



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
21st session
Agenda item 5

92FUND/EXC.21/5
9 May 2003
Original: ENGLISH

RECORD OF DECISIONS OF THE TWENTY-FIRST SESSION OF THE EXECUTIVE COMMITTEE

(held from 7 to 9 May 2003)

Chairman: Mr J Rysanek (Canada)

Vice-Chairman: Lieutenant Commander K Amaranitidis (Greece)

Opening of the session

1 Adoption of the Agenda

The Executive Committee adopted the Agenda as contained in document 92FUND/EXC.21/1.

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	Dominica	Panama
Antigua and Barbuda	Finland	Portugal
Argentina	Germany	Qatar
Bahamas	Ireland	Russian Federation
Belgium	Japan	Trinidad and Tobago
China (Hong Kong Special Administrative Region)	Malta	Turkey
Colombia	Netherlands	United Arab Emirates
Denmark	Norway	Uruguay
	Oman	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:

Gabon

Ghana

Nigeria

Other States

Ecuador

Saudi Arabia

United States

Peru

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

Intergovernmental organisations:

International Oil Pollution Compensation Fund 1971

International Maritime Organization

International non-governmental organisations:

Comité Maritime International

European Chemical Industry Council

Friends of the Earth International

International Association of Independent Tanker Owners (INTERTANKO)

International Chamber of Shipping

International Group of P & I Clubs

International Tanker Owners Pollution Federation Ltd

Oil Companies International Marine Forum

3 Incidents involving the 1992 Fund

3.1 Erika

- 3.1.1 The Executive Committee took note of the developments regarding the *Erika* incident as contained in document 92FUND/EXC.21/2.
- 3.1.2 Executive Committee noted that, as at 23 April 2003, 6 700 claims for compensation had been submitted to the Claims Handling Office in Lorient established by the 1992 Fund and the shipowner's insurer, the Steamship Mutual Underwriting Association (Bermuda) Limited (Steamship Mutual), for a total of FFr1 292 million or €197 million (£136 million). It was also noted that 6 309 claims, corresponding to 94% of all claims received, and totalling FFr1 084 million or €165 million (£114 million), had been assessed at a total of FFr606 million or €92 million (£64 million).
- 3.1.3 The Committee also noted that 718 claims totalling FFr135 million or €21million (£14 million) had been rejected, that 52 claimants whose claims totalled FFr23 million or €3.5 million (£2.4 million) had contested the rejection, and that their claims were being reassessed in the light of additional documentation provided by the claimants.
- 3.1.4 It was noted that payments of compensation had been made in respect of 5 184 claims for a total of FFr419 million or €64 million (£44 million) corresponding to 77% of all claims. It was also noted that 391 claims totalling FFr207 million or €32 million (£22 million) were either in the process of being assessed or were awaiting claimants providing further information necessary for the completion of the assessment.

Limitation proceedings

- 3.1.5 The Committee recalled that the Commercial Court in Nantes had determined the limitation amount applicable to the *Erika* at FFr84 247 733 (£8.4 million) corresponding to €12 843 484 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 Steamship Mutual. The Committee also recalled that in 2002, the limitation fund had been transferred to the Commercial Court in Rennes and that a new liquidator had been appointed.

Claims in various courts

- 3.1.6 The Executive Committee took note of the court actions relating to claims set out in section 4 of document 92FUND/EXC.21/2.
- 3.1.7 It was noted that settlements had been concluded in respect of 113 claims that had been pursued in the court proceedings and that the 1992 Fund would continue to hold discussions with those claimants whose claims were not time barred for the purpose of arriving at out-of-court settlements if appropriate.

Maximum amount available for compensation

- 3.1.8 The Committee recalled that the maximum amount available for compensation under the 1992 Civil Liability Convention and the 1992 Fund Convention, i.e. 135 million Special Drawing Rights (SDR) per incident, should be converted into national currency on the basis of the value of that currency by reference to the SDR on the date of the decision by the Assembly as to the first date of payment of compensation. 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 should be made using the rate of the SDR as at 15 February 2000 and had instructed the Director to make the necessary calculations (document 92FUND/EXC.6/5, paragraph 3.29).
- 3.1.9 The Committee recalled that the Director's calculation had given 135 million SDR = FFr1 211 966 811 corresponding to €184 763 149 (£117 million) and that it had endorsed this calculation at its April 2000 session. The Committee also recalled that its decision had been endorsed by the Assembly at its October 2000 and October 2001 sessions.

