INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
20th session
Agenda item 5

92FUND/EXC.20/7
7 February 2003
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RECORD OF DECISIONS OF THE TWENTIETH SESSION OF THE EXECUTIVE COMMITTEE

(held on 3, 4 and 7 February 2003)

Chairman: Mr J Rysanek (Canada)

Vice-Chairman: Lieutenant Commander K Amarantidis (Greece)

Opening of the session

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 92FUND/EXC.20/1.

2 Examination of credentials

2.1 The following members of the Executive Committee were present:

Cameroon	Liberia	Republic of Korea
Canada	Marshall Islands	Singapore
France	Mexico	Spain
Greece	Philippines	Sweden
Italy	Poland	United Kingdom

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:

Algeria	Denmark	Netherlands
Angola	Dominica	Norway
Antigua and Barbuda	Finland	Panama
Argentina	Germany	Portugal
Bahamas	Grenada	Russian Federation
Barbados	Ireland	Turkey
Belgium	Japan	Tunisia
Colombia	Malta	Uruguay
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:

Nigeria

Other States

Chile	Ecuador	Malaysia
Côte d'Ivoire	Iran	Peru

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

Intergovernmental organisations:
European Commission

International non-governmental organisations:
Conference of Peripheral Maritime Regions (CPMR)
Cristal Limited
Friends of the Earth International (FOEI)
International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)
International Group of P & I Clubs
International Tanker Owners Pollution Federation Limited (ITOPF)
Oil Companies International Marine Forum (OCIMF)

3 Incidents involving the 1992 Fund

3.1 *Nakhodka*

3.1.1 The Executive Committee took note of the information concerning the developments in respect of the *Nakhodka* incident (Japan, 2 January 1997) contained in document 92FUND/EXC.20/2 (cf 71FUNDAC.10/3).

3.1.2 It was recalled that the *Nakhodka* incident had resulted in claims totalling ¥36 045 million (£188 million) and that in view of the total amount of the claims the governing bodies had decided to limit the IOPC Funds' payments to 80% of the amount of the damage actually suffered by the individual claimant. It was noted that all the claims had been finally settled at a total of ¥26 087 879 202 (£136 million).

Legal actions in the Japanese Courts

3.1.3 The Committee recalled that, pursuant to the governing bodies' decisions, 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 United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd (UK Club) and the Russian Maritime Register of Shipping, to recover any amounts paid by the Funds in compensation.

Global solution

3.1.4 It was recalled that at their April/May 2002 sessions, the governing bodies had approved the proposal for a global settlement made by the UK Club. 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 3.1 of document 92FUND/EXC.20/2 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 Maritime Register of Shipping.

3.1.5 The Committee noted that the Settlement Agreement between the IOPC Funds, on the one hand, and Prisco Traffic Limited and the UK Club, on the other, had been signed on 28 October 2002. It was noted that, in accordance with the Agreement, on 31 October 2002 the UK Club had reimbursed the IOPC Funds ¥5 229 812 901 (£27.3 million) in respect of the compensation payments made by the Funds and £3.6 million in respect of the Club's share of the joint costs. It was also noted that the UK Club had paid the 20% balance of all settled claims, that all claimants had therefore been fully compensated and that as a result, all claimants had withdrawn their court actions. The Council noted that the legal actions taken in the Fukui District Court by the IOPC Funds, Prisco Traffic Limited and the UK Club, as well as the IOPC Funds' actions against Primorsk Shipping Corporation and the Russian Register of Shipping, had been withdrawn on 9 December 2002.

3.1.6 It was noted that, whilst Primorsk Shipping Corporation and the Russian Maritime Register of Shipping were not parties to the Agreement, they had undertaken not to pursue any claims for legal costs against the IOPC Funds.

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

3.1.7 It was recalled that the governing bodies had decided at their October 2002 sessions 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 and that all costs borne by the Funds should be apportioned between the two Funds on the same basis (document 92FUND/EXC.18/14, paragraph 3.2.23 and 71FUND/AC.9/20, paragraph 15.6.23). The Committee noted that the distribution of the amount recovered from the UK Club, ¥5 229 812 901 (£27 288 353), had been made according to those decisions, resulting in the 1992 Fund recovering ¥2 966 977 455 (£15 481 228) and the 1971 Fund ¥2 262 835 446 (£11 807 125). It was also noted that the UK Club's contribution to joint costs, £3 617 526, had been distributed on the same basis.

Benefits of the global settlement

3.1.8 The Director drew the Committee's attention to the fact that the financial benefits to the IOPC Funds totalled some £42 million, namely £27.3 million reimbursed by the UK Club in respect of the compensation payments, £3.6 million in respect of the UK Club's share of the joint costs and £11 million as a result of the 1992 Fund not having to pay compensation up to its limit. He

expressed the view that the global settlement presented three major benefits: firstly, all claimants had been compensated in full; secondly, the IOPC Funds and the other parties concerned did not need to be involved in protracted legal proceedings; and thirdly, the 1971 and 1992 Funds had recovered significant portions of the amounts paid by them in compensation.

3.1.9 The Japanese delegation expressed its satisfaction with the global settlement.

3.1.10 The Executive Committee expressed its satisfaction that the *Nakhodka* incident had been settled, that all claimants had been paid in full and that the 1971 and 1992 Funds had recovered significant portions of the amounts paid by them in compensation. The Committee expressed its gratitude to all parties involved for their contribution to the settlement of this incident.

Lesson to be learned

3.1.11 One delegation proposed that the Director should be instructed to prepare a document for consideration by the Assembly on the experience of the claims handling in the *Nakhodka* case so as to enable the Funds to learn from their experiences for future cases.

3.1.12 The Director drew attention to the fact that the Executive Committee had at its 18th session, held in October 2002, endorsed a proposal by the Director that he should submit a report to the governing bodies at their October 2003 sessions on certain points raised by the Japanese delegation concerning the need to improve the claims handling and settlement process in the light of the lessons learned from the *Nakhodka* incident (document 92FUND/EXC.18/14, paragraph 3.3.33).

3.2 *Erika*

3.2.1 The Executive Committee took note of the developments in respect of the *Erika* incident (France, 12 December 1999) as set out in documents 92FUND/EXC.20/3 and 92FUND/EXC.20/3/Add.1.

Limitation proceedings

3.2.2 The Executive Committee recalled that, at the request of the shipowner, the Commercial Court in Nantes had issued an order on 14 March 2000 opening the limitation proceedings. It was recalled that the Court had determined the limitation amount applicable to the *Erika* at FFr84 247 733 corresponding to €12 843 484 (£8.4 million) and had declared that the shipowner had constituted the limitation fund by means of a letter of guarantee issued by the shipowner's P & I insurer, the Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual). It was noted that in 2002, the limitation fund had been transferred from the Commercial Court in Nantes to the Commercial Court in Rennes and that a new liquidator had been appointed.

Action in Italy by RINA SPA/Registro Navale

3.2.3 The Committee recalled that in late April 2000 RINA SpA and Registro Italiano Navale had brought legal action in the Court of Syracusa (Augusta section) (Italy) against the shipowner, his insurer, Total Fina, the 1992 Fund and the French State and others. It was also recalled that RINA SpA and Registro Italiano Navale had requested the Court to declare that they were not liable, jointly or severally or alternatively, for the sinking of the *Erika* and for the pollution of the French coast, or for any other consequence of the incident whatsoever.

3.2.4 It was recalled that in March 2001 the 1992 Fund had commenced legal action under a special procedure directly before the Italian Supreme Court of Cassation requesting that the Court should decide that the Italian Courts did not have jurisdiction and arguing that, although the plaintiffs had requested a negative declaration, their actions should be considered as actions for compensation under Article IX of the 1992 Civil Liability Convention, or alternatively, that Article 5.3 of the

Brussels Convention did not apply to the plaintiffs' actions, since the actions related to a declaration of non-liability. It was also recalled that subsequently the French Government and the companies in the Total Fina Group had taken corresponding actions and that as a consequence of this procedure, the Tribunal of Syracuse had suspended the proceedings on the merits pending the decision of the Court of Cassation.

