable to pay compensation when a shipowner was exonerated from liability under Article III.2 of the 1992 Civil Liability Convention.

3.12.11 The Director mentioned that the 1992 Fund was dealing with five incidents where the ship from which the pollution originated had not been established or was in dispute. He pointed out that the incidents in question gave rise to questions of scientific, factual and legal nature. He pointed out that whereas the 1969 Civil Liability Convention and the 1971 Fund Convention only applied to ships actually carrying oil in bulk as cargo, the 1992 Fund Convention applied not only to laden tankers but also to unladen tankers in certain circumstances. He referred to the position taken by the Assembly in respect of the applicability of the 1992 Fund Convention to unladen tankers (document 92FUND/A.5/28, paragraph 23.2). He pointed out that as regards the incident in the United Kingdom, it was in his view clear that the oil must have originated from a tanker since crude oil was not used as bunkers and there was no indication that the oil could have come from a source other than a ship.

3.12.12 A number of delegations expressed the view that it had always been their understanding that spills from an unknown source (so called mystery spills) were covered by the 1992 Fund Convention provided that it could be established that the spill was of persistent oil and that the spill originated from a 'ship' as defined in the 1992 Conventions and that in contrast with the 1969 Civil Liability Convention and the 1971 Fund Convention it was not required that the 'ship' was laden.

3.12.13 The Executive Committee endorsed the interpretation of the 1992 Fund Convention on this point made by the Director, ie that the 1992 Fund Convention applied also to spills of persistent oil even if the ship from which the oil came could not be identified, provided that it was shown to the satisfaction of the 1992 Fund, or in the case of dispute to the satisfaction of a competent court, that the oil originated from a ship as defined in the 1992 Fund Convention.

3.12.14 The Committee decided to authorise the Director to make final settlements on behalf of the 1992 Fund of all claims arising out of the three incidents in question in the event that the claimants were unable to obtain compensation under the 1992 Civil Liability Convention, but could demonstrate to the satisfaction of the Director that the pollution damage was caused by persistent oil originating from a ship as defined in the 1992 Civil Liability Convention.

4 Future sessions

4.1 The Executive Committee decided to hold its 19th session on 18 October 2002.

4.2 The Committee decided to hold further sessions during the weeks of 3 February and 6 May 2003, if required.

4.3 It was decided that the Committee would hold its normal autumn session during the week of 20 October 2003.

5 Any other business

The Executive Committee expressed its appreciation to the out-going Chairman, Mr Gaute Sivertsen, for his excellent chairmanship.

6 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.18/WP.1, was adopted, subject to certain amendments.