Time bar

- 3.1.10 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 and 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, in accordance with the formalities required by the law of the court seized of an action against the shipowner or his insurer.
- 3.1.11 The Committee recalled 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 recalled 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.
- 3.1.12 The Committee also recalled 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 would expire for individual claimants.

- 3.1.13 It was recalled that, at its February 2003 session, the Committee had decided that 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. It was further recalled that the Committee had recognised that there could be claims in respect of which the starting point for the time bar period might be some time after the beginning of the period of the loss and that such claims would have to be considered in the light of the particular circumstances in each case (document 92FUND/EXC.20/7, paragraphs 3.2.36 and 3.2.37).
- 3.1.14 The Committee noted that as a result of its decision some 50 claims, which had not been the subject of legal actions, and for which the time bar period ended after the Committee's February 2003 session, had subsequently been settled out-of-court.
- 3.1.15 In response to a question as to how the time bar issue had been dealt with in respect of the outstanding claims, the Director stated that no question of principle had arisen since the claims concerned had all been settled within three years of the beginning of the period of the loss or damage.

Level of the 1992 Fund's payments

- 3.1.16 It was recalled that, in view of the uncertainties as to the total amount of the established claims, the Committee had decided at its February 2003 session 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 (document 92FUND/EXC.20/7, paragraph 3.2.47).
- 3.1.17 It was also recalled that the claims by the French Government and Total Fina Elf could be discarded for the purpose 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.
- 3.1.18 The Executive Committee took note of the Director's assessment of the 1992 Fund's exposure as at 23 April 2003, as set out in paragraph 9.5 of document 92FUND/EXC.21/2, which, in his view, gave a significant safety margin to make it possible to increase the level of payments to 100%. It was noted that he had therefore decided on 25 April 2003 to increase the level of payments to 100% of the amount of the loss or damage actually suffered by the respective claimants as assessed by the 1992 Fund and the Steamship Mutual or decided by the French courts in final judgements.
- 3.1.19 The French delegation thanked the Director for increasing the level of payments to 100% in accordance with the mandate given to him by the Executive Committee. That delegation stated that the decision demonstrated the 1992 Fund's willingness to assist claimants in receiving full compensation at the earliest opportunity and underlined the value of close co-operation between the Fund and the affected State on the exchange of information on the likely levels of claims. That delegation stated that in view of the above situation the French authorities would consult with the Fund in order to proceed with the settlement of the French Government's claim, provided that sufficient funds remained after all the outstanding claims by private claimants had been settled and paid.
- 3.1.20 A number of delegations also expressed their satisfaction at the final outcome and noted the generous gesture by the French Government and Total Fina Elf in not pursuing their own claims until such time as all other claims had been settled and paid.

- 3.1.21 The Chairman expressed the Executive Committee's appreciation to the Director, the Secretariat and the French Government for their efforts which had made it possible to arrive at a level of payment of 100%, which at one time had been beyond the Committee's expectation.

Recourse actions by the 1992 Fund

- 3.1.22 It was recalled that, at its October 2002 session, the Executive Committee had authorised the Director to take legal actions against certain parties to recover the amounts paid by it in compensation. It was also recalled that on 12 December 2002, the 1992 Fund had taken legal action 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*)
RINA Spa (classification society)
Registro Italiano Navale (classification society)
Bureau Veritas (classification society)

- 3.1.23 The Executive Committee noted that there had been no developments in respect of those actions.
- 3.1.24 One delegation stated that as there were now only a few remaining claims to be settled it was time for the 1992 Fund to start a serious consideration of the question of recourse action, which would have to rely on the outcomes of the investigations into the cause of the incident and in particular the criminal proceedings. That delegation also stated that the Fund should resist the request by Steamship Mutual to the Commercial Court in Rennes to declare that the shipowner was exonerated from further liability under the 1992 Civil Liability Convention, since the shipowner might be liable in any future recourse action for the damage over and above the limit due to his intent to cause the damage or his recklessness.
- 3.1.25 One delegation also stated that the Fund should resist the request by Steamship Mutual to the Commercial Court in Rennes to declare that the shipowner was exonerated from further liability under the 1992 Civil Liability Convention, since the shipowner may be liable in any future recourse action for the damage over and above the limit due to his intention or recklessness.
- 3.1.26 An observer delegation also expressed the view that the Fund should resist the request by Steamship Mutual since it was clear, in that delegations' view, that all claimants were entitled to a share of the limitation fund referred to in paragraph 3.1.5 in accordance with Article V.4 of that Convention.