3.2.5 The Committee noted that the Court of Cassation had rendered its decision in October 2002, declaring that the Italian Courts lacked jurisdiction as regards the parties having used the special procedure on the grounds that Article IX of the 1992 Civil Liability Convention conferred exclusive jurisdiction on the Courts of the State where the pollution damage was caused.

Legal actions by the French State and Total Fina

3.2.6 The Committee noted that the French State had brought actions in the Civil Court (Tribunal de Grande Instance) in Lorient against Tevere Shipping Co Ltd, Panship Management and Services Srl, Steamship Mutual, Total Transport Corporation, Selmont International Inc, the limitation fund referred to in paragraph 3.2.2 above, and the 1992 Fund, claiming €190 553 427 (£125 million) (which could be increased at a later stage), plus interest at legal rate under Article 1153-1 of the Civil Code, as follows:

> €50 124 354.11 (£33 million) in respect of expenses incurred by the Ministries of Interior, Defence, Economy, Finance and Industry and Health;
>
> €127 395 920.58 (£83 million) in respect of payments made under the French oil pollution contingency plan Plan Polmar;
>
> €13 033 152.75 (£8.5million) in respect of payments made to victims.

3.2.7 It was noted that the French State had requested the Court to order the defendants, except the limitation fund and the 1992 Fund, to pay €190 553 427 and to declare that the limitation fund and the 1992 Fund should execute the judgement within the respective limits laid down in the 1992 Civil Liability Convention and the 1992 Fund Convention.

3.2.8 It was also noted that four companies in the Group Total Fina, namely Total Fina Elf SA, Total Fina Elf France SA (in succession of Total Raffinage Distribution SA), Total International Limited and Total Transport Corporation, had commenced actions in the Commercial Court in Rennes against Tevere Shipping Co Ltd, Panship Management & Services Srl, Steamship Mutual, the limitation fund, RINA, Registro Italiano Navale and the 1992 Fund. It was noted that the claim was for €143 million (£93 million) (which could be increased at a later stage), allegedly admissible under the 1992 Fund Convention, and for €3 million (£2 million) for the cost of an 'expertise judiciaire' which, according to the Total Fina Group of companies, was not admissible under the 1992 Fund Convention. It was also noted that the Total Fina Group of companies had claimed interest at the legal rate under Article 1154 of the Civil Code. It was further noted that, as regards the action against the 1992 Fund, the Total Group of companies had requested a declaration that the claim was admissible for €143 million but that the right to compensation would be exercised only if all victims (including the French State and the public bodies) were compensated in full.

Legal action in France by Steamship Mutual

3.2.9 The Committee noted that Steamship Mutual had filed action in the Commercial Court in Rennes against the 1992 Fund, requesting *inter alia* the Court to note that, in the fulfilment of its obligations under the 1992 Civil Liability Convention, Steamship Mutual had paid €12 843 484 (£8.4 million) corresponding to the limitation amount applicable to the shipowner, in agreement with and under the control of the 1992 Fund and its Executive Committee and to declare that it

had fulfilled all its obligations under the 1992 Civil Liability Convention, that the limitation amount had been paid and that the shipowner was exonerated from his liability under the Convention. It was also noted that the Steamship Mutual had requested the Court to order the 1992 Fund to reimburse it any amount it would have paid in excess of the limitation amount.

Recourse actions by the 1992 Fund

3.2.10 The Committee recalled that at its 18th session, held in October 2002, it had considered a document presented by the Director (document 92FUND/EXC.18/5/Add.2) raising the question as to whether the 1992 Fund should take recourse actions against certain parties to recover the amounts paid by it in compensation. It was also recalled that the Director had expressed the view that 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 but that the Director had considered that the 1992 Fund should take such actions as were necessary to prevent its rights becoming time-barred.

3.2.11 It was recalled that the Executive Committee had authorised 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*)

3.2.12 The Committee noted that on 11 December 2002 the 1992 Fund had brought actions in the Civil Court (Tribunal de Grande Instance) in Lorient against the parties listed in paragraph 3.2.11.

3.2.13 It was noted that after the Executive Committee's October 2002 session, the Director had been made aware of the fact that the classification society Bureau Veritas had inspected the *Erika* prior to the transfer of class to RINA and that the 1992 Fund had taken recourse action, as a protective measure, against Bureau Veritas in the Civil Court in Lorient on 11 December 2002.

Claims submitted to the Claims Handling Office

3.2.14 The Committee noted that as at 23 January 2003, 6 647 claims for compensation totalling FFr1 291 million or €197 million (£121 million) had been submitted to the Claims Handling Office in Lorient established by the 1992 Fund and Steamship Mutual. It was noted that 6 188 claims totalling FFr985 million or €150 million (£100 million) had been assessed at a total of FFr537 million or €82 million (£54 million). It was also noted that 696 claims totalling FFr126 million or €19million (£12 million), had been rejected, that 61 claimants whose claims totalled FFr23 million or €3.5 million (£2.3 million) had contested the rejection and that their claims were being reassessed in the light of additional documentation provided by the claimants.

3.2.15 The Committee noted that payments of compensation had been made in respect of 5 009 claims (including interim payments) for a total of FFr372 million or €57 million (£37 million), out of which the Steamship Mutual had paid FFr84 million or €13 million (£8 million) and the 1992 Fund FFr288 million or €44 million (£27 million). The Committee also noted that 459 claims totalling FFr306 million or €47 million (£31 million) were either in the process of being assessed

or were awaiting claimants providing further information necessary for the completion of the assessment.

3.2.16 The Chairman made the point that there had been remarkable productivity in the assessment and settlement of claims.

3.2.17 One delegation asked whether there was any significance in the fact that the remaining 459 claims which were either in the process of being assessed or were awaiting further information from claimants appeared to be for large amounts compared with the 6 188 claims which had been assessed. The Director stated that some of the outstanding claims, such as the claim by Brittany Ferries, were for relatively high amounts, and that these claims were much more complex than many of those already settled.

3.2.18 Another delegation asked whether, in view of the complex legal situation, which could take many years to resolve, the French State might be requested to try to settle all the outstanding issues on a global basis. The Director stated that the claims situation was not as complicated as it appeared, but that such a initiative from the French Government might be called for in the future in the context of the recourse actions.

3.2.19 The observer delegation of Friends of the Earth International expressed the view that although the 1992 Fund had paid compensation to many claimants as a result of amicable settlements and subrogated the rights of the claimants, the Fund had not presented its claim as required in Article 6 of the Fund Convention and therefore the claims paid by the Fund had no legal existence. In the view of that delegation the Fund was still liable for the amounts already paid unless it produced the proper subrogation documents within the three year time period to the Commercial Court in Rennes. That delegation stated that the same applied in respect of the payments made by Steamship Mutual.

3.2.20 The Director disagreed with the delegation of Friends of the Earth International and stated that the Steamship Mutual and the 1992 Fund had exercised their subrogation rights under Article V.5 of the 1992 Civil Liability Convention and under Articles 9.1 and 9.2 of the 1992 Fund Convention respectively.

Claims presented in various courts against the shipowner, Steamship Mutual and the 1992 Fund

3.2.21 The Executive Committee noted that claims totalling €484 million (£300 million) had been lodged against the shipowner's limitation fund constituted by the Steamship Mutual, including the claims by the French Government at €191 million (£125 million) and by Total Fina Elf at €170 million (£105 million). The Committee noted however that most of these claims, other than those of the French Government and Total Fina Elf, 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. It was noted that the 1992 Fund had received formal notifications of the claims lodged against the limitation fund only on 31 January 2003.

3.2.22 It was noted that some 650 claimants had taken court action against the shipowner, Steamship Mutual and the 1992 Fund. The Committee noted that the total amount claimed, excluding the claims by the French State and Total Fina Elf, was FFr705 million or €108 million (£66 million).

3.2.23 The Committee noted that most of the claims covered by the court actions had previously been submitted to the Claims Handling Office but that 22 claims for a total of FFr36 million or €5.5 million (£3.5 million) had not been presented to the Office. It was noted that in respect of a number of claimants the amount claimed in the Claims Handling Office and the amount claimed in the court action were not the same. It was further noted that the 1992 Fund would continue the discussions with the claimants whose claims were not time-barred for the purpose of arriving at out-of-court settlements if appropriate.

Time bar

3.2.24 It was 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 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, in accordance with the formalities required by the law of the court seized, of an action against the shipowner or his insurer (Article 6). It was further recalled both Conventions provided that in no case should legal actions be brought after six years from the date of the incident.

3.2.25 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. The Committee noted that in respect of the *Erika* incident there were uncertainties as to the dates from which the three-year time bar period started to run for individual claimants (ie the date when the respective claimant's damage or loss occurred). The Committee also noted that in view of this uncertainty 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. The Committee further noted that, despite these warnings, a number of claimants who had presented claims to the Claims Handling Office had not taken legal action against the shipowner, Steamship Mutual and the 1992 Fund, or had taken legal action later than 12 December 2002 and that the question arose as to when the three-year time bar period expired for individual claimants. It was also noted that this issue had not previously been addressed in any depth by the governing bodies of the IOPC Funds, since in the past there had not been any need to do so.

3.2.26 As regards claims for the costs of clean-up operations it was recalled that in the past the IOPC Funds had taken the date when oil reached a particular stretch of coast as the date when the damage occurred and hence the date from which the three-year time bar period commenced. It was noted, however, that shorelines were rarely polluted on a single day and that this was certainly the case following the *Erika* incident where there had been a tendency for oil to migrate along the coast over a period of several months. It was also noted that for this reason some local authorities had decided to postpone clean-up operations until the situation had become stabilised, that in such cases it would be difficult to decide on a precise date when the damage had occurred and that it could be argued that each successive oiling of a shoreline would constitute a new date from which the three-year time-bar period should run. The Committee noted that many shorelines that were cleaned promptly had subsequently been re-oiled later in 2000 and in some cases 2001, and that in the Director's view such re-oiling would be regarded as a new damage. It was noted that although it had in the past been assumed that the date of oiling of a particular coastline should be taken as that from which the time bar should run, it could, in the Director's view, equally be argued that the date should be when the costs of clean-up were incurred or when the clean-up operations on a particular stretch of coast had been completed.

3.2.27 As regards claims in respect of damage to fishery and mariculture it was recalled that in the past the IOPC Funds had taken the date on which the contamination of the fishing gear/mariculture facilities had taken place or when a fishing ban had been imposed as the date that the consequential losses occurred, that that date had been used for the commencement of the three-year time bar period and that the date of the damage had therefore often been some considerable time after the date of the incident. It was recalled that in the *Sea Empress* case (15 February 1996) a number of angling associations had taken legal actions against the shipowner and his insurer on 11 February 1999 and had notified the 1971 Fund of these actions on 2 March 1999. It was noted that the 1971 Fund Executive Committee had taken the view that the damage allegedly suffered by the claimants had not been sustained until 20 March 1996, the date on which a Parliamentary Order closing river fishing had taken effect. It was further noted that the Committee had therefore decided that the claimants had properly notified the 1971 Fund before the expiry of the three-year period and that these claims were not time-barred (document 71FUND/EXC.51/14, paragraphs 4.6.14 and 4.6.15). It was further noted that the Committee had

not needed to address the issue as to whether a notification made within three years of the lifting of the ban on river fishing would have prevented the claims from becoming time-barred.

3.2.28 The Committee took note of the complication arising in cases where a claimant had suffered economic losses prior to the occurrence of property damage or the imposition of a fishing ban, for example due to market resistance immediately following the incident. It was noted that, although the overall losses could be ascribed to two different effects, with two different time bar periods, claimants were unlikely to distinguish between these effects when submitting their claims. It was also noted that, whilst there was less uncertainty as regards the date of the start of the damage period in respect of fishery and aquaculture claims, it could, in the Director's view, be argued that the actual losses resulting from business interruption should be considered as having been suffered at the end of the period of the loss rather than at the beginning.

3.2.29 As regards claims in the tourism sector, the Committee recalled that claims in the tourism sector had been submitted by businesses that were open all year (eg bars, restaurants and shops) and businesses that were only open in the holiday season (eg campsites, holiday flats and some hotels), that whilst some of the former businesses had claimed for losses over the whole of 2000, the majority of these businesses and all the seasonal businesses had filed claims only in respect of losses that had been incurred over the main tourist season (April – October 2000).

3.2.30 The Committee noted that, although some of the losses incurred by seasonal businesses had been due to potential tourists having made the decision not to visit the affected area as soon as the news of the incident broke out on or about 12 December 1999 or shortly thereafter, this was unlikely to be the case with most tourists and that the decision not to visit the affected area was probably taken by the majority of the potential visitors during the spring or early summer of 2000. It was noted that for claims in the tourist sector there appeared to be two options as regards the date when the losses resulting from a reduction in the number of tourists had been sustained, ie at the beginning of the tourist season or the end of the period during which the losses were sustained. It was further noted that many claims in the tourism sector had not been submitted until April 2001, since only then had claimants been able to determine their losses accurately and submit their claims on the basis of audited accounts.

3.2.31 The Committee noted the distinction as regards the starting point between the three year time bar period which ran from the date of the damage and the six year time bar period which ran from the date of the incident and that therefore the starting point for the three-year time bar period would be the date when the individual claimant had suffered his or her loss or damage.

3.2.32 It was noted that for claimants who had suffered consequential or pure economic losses, the pollution damage was loss of income, which was usually sustained some time after the date of an incident and that, in the Director's view, the correct approach would be to take as the starting point for the three-year time bar period the date corresponding to the end of the period during which these losses were suffered by a claimant or group of claimants. It was also noted that in most cases only at the end of that period were claimants able to establish whether they had suffered losses. It was further noted that using the end of the period of the loss would allow claimants a full three years to submit a properly documented claim and for the Fund to carry out an assessment of that claim, with sufficient time for negotiation between the claimant and the Fund should it be required, reducing the number of claims becoming the subject of legal actions.

3.2.33 A number of delegations pointed out that it had always been the Funds' policy to avoid litigation whenever possible, and that every effort should be made to act in the best interest of claimants. Those delegations also expressed the view that although the time bar provisions were somewhat onerous for claimants it was crucial that there was clarity and certainty as to when a claimant's rights to compensation were extinguished. One delegation stated that views might differ as to the date considered to be the end of the claim period and that this could lead to confusion for claimants.

3.2.34 One delegation stated that in situations such as those posed by the *Erika* incident where there could be more than one way of interpreting the time bar provisions, it was necessary to consider the overall purpose of the Conventions, which was to compensate victims, and that the interpretation that best satisfied that purpose should be adopted. In that delegation's view it was not possible to consider such matters in the abstract, but that each claim needed to be considered on its own merits as regards time bar, bearing in mind that it was incumbent on the claimant to demonstrate when he or she had suffered pollution damage, whilst at the same avoiding the opportunity for claimants to manipulate the evidence.

3.2.35 A number of delegations expressed the view that the legal issues were complex and that they centred on the legal construction of Article I.6 of the 1992 Civil Liability Convention and Article 6 of the 1992 Fund Convention. Those delegations considered that the Committee should defer making any decision until it had had more time to consider these issues.