3.2 *Prestige*

- 3.2.1 The Executive Committee took note of the information contained in document 92FUND/EXC.21/3 submitted by the Director regarding the *Prestige* incident, the clean-up operations in Spain, France and Portugal, and the impact of the spill in those countries.
- 3.2.2 The Committee recalled that, in anticipation of a large number of claims, and after consultation with the Spanish authorities, the P & I insurer of the *Prestige*, the London Steam-Ship Owners' Mutual Insurance Association Limited (the London Club) and the 1992 Fund had established a Claims Handling Office in La Coruña (Spain) and that the office, with four staff members, had become operational on 20 December 2002. The Committee further noted that, after consultation with the French Government, the 1992 Fund and the London Club had also established a Claims

Handling Office in Bordeaux (France), which had been opened on 17 March 2003, operated by two staff members.

Presentation by the Spanish delegation

- 3.2.3 Before introducing document 92FUND/EXC.21/3/1, the Spanish delegation made introductory remarks, stating that the incident had had important environmental, economic and social consequences for Spain, particularly for Galicia, which had suffered seven major incidents off its coast since 1976. The delegation also reported that from an environmental point of view the situation had improved considerably, with 90% of beaches already cleaned to a high standard, which was vital given the importance of tourism in the affected area. It was stated that moreover, in economic terms, there were already signs of recovery, especially in the fisheries sectors. The delegation mentioned, however, that there remained two major uncertainties, namely the removal of the oil remaining in the wreck and the associated costs, and the economic consequences of the pollution on the non-fisheries sectors, particularly tourism.
- 3.2.4 The Spanish delegation noted that it was generally recognised that the current limit of the 1992 Fund Convention was insufficient to meet the costs incurred and the losses suffered by the public and private sectors, and that whilst the Spanish central and regional authorities had taken steps to underwrite all claims arising from the incident, they would also be taking legal actions against all responsible parties, including the shipowner, the insurer, the cargo owner and the classification society. That delegation expressed the opinion that it should be possible for the 1992 Fund to initiate the payment of claims at an early stage and at a level to be decided by the Committee on the basis of the Director's recommendation. The Spanish delegation also stated that it was of vital importance that governments took urgent steps to prevent major pollution incidents such as those that had occurred in recent years.
- 3.2.5 The Spanish delegation gave an illustrated presentation to the Executive Committee on the Spanish authorities' response to the incident to assist delegations in gaining a better understanding of the problems that had been faced in Spain.
- 3.2.6 The Spanish delegation mentioned that in managing the crisis the Spanish authorities had pursued the following objectives: the saving of human life, combating the pollution, preventing the tanker from running aground and minimising the risks to the Spanish coast and its local population.
- 3.2.7 The Spanish delegation further mentioned that once the first three objectives had been successfully executed, the authorities had considered three possibilities for minimising the risks to the coast and its population, namely allowing the vessel entry into a port or other place of refuge, removal of part of the cargo at sea, or towing the tanker away from the coast to calm waters where a cargo transfer could take place. It was stated that after taking into account all the circumstances, including the risk posed by the structurally damaged ship, the hazards posed by the rocky and dangerous coastline and adverse weather conditions and the risks to the rich fisheries in the Galician estuaries, the authorities had decided to order the vessel to be towed away from the coast to calm waters to enable a lightering operation to be carried out. It was remarked that the decision taken was in accordance with Spanish and EU legislation and was consistent with decisions taken in respect of previous major casualties.
- 3.2.8 A number of delegations expressed their gratitude to the Spanish delegation for the clear and useful presentation on the *Prestige* incident.
- 3.2.9 The Spanish delegation provided information on the estimated costs of the incident in Spain on the basis of expenditure incurred up to 31 March 2003 as well as estimates of the cost of operations that had yet to be completed after that date, namely offshore and onshore clean-up, reinstatement of areas damaged as a result of clean-up operations and removing the remaining cargo from the wreck. That delegation also provided estimates of the damage to the fishing, shellfish harvesting and aquaculture sectors based on assistance payments already made and to be