3.2.36 The Director pointed out that in the context of many of the outstanding claims arising from the *Erika* incident, which related to pollution damage that commenced in April 2000, it was important for the Committee to take a decision at the current session, especially if the decision was that the starting point for the three-year time bar period was the date of the beginning of the loss or damage. The Director therefore proposed that the Committee adopt a compromise solution whereby the three-year time bar period should be considered to start to run at the earliest from the beginning of the period of the loss suffered by the individual claimant.

3.2.37 The Executive Committee approved the Director's proposal, recognising that there may be claims in respect of which the starting point for the time bar period may be some time after the beginning of the period of the loss but that such claims would have to be considered in the light of the particular circumstances in each case.

Level of payments

3.2.38 It was recalled that, applying the principles laid down by the Assembly in the *Nakhodka* case, the Executive Committee had decided in February 2000 that the conversion of the maximum amount available for compensation under the 1992 Civil Liability and Fund Conventions, 135 million SDR, should be made using the rate of the SDR as at 15 February 2000, that the Director's calculation had given 135 million SDR = FFr1 211 966 811 corresponding to €184 763 149 (£117 million) and that the Committee had endorsed this calculation at its April 2000 session.

3.2.39 It was also recalled that in light of the uncertainties that remained as to the level of admissible claims the Executive Committee had decided at its 18th session, held in October 2002, that the level of payments should be maintained at 80% of the loss or damage actually suffered by the respective claimants, as assessed by the 1992 Fund's experts (document 92FUND/EXC.18/14, paragraph 3.4.18).

3.2.40 The Executive Committee noted that it had again 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.

3.2.41 It was recalled that the claims by Total Fina Elf 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 against the 1992 Fund and the shipowner's limitation fund only if and to the extent that all other claims had been paid in full. The Committee noted that the undertaking by the French Government not to pursue claims covered also subrogated claims in respect of payments made to claimants under the schemes established to provide supplementary payments to claimants (cf document 92FUND/EXC.20/3/Add.1, paragraph 4).

3.2.42 The Committee noted the Director's estimate of the total amount of the claims against the 1992 Fund, disregarding the claims against the limitation fund:

Total amount of claims settled	FFr462 082 753
Total claims in court (except those of Total Fina Elf and the French Government)	FFr704 575 956
Total pending claims presented to the Claims Handling Office not in court	FFr116 879 729
Interest on claims in court (estimate)	FFr50 000 000
Legal costs for claimants (estimate)	FFr50 000 000
Total 1992 Fund exposure	FFr1 383 538 438
	(€210 919 075)
	(£131 765 565)

3.2.43 The Committee noted that the Director recognised that this estimate might be on the pessimistic side, that it was likely that a number of the claims submitted to the Claims Handling Office but not filed in court would not be pursued even if they would be considered as not time-barred and that a number of claims in court might be settled at amounts somewhat lower than the amounts claimed. It was noted however that there were claims presented to the shipowner's limitation fund (other than those by the French Government and Total Fina Elf) totalling some €123 million (£81 million), that it was likely that a number of these claims had also been filed in the court proceedings against the 1992 Fund and that it was possible that some claimants would increase the amounts claimed in the court proceedings as was permitted under French procedural law. It also noted that some further claims presented to the Claims Handling Office might be pursued in court and that the question of time bar would then arise. In addition, the Committee noted that its decision regarding the issue of time bar might have a bearing on the level of claims and payments.

3.2.44 The Committee noted that the total amounts of established claims could be at least FFr1 400 million or €251 million (£164 million), that there were still a number of uncertainties in this regard and that in view of these uncertainties the Director had proposed that the level of payments should be maintained at 80%.

3.2.45 The French delegation expressed its disappointment that the Director had not considered it possible to recommend an increase of the level of payments. That delegation proposed that if the level of payments were to be maintained at 80% for the time being, the Director should be given the mandate to increase the level to 100% once it became apparent that the 1992 Fund ceiling would not be exceeded. The French delegation undertook to try to resolve the apparent misunderstandings and duplications of some of the claims in the public sector.

3.2.46 Many delegations expressed regret that the potential claims exposure was greater than the 1992 Fund limit, particularly since it had appeared in October 2002 that it would be possible, after the third anniversary of the incident, to increase payments to 100% of the amount actually suffered. Those delegations nevertheless considered that it was imperative to follow the Director's advice unless there were good grounds for doubting his analysis of the situation.

3.2.47 In view of the remaining uncertainties as to the total amount of the established claims, the Executive Committee decided that 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, but that the Director should be authorised to increase the level to 100% when he considered it safe to do so.

3.3 Incident in Germany

3.3.1 The Executive Committee took note of the developments in respect of this incident which occurred in Germany in June 1996 contained in document 92FUND/EXC.20/4.

Legal actions

3.3.2 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, the West of England Ship Owners' Mutual Insurance Association (Luxembourg) (West of England Club), 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.

3.3.3 It was noted that on 12 December 2002 a hearing before the Court of first instance had been held in Flensburg. It was noted that the Court had rendered a part-judgement in which it held that the owner of the *Kuzbass* and the West of England Club were jointly and severally liable for the pollution damage on the grounds that the circumstantial evidence pointed overwhelmingly to the oil having originated from the *Kuzbass*. It was noted that the Court had not dealt with the quantum of the losses suffered by the German authorities and that it had stated that this issue would be considered at the request of one of the parties, but not until the judgement on the liability issue had become final. The Committee noted that it was likely that the owner of the *Kuzbass* and the West of England Club would appeal against the judgement.

Time bar

3.3.4 It was recalled that, in order to prevent their claims against the Fund becoming time-barred at the expiry of the six-year period, the German authorities had taken legal action against the 1992 Fund on 14 June 2002 and that the 1992 Fund had applied to the Court to stay the proceedings in respect of this action, pending the outcome of the action by the German authorities against the shipowner and the West of England Club. It was noted that the stay had been granted by the Court on 12 November 2002.

3.4 *Prestige*

Chairman's opening remarks

3.4.1 As the Committee started its work on another serious incident, the *Prestige* incident, that had affected three 1992 Fund Member States, Spain, France and Portugal, and polluted considerable stretches of coastline and affected the lives and livelihoods of thousands of people in the coastal regions, the Chairman expressed, on behalf of the Executive Committee, its sympathy with the victims and Governments and regional and local authorities impacted by this major incident.

3.4.2 The Chairman noted that the 1992 Fund, which had in the last three years dealt with an incident of similar magnitude, namely the *Erika*, and processed thousands of claims arising from that incident, would do its utmost to provide compensation to the victims of the *Prestige* incident as rapidly as possible within the framework of the 1992 Civil Liability Convention and the 1992 Fund Convention.

3.4.3 The Chairman stated that with over 80 Member States, the 1992 Fund was truly international in its scope and its mission, and as any organisation that made money available to claimants, it would have to ensure that all claimants were treated fairly and equitably. He stated that at the outset of its work on the *Prestige* incident, the Executive Committee must be sensitive to the pressures that had been brought to bear on the various parties directly involved and these would have to be taken fully into account in future deliberations.

3.4.4 The Executive Committee took note of the information contained in documents 92FUND/EXC.20/5, 92FUND/EXC.20/5/Add.1 and 92FUND/EXC.20/5/1. The Committee noted that on 13 November 2002 the Bahamas registered tanker *Prestige*, en route from Ventspils (Latvia) to Singapore, had suffered structural damage some 30 miles off Cape Finisterre (Spain),

that the ship had been towed away from the coast and that on 19 November 2002 it had broken in two some 170 miles west of Vigo with the two sections of the vessel sinking in about 3500 metres of water. It was noted that all members of the crew had been airlifted to safety by the Sociedad de Salvamento y Seguridad Maritima (SASEMAR) before the break up of the vessel. It was also noted that the *Prestige* had been carrying a cargo of 77 000 tonnes of heavy fuel oil, an unknown quantity of which had been lost before the vessel broke up and that a further unknown quantity of oil had been released when the vessel broke in two.

3.4.5 It was noted that the *Prestige* was entered in the London Steam-Ship Owners' Mutual Insurance Association Ltd (London Club).

3.4.6 A number of delegations raised questions relating to the circumstances surrounding the cause of the incident and the final break-up of the *Prestige*, but the Committee agreed that these issues were secondary to the main purpose of the 1992 Conventions.

Clean-up operations in Spain

3.4.7 The Committee noted that clean-up operations at sea had been led by the SASEMAR and that a major offshore oil recovery operation had been undertaken with vessels from Spain, Belgium, Denmark, France, Germany, Italy, the Netherlands, Norway, Portugal and the United Kingdom participating in the clean-up. It was also noted that up to 1 000 fishing vessels had also participated in the clean-up in sheltered coastal waters.

3.4.8 It was noted that a major attempt had been made to protect a number of estuaries and sensitive areas by means of defensive booming with over 20 000 metres of boom deployed and a further 36 000 metres staged at key locations for deployment in the event of new threats from oil at sea.

3.4.9 It was noted that manual clean-up of shorelines had been undertaken by a workforce comprising military and local government personnel, contractors and volunteers and that some 5 500 personnel had been involved in the clean-up in mid-December. It was also noted that, because many of the affected sites were difficult to access, an extensive road-building programme had been undertaken to facilitate clean-up operations.

3.4.10 It was also noted that, by late January 2003, some 25 000 tonnes of liquid waste and 38 000 tonnes of solid waste had been collected, that liquid wastes would eventually be recycled and that solid wastes were being stored at several sites pending a decision on the final disposal method to be employed.

Clean-up operations in France

3.4.11 It was noted that in early January 2003 the main area of accumulated patches of oil at sea had drifted into the Exclusive Economic Zone of France and that the co-ordination of the large-scale operation to recover oil at sea, initiated by the Spanish authorities, had been transferred to the Maritime Prefecture in Brest.

3.4.12 The Committee noted that a fleet of 16 vessels, including specialist recovery vessels from France, Germany, Netherlands, Norway and Spain, was still operating in the Bay of Biscay by 27 January, despite the limited quantities of oil available for recovery and that, in addition, about 20 small fishing boats had been engaged to recover floating oil close inshore and to collect oil stranded on sandbanks in the entrance to the Arcachon Basin.

3.4.13 It was noted that most of the shorelines affected in France were composed of relatively hard-packed sand, which were relatively easy to clean and that in mid-January around 900 people were working to the south of the river Gironde and a further 100 people to the north of the river.

Impact of the spill in Spain

3.4.14 It was noted that intermittent oiling of shorelines in Spain extended over some 900 km from Vigo in the south to the French border in the north and that the heaviest shoreline pollution was between La Coruña and Aguiño and on the islands of Sálvar, Vionta, Ons and Cies.

3.4.15 The Committee noted that the coastline of Galicia, one of the richest fishing areas in Europe, had been most adversely affected by the incident and that fisheries exclusion zones had been put in place shortly after the incident banning virtually all fishing along about 90% of the coastline and extending eight miles offshore. It was noted that the bans were causing widespread economic impact to some 13 000 shellfish harvesters and the owners of some 6 000 inshore fishing vessels. It was noted that fishing bans had also been imposed in Asturia and Cantabria, but that these were on a limited scale and did not affect all species and all types of fishing.

3.4.16 The Committee noted that some of the bans covered areas unaffected by oil from the *Prestige* and that the 1992 Fund did not know the criteria the Spanish authorities were using to decide whether or not fishing zones should be closed or open. The Committee also noted that the bans did not cover aquaculture, even though this sector had been affected by pollution including a major turbot farming industry, which used onshore tanks supplied with seawater abstracted via sub-surface intakes. It was further noted that a number of important farms were located in heavily polluted areas, that most had taken measures to prevent oil entering the rearing tanks so that they could continue to operate but that, despite these efforts, stocks had been destroyed at one of the smaller farms on the order of the health authorities.

3.4.17 It was noted that the major aquaculture activity in Galicia was the rearing of mussels on rafts and that, although no mussel rafts appeared to have been directly affected by oil, a downturn in demand had been reported. It was further noted that current fishing bans prohibited the collection of mussel seed for sale to mussel farmers and that, if the bans were to be prolonged, this could result in substantial mussel production losses in 2004.

3.4.18 It was noted that although the rearing of molluscs in intertidal areas was not subject to closures, some areas had been physically oiled and that owners had reported that depuration plants were refusing to accept their products, effectively closing their markets.

3.4.19 It was further noted that a number of depuration plants and aquariums, which rely on a regular supply of clean seawater, had closed either as a result of actual or perceived contamination of their intakes or due to limited supplies of marine products arising from the fishing bans.

3.4.20 It was noted that the coasts of Galicia, Asturias and Cantabria provided attractive tourist destinations for those seeking outdoor activities and high quality seafood, that the affected region was particularly popular with the domestic market but that it did not have a high profile with overseas tourists compared with other parts of mainland Spain.

3.4.21 The Spanish delegation introduced document 92FUND/EXC.20/5/1, which was intended to provide the Executive Committee with further information on the consequences of the pollution of the Spanish coast and the measures taken in response to the incident. It was noted that according to the authorities around 60% of the beaches along some 2 890 km of coastline had been affected by oil. It was also noted that the fishing bans imposed by the Regional Government of Galicia had affected some 4000 owners of fishing vessels, almost 9000 crew members and more than 5 000 shellfish harvesters, as well as other groups such as net repairers, fish market operators and traders. The Spanish delegation indicated that at the beginning of February 2003 some of the fishing bans had been lifted, as result of which some 1 688 shellfish harvesters and some 450 fishing vessels had returned to work. That delegation also stated that the collection of mussel seed for future cultivation had resumed.

3.4.22 The Spanish delegation also stated that the Spanish response had involved some 23 fixed-wing aircraft, 25 helicopters, 67 national and foreign vessels and craft. It was noted that a large fleet of fishing boats had also assisted in combating the pollution at sea in accordance with agreements signed with various fishermen's guilds in lieu of economic losses. It was stated that some 78 000 metres of boom had been mobilised as well as other equipment. It was further stated that a total of 240 000 man-days had been expended in shoreline clean-up operations, that some 23 000 tonnes of oil had been recovered from the sea and that some 45 000 tonnes of waste had been collected from the coast.

3.4.23 The Spanish delegation indicated that a package of measures had been adopted by the Spanish Government, including the creation of an inter-ministerial commission with the Government's Vice-President as Chairman, and the appointment of a Government Commissioner to deal with the incident. The delegation referred to the annex to document 92FUND/EXC.20/5/1, which listed the various regulations that had been adopted and published by the Spanish Government.

3.4.24 As regards the costs of clean-up operations, which were being borne by the Government, the Spanish delegation stated that the total cost as at 31 December 2002 was some €264 million (£194 million) and that the authorities had predicted that the final clean-up costs would be a minimum of €1 000 million (£735 million).

Impact of the spill in France

3.4.25 The Executive Committee noted that shoreline contamination in France had been much less severe than in Spain, with light to moderate deposits of tar balls extending over some 300 km from the Spanish border in the south as far as La Rochelle in the north.

3.4.26 It was noted that on 5 January 2003 the French authorities had imposed a ban on the sale of shellfish, primarily oysters, from the Arcachon Basin due to the presence of oil in the entrance to the Basin but that, on the basis of analyses of samples of seawater, fish and shellfish, which had confirmed that the levels of petroleum hydrocarbons were within acceptable limits, the ban had been lifted on 15 January 2003.

3.4.27 The Committee noted that it was anticipated that the greatest potential impact in France would be on the tourism sector, since the southern Atlantic coast was noted for the quality and length of its sand beaches backed by pine forests and that the turnover in the tourism sector in the affected departments was more important than in the departments affected by the *Erika* incident.

3.4.28 The French delegation stated that the pollution affecting France was not of the same magnitude as that in Spain. That delegation mentioned that 3 000 tonnes of polluted waste had been collected at sea after 6 January 2003 and that more than 2 000 tonnes had been collected on the coast. It was mentioned that the extent of the coastal pollution varied from day to day but that the pollution had so far not affected more than 175 km of coastline, although it was regrettable that certain areas which had been affected by the *Erika* had again been polluted (Belle Île in Morbihan). It was also mentioned that from an economic point of view the production of oysters in the Arcachon had been interrupted during some ten days but had again been permitted. That delegation added that some sectors linked to water sports had also been affected but that it was not yet possible to estimate the economic impact.

Impact of the spill in Portugal

3.4.29 The Portuguese observer delegation stated that whilst no oil from the *Prestige* had impacted the coast of Portugal, it had entered Portuguese waters. That delegation further indicated that Portugal had taken a number of measures and gave a preliminary estimate of €1.6 million (£1 million), representing mainly costs incurred by the Portuguese Navy. The Committee noted that these amounts would be updated as the effort to prevent and combat pollution continued and that the situation may change depending on various factors, including what happened to the wreck and weather conditions.

Operations to prevent further oil escaping from the wreck

3.4.30 The Committee noted that the two sunken parts of the *Prestige* contained significant quantities of oil and that a survey carried out by a French remotely operated submersible vehicle (ROV) had revealed oil escaping from a number of openings in the tanks several weeks after the sinking.

3.4.31 It was noted that the ROV had been used to temporarily seal and plug cracks and holes in the wreck to minimise the escape of oil, that the operation appeared to have been successful and that the operations had been completed. It was noted that the amount of oil escaping had been estimated at less than 5 tonnes per day and was no longer considered a threat to shorelines. It was also noted that investigations by a French laboratory had indicated that the cargo oil could continue to flow at the temperatures prevailing at the seabed (+2°C).

3.4.32 It was further noted that the Spanish Ministry of Science and Technology had established a Commission to investigate the long-term risk of further pollution from the wreck and to examine proposals submitted by five companies on ways of preventing any future escape of oil.

Legal actions

3.4.33 As regards legal issues it was noted that the only action initiated in Spain to date was the proceedings in the Court of Corcubión against the master of the *Prestige*, who had been held temporarily in custody (document 92FUND/EXC.20/5/1, paragraph 6).

3.4.34 The Spanish delegation informed the Committee that on 7 February 2003 the Criminal Court in Corcubión had ordered the conditional release from detention of the master of the *Prestige* since the bail required had been provided.

Claims handling

3.4.35 The Committee noted that after consultation with the Spanish Government and the Regional Government of Galicia (Xunta), the London Club and the 1992 Fund had established a Claims Office in La Coruña, which became fully operational on 20 December 2002.

3.4.36 It was noted that although the scale of pollution in France was on a smaller scale than that in Spain, it was anticipated that there would be a significant number of claims, particularly from the tourism sector. It was also noted that the London Club and the 1992 Fund were giving consideration to setting up a Claims Office in Bordeaux.

3.4.37 A number of delegations voiced their concerns regarding an intrusion into the Claims Office in La Coruña in December 2002 and appealed to the authorities in the hope that such an occurrence would not be repeated. The Committee reiterated its previous authorisation to the Director to close any Claims Office if he felt that the safety of the staff was threatened.

3.4.38 The Spanish delegation informed the Committee that immediately after the attack on the Office in La Coruña, police officers were appointed to protect the Office until the intruders had left Spain.

Claims for compensation in Spain

3.4.39 The Committee noted that as at 27 January 2003 the Claims Office in La Coruña had received one claim by a municipality totalling €942 000 (£615 000) in respect of the costs of clean-up and five claims by fishmongers totalling €12 700 (£8 200) in respect of economic losses, that a total of 260 prospective claimants had visited the office and that 44 had communicated their intention to submit claims in respect of economic losses.

3.4.40 It was noted that the Spanish authorities had been making compensation payments of some €40 (£26) per day to all those directly affected by the fishing bans and that the total number of people

receiving such compensation was estimated at about 40 000, including shellfish harvesters, inshore fishermen and associated onshore workers with a high dependence on the closed fisheries, such as fish vendors, fishing net repairers and employees of fishing co-operatives, fish markets and ice factories. It was noted that these payments might eventually be included in subrogated claims by the Spanish authorities under Article 9.3 of the 1992 Fund Convention and that, if this was to be the case, in the Director's view such payments should be offset against any claims filed by the individual claimants against the London Club/1992 Fund.

Levy of contributions

3.4.41 The Committee invited the Director to convene an extraordinary session of the Assembly during the week of 6 May 2003 to consider whether contributions should be levied for payment during the second half of 2003 to enable the 1992 Fund to make prompt payments of compensation. It was noted that payments at an earlier stage could be made through the General Fund or by borrowing from other Major Claims Funds.

Level of payments

3.4.42 It was noted that experts from the International Tankers Owners Pollution Federation Ltd (ITOPF) who had been monitoring the clean-up operations on behalf of the 1992 Fund and the London Club had made a preliminary estimate of the costs incurred in Spain and Portugal. It was also noted that estimates had been made of the costs of manpower and equipment, specialised and non-specialised offshore oil recovery vessels and aircraft used for aerial surveillance including the costs of resources provided by other European States, as well as Portugal, which had responded to pollution threats to its own coastline. It was also noted that estimates had been made of the costs of constructing roads to inaccessible shorelines, the construction of temporary oil storage pits and the disposal of solid and liquid wastes. The Committee noted ITOPF's estimate that the total response costs in Spain and Portugal between 14 November 2002 and 17 January 2003 were around €118 million (£79 million), equating to around €1.6 million (£1.1 million) per day. It was also noted that although the ongoing daily response costs in Spain and Portugal were likely to have decreased considerably after 17 January, when the responsibility for at sea clean-up operations had been taken over by the French authorities, shoreline clean-up operations were expected to continue in Spain until at least the end of April 2003 and that the final clean-up response costs in Spain and Portugal could therefore be in the region of €150-200 million (£110-147 million).

3.4.43 The Committee noted that in the document submitted by the Spanish delegation, preliminary estimates had indicated that clean-up costs would exceed €1 000 million (£650 million). It was further noted that the costs of other measures, such as the suspension of fishing, stimulating other economic activity, other financial measures, such as a reduction or exemption of taxes for affected economic sectors and areas and the promotion of the domestic and international image of sea products and tourist areas would have to be taken into account in the final evaluation of the impact of the incident.

3.4.44 It was noted that the response in France had commenced in mid December 2002, that the total costs up to 17 January 2003 had been estimated by the ITOPF experts at €11 million (£8 million), that a substantial element of the costs related to the at sea recovery operations, which were taken over by the French authorities, and that it was considered unlikely that these operations would continue much beyond the end of January 2003 as the quantity of oil at sea decreased. It was also noted that the final clean-up costs in France could be in the region of €15-20 million (£11-15 million.

3.4.45 It was also noted that although no decision, nor cost evaluation, had yet been made by the Spanish authorities as to whether anything should be done to prevent further pollution from the wreck, beyond the operation to seal as many leaks as possible, it had been estimated that the cost of removing the remaining oil from the wreck could be in the range of €50-100 million (£37-

74 million), but that in view of the distance of the wreck from shore and the depth of water in which it was located, the actual costs could be considerably greater than this.

3.4.46 The Committee also noted that the experts engaged by the 1992 Fund and the London Club had estimated that if the majority of the fisheries bans in Spain were to be lifted by the end of March 2003 and the mussel industry were able to obtain sufficient seed, the losses should be in the region of €80-100 million (£59-73 million) but that if all the bans were to remain in place until the end of 2003, the losses could be in the region of €200-250 million (£146-183 million). It was also noted that in view of the limited scale of pollution in France and the short duration of the French fisheries bans, it was estimated that the losses in the fisheries and aquaculture sectors were likely to be relatively small.

3.4.47 The Committee noted that in the case of Spain, direct revenue from all overnight tourism in the affected area in 2001 was estimated to be in the range of €500 – 750 million (£365 – 550 million) but that the experts had indicated that the impact on tourism might be a low percentage of the annual total, bearing in mind the dependence on the domestic market, which reportedly had a low level of advance bookings, and the high seasonality confining most activity to July and August.

3.4.48 It was noted that as regards France, the tourism industry in the affected departments was estimated to generate annual spending of over €3 000 million (£1 200 million) compared with €2 000 million (£780 million) in the area affected by the *Erika* incident, that the actual losses sustained would depend on the level, extent and duration of any further pollution but that, given the scale of the industry in the area, a small percentage downturn in tourism would generate significant economic loss.

3.4.49 It was noted that the French and British tourism experts engaged by the 1992 Fund and the London Club had expressed the view that it was too early to generate any meaningful figures in respect of potential losses in the tourism sectors in Spain and France.

3.4.50 The United Kingdom delegation stated that one of the lessons learned from the two major incidents in the United Kingdom was the importance of not overstating the extent of the losses during the early stages, since this would immediately lead to a restriction on the level of payments.

3.4.51 The Director stated that it was important to keep in mind the lessons learned from the *Aegean Sea* incident in Spain, and in particular the need for close co-operation between the Fund and the affected States. He emphasised that the primary objective of the Fund was to settle claims as quickly as possible, but that there were many constraints on the Fund imposed by Governments, such as the amount of money available per incident and the policy of pro-rating payments in order to ensure that all claimants were treated equally and equitably and to protect the Fund against over payment.

3.4.52 The Director drew attention to the considerable discrepancy between the Fund's estimation of the total clean-up costs in Spain and the preliminary estimate by the Spanish authorities. He stated that this discrepancy underlined the uncertainties that existed during the early stages of an incident of the magnitude of the *Prestige* oil spill. The Director pointed out that these uncertainties were even greater bearing in mind the potential losses in the fisheries, aquaculture and tourism sectors. He further indicated that if the Governments of the affected States were to adopt the same position as that taken by the French Government following the *Erika* incident, whereby the Government's claims in respect of clean-up costs, as well as its subrogated claims, would not be pursued against the 1992 Fund unless all other claimants, with the exception of Total Fina Elf, were compensated fully, this would make it possible for the Fund to make meaningful payments quite quickly.

3.4.53 The Spanish delegation stated that the Council of Ministers, at its session of 20 December 2002, had agreed to a proposal by the Interministerial Commission to develop the legislation required to

guarantee that payment of compensation to victims of the *Prestige* incident would take priority over compensation of the State for the losses suffered and costs incurred in clean-up operations.

3.4.54 The French delegation stated that the claim for the costs incurred by the French State for combating the oil pollution would take the same place as that of the Spanish State as the latter had declared. That delegation added that in general the French State would in the *Prestige* case take the same position as it had taken in respect of the *Erika* incident.

3.4.55 The Committee noted that the *Prestige* incident had highlighted a major problem that had arisen which could have a serious effect on the smooth running of the claims handling process. It was noted that in previous major incidents it had been normal practice for the P&I Club involved to pay compensation at an early stage and for the IOPC Funds to commence payments only when the total payments made by the Club reached the limitation amount applicable to the particular ship under the Civil Liability Convention. It was also recalled that as regards small claims the Clubs had normally in the past paid the settlement amounts in full, often before the total claims exposure was known, recognising that if it subsequently transpired that payments should have been pro-rated the Club may have found itself in an overpayment situation.

3.4.56 The representative of the London Club drew the Committee's attention to the advice it had received from its legal advisers in Spain, which indicated that if the Club were to make payments to claimants in line with past practice it was highly likely that these payments would not be taken into account by the Spanish courts when the shipowner set up the limitation fund with the result that the Club could end up paying twice the limitation amount.

3.4.57 The Director explained the usual payment procedures followed by the insurer/P&I Club and the Fund in accordance with the Memorandum of Understanding (MOU) signed by the Funds and the International Group of P&I Clubs, which was normally invoked in the case of incidents involving both the Civil Liability Convention and the Fund Convention. He stated that the basis of the MOU was that the Club and the Fund used joint experts to assess claims for compensation and that claims were also approved jointly. He mentioned that once a claim had been approved, strictly speaking the Club and the Fund should each pay part of the settlement amount in proportion to their respective liabilities. He stated, however, that for practical purposes the Club usually paid the amount due, recognising that it was actually making a payment partly on behalf of the shipowner/insurer and partly on behalf of the Fund. He also stated that once the shipowner's limit was reached, the Fund would take over the payment of the remaining claims recognising that it was also making a payment partly on behalf of the shipowner/insurer. He added that such an arrangement did not present any problems provided the total amount of the established claims did not exceed the total amount of compensation available, but that in the event that they did, the shipowner/insurer could end up paying more than the applicable limitation amount under the Civil Liability Convention.

3.4.58 The Spanish delegation pointed out that Article V.5 of the 1992 Civil Liability Convention provided the shipowner with the right of subrogation in the situation where the compensation was paid before the limitation fund was distributed and that it was important to ensure that this right was upheld. That delegation pointed out, however, that in the case of the *Aegean Sea*, problems in respect of the rights of subrogation had arisen, but that this was not due to the existence of any Spanish law overruling Article V.5, but as a result of the petition of subrogation not being presented before the Spanish Courts in an appropriate way.

3.4.59 The London Club representative stated that despite lengthy discussions between the Club's legal advisers and lawyers representing the Spanish State, the Club was not convinced that a double payment situation could be avoided, which left the Club no alternative but to deposit the limitation fund with a competent court in Spain or France, recognising that this could result in the money becoming unavailable for the payment of claims for several years.

3.4.60 A number of delegations accepted that the 1992 Fund could not dictate to the London Club that it should make compensation payments without the Club receiving a guarantee that it would not be required to pay double the limitation amount. In those delegations' view it would therefore be necessary for the Fund to make payments from the outset since the concerns of the victims of pollution damage was paramount. It was noted that if the 1992 Fund were to depart from its previous policy of not paying claims before the insurer had paid up to the limitation amount, the Fund could only pay up to 135 million SDR minus the shipowner's limitation amount under the 1992 Civil Liability Convention.

3.4.61 The Executive Committee considered that it was not possible at this stage to make any meaningful assessment of the magnitude of the total amount of the established claims arising from the *Prestige* incident. The Committee decided that in view of this uncertainty the Director's authority to make payments should, for the time being, be limited to provisional payments under Internal Regulation 7.9.

3.4.62 The Executive Committee noted that it was expected that the claims situation would become clearer by the end of April 2003, prior to its next session. It was further noted that the intentions of the affected States with regard to their own claims and subrogated claims would be known at that time, thus enabling the Committee to make a decision on the appropriate level of payments by the 1992 Fund.

Maximum amount payable under the 1992 Fund Convention

3.4.63 It was noted that the limitation amount applicable to the *Prestige* under the 1992 Civil Liability Convention was approximately 18.9 million SDR or €25 million (£15.9 million).

3.4.64 The Committee recalled that under Article 4.4(e) of the 1992 Fund Convention, the maximum amount of compensation payable in respect of the *Prestige* incident under the 1992 Conventions (135 million SDR) should be converted into the national currency in question, ie Euros, on the basis of the value of that currency by reference to the SDR on the date of the decision of the Assembly as to the first date of payment of compensation.

3.4.65 It was recalled that at its 2nd session the Assembly had decided, in the context of the *Nakhodka* incident, that the conversion of 135 million SDR into national currency should be made on the basis of the value of that currency vis-à-vis the SDR on the date of the Assembly's (or the Executive Committee's) adoption of the Record of Decisions of the session at which the Assembly (or the Executive Committee) took the decision which made payments of claims possible, that if the Record of Decisions was not adopted during the session, the date for conversion should be that of the last day of the session (document 92FUND/A.2/29, paragraph 17.2.8) and that the Assembly had explicitly recognised that the Executive Committee would take decisions on the date for conversion. It was further recalled that the Executive Committee had applied the same principles at its 6th session in February 2000 in connection with the *Erika* incident (document 9FUND/EXC.6/5, paragraph 3.29). It was also recalled that the Committee's decision had been endorsed by the Assembly[<1>].

3.4.66 Following the same principles in the *Prestige* incident, the Executive Committee decided that the conversion of 135 million SDR into Euros should be made on the basis of the value of that currency vis-à-vis the SDR on the date of the adoption of the Executive Committee's Record of Decisions of its 20th session, ie 7 February 2003.

3.4.67 The observer delegation of the Friends of the Earth International stated that the basis of the conversion of 135 million SDR into Euros adopted by the Executive Committee was, in its view, contrary to that set out in Article 4.4 (e) of the 1992 Fund Convention and that it therefore

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<1> Cf Records of Decisions of the Assembly's 5th session held in October 2000 and its 6th session held in October 2001 (cf documents 92FUND/A.5/28, paragraph 20.2 and 92FUND/A.6/28, paragraphs 21.1-21.4.)

constituted an amendment to the 1992 Convention, which, according to Article 32 of the Convention, could only be adopted through a Diplomatic Conference convened by the International Maritime Organization.

3.4.68 No delegation supported the views expressed by that observer delegation.

3.5 *Slops*

3.5.1 The Executive Committee took note of the information contained in document 92FUND/EXC.20/6 concerning the *Slops* incident which occurred in Greece on 15 June 2000.

3.5.2 The Executive Committee recalled that at its 8th session, held in July 2000, the Committee had decided that, since the *Slops* was not engaged in the carriage of oil in bulk, it could not be regarded as 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).

3.5.3 The Committee recalled that two Greek companies had taken legal action in the Court of first instance in Piraeus (Greece) against the registered owner of the *Slops* claiming compensation for the costs of clean-up operations and preventive measures for €1 536 528 (£1 001 000) and €786 329 (£512 400) respectively, plus interest.

3.5.4 It was also recalled that these companies had later 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 the same amounts. 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 tanker 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.

3.5.5 The Committee also recalled 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.

3.5.6 It was further recalled that at its 17th session 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 and that a court hearing had been held on 8 October 2002.

3.5.7 The Committee noted that the Court had rendered its judgements on 13 December 2002. It was noted that, as regards the actions against the registered owner of the *Slops* who did not appear at the court hearing, the Court had rendered a default judgement against him for the amounts claimed plus interest. It was also noted that, as regards the actions against the 1992 Fund, the Court had held that the *Slops* fell within the definition of 'ship' laid down in the 1992 Civil Liability Convention and the 1992 Fund Convention. The Committee noted the Court's opinion that any type of floating unit originally constructed as a seagoing vessel for the purpose of carrying oil was and remained a ship, although it may subsequently be converted into another type of floating unit, such as a floating oil waste receiving and processing facility, and notwithstanding

that it may be stationary or that the engine may have been temporarily sealed or the propeller removed.

3.5.8 The Committee noted that the Court had ordered the 1992 Fund to pay the two companies €1 536 528 (£1 001 000) and €786 832 (£518 400) respectively, ie the amounts claimed, plus legal interest from the date of service of the writ (12 February 2002) to the date of payment and costs of €93 000 (£60 000).

3.5.9 The Committee took note of the Director's view that the 1992 Fund should appeal against the judgement since the Executive Committee had set out clearly the reasons why the *Slops* did not fall within the definition of 'ship' and the issue involved raised an important question of interpretation of one of the basic definitions in the 1992 Conventions.

3.5.10 The Committee noted that the owner of the two companies claiming against the 1992 Fund had requested the Director to present a document to the Executive Committee explaining why they believed the *Slops* fell within the definition of 'ship' under the 1992 Conventions. It was noted that according to the claimants, the *Slops* was constructed as a tanker and that despite the modification that had been made to enable it to operate as an oil reception facility, the vessel remained capable of operating as a tanker. It was also noted that the claimants had argued that the reason for sealing the vessel's engine and removing the propeller was to reduce the number of crew whilst it operated as an oil reception facility and that in this condition the vessel was still capable of carrying oil and being towed. It was noted that at the time of the incident, the *Slops* had more than 2 000 m^3 of oil on board. The Committee also noted that the claimants had argued that any sea-going vessel and any sea-borne craft constructed for the carriage of oil in bulk as cargo fell under the definition of 'ship' whether or not it was on a voyage and that the proviso in the definition of 'ship' requiring a ship to be actually carrying oil in bulk as cargo only applied to oil/bulk/ore carriers.

3.5.11 The Greek delegation took the view that no appeal should be lodged against the judgement of the Court of first instance since the reasoning behind the Court's judgement was convincing. That delegation pointed out that the changes made to the *Slops* to enable it to be used as an oil reception facility did not affect its ability to carry oil as cargo and that the sealing of the engine and the removal of the propeller were temporary operational measures. The delegation further stated that the proviso in the definition of 'ship' in the 1992 Civil Liability Convention did not apply to vessels constructed as tankers, but only to combination carriers, and that a different interpretation made the distinction of two categories of ship meaningless. The Greek delegation referred to the conclusions of the 1992 Fund Working Group on the interpretation of the definition of 'ship' in the 1992 Conventions, and in particular to document 92FUND/WGR.2/3 presented by the Director regarding the preparatory works in connection with the amendment of the 1969 Civil Liability Convention, which supported this view. Finally, the Greek delegation drew attention to the general obligation of States to protect the marine environment laid down in Article 192 of the Law of the Sea Convention, which called for the interpretation of other Conventions in a manner compatible with this general obligation, ie in a manner as broad as possible to the extent that this contributed to the protection of the marine environment.

3.5.12 A number of delegations expressed sympathy with the views expressed by the Greek delegation but pointed out that the decision by the Executive Committee that the *Slops* should not be considered a 'ship' for the purposes of the 1992 Conventions was based on a policy decision by the 1992 Fund Assembly regarding the conditions under which floating storage units should be considered a 'ship' for the purpose of the Conventions, namely only when they were carrying oil in bulk, which implied that they were on a voyage. Those delegations referred to the preamble to the Conventions, which specifically referred to the transportation of oil.

3.5.13 Other delegations, which had previously expressed reservations about the 1992 Fund's policy in this regard, agreed that unless the policy was changed, the Fund had no option but to appeal against the decision of the Court of first instance.

3.5.14 One delegation, whilst recognising that it was difficult for the 1992 Fund to change its policy regarding the scope of coverage of floating storage units under the 1992 Conventions, questioned the need to appeal against the judgement of the Court of first instance, bearing in mind that the Court of appeal was likely to uphold that decision.

3.5.15 The Committee decided that the 1992 Fund should appeal against the decision of the first instance Court.

4 Any other business

The Director informed the Executive Committee that Ghana had deposited instruments of accession to the 1992 Civil Liability Convention and 1992 Fund Convention on 3 February 2003.

5 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.20/WP.1, was adopted, subject to certain amendments.