made by the authorities to those affected by fishing bans as well as anticipated losses by private claimants as set out in paragraph 4.3 of document 92FUND/EXC.21/3/1. The Committee noted that the Spanish delegation had estimated that the total economic losses in Spain would be between €62-675 million (£473-482 million). It was noted, however, that the estimates did not include potential losses in the tourism sector, although the Spanish delegation expressed the view that about €100 million (£71 million) should be reserved for possible tourism claims.

Intervention by the French delegation

- 3.2.10 The French delegation apologised for not having been able to submit a document in time for the Executive Committee, but stated that this was due to its wish to present the most up-to-date estimates. That delegation stated that it was its intention to submit a document to the 1992 Fund in the near future containing estimates of the costs of the incident in France. It was stated that the initial estimates indicated that the clean-up costs incurred by public authorities were some €78 million (£56 million), although the French coast was continuing to be polluted by oil from the *Prestige*. It was also stated that environmental damage had been estimated at €9 million (£6.4 million), damage to fisheries, shell-fish and related sectors at €6 million (£4.3 million) and losses in the tourism sector at €1-100 million (£8-71 million), although the latter sector had been difficult to quantify at such an early stage bearing in mind the extreme sensitivity of the tourism sector to the effects of oil pollution. It was mentioned that the annual turnover of the tourist sector in the affected parts of Gironde, Landes and Pyrénées Atlantiques was €2 000 million (£1 420 million).

Intervention by the Portuguese delegation

- 3.2.11 The Portuguese delegation stated that the Portuguese authorities had yet to estimate the costs incurred in response to the incident, although the situation in Portugal was somewhat different to that in France and Spain in that no oil had affected its coastline. It was mentioned, however, that the Portuguese authorities had undertaken measures in response to the threat of pollution of its coast and that the authorities were concerned that further releases from the wreck could affect Portugal, particularly if these occurred during the summer months when the prevailing winds could drive the oil towards its coast.

Interventions by the Bahamas and Spanish delegations

- 3.2.12 The observer delegation of the Bahamas, the flag state of the *Prestige*, expressed concern regarding the late submission of the document by the Spanish delegation and stated that the information contained in the document was counter to its own understanding of events. That delegation, whilst commending the action of the Spanish rescue services in saving the lives of the crew of the *Prestige*, stated that in its view, had the authorities allowed the vessel to enter a port of refuge this would most likely have prevented the sinking of the vessel and reduced the amount of oil spilled. The Bahamas delegation stated that, despite a number of official requests, it had had difficulty obtaining information from the Spanish authorities for their own investigation into the cause of the incident.
- 3.2.13 The Spanish delegation stated that the sole purpose of its intervention had been to provide the Committee with clear and transparent information on the circumstances surrounding the *Prestige* incident. That delegation further stated that the decision by the Spanish authorities to order the vessel to be towed away from the coast was based on the circumstances set out in paragraphs 1.2 and 1.3 of document 92FUND/EXC.21/3/1. That delegation also stated that some information had been provided to the Bahamas authorities and that additional information would be provided. The Spanish delegation expressed its deep dissatisfaction in respect of the intervention by the Bahamas delegation.

- 3.2.14 The Bahamas delegation expressed its deep dissatisfaction in respect of the intervention by the Spanish delegation and reiterated its strong disagreement with the description of the incident put forward by the Spanish authorities.
- 3.2.15 A number of delegations expressed the view that questions of fact relating to the fate of the *Prestige* should not be the primary concern of the Executive Committee until the reports of the investigations into the cause of the incident were complete, and that in the meantime the main focus should be on compensating victims of the pollution.

Maximum amount available under the 1992 Fund Convention

- 3.2.16 The Executive 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 Special Drawing Rights (SDR), should be converted into the national currency in question, ie Euro, 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.
- 3.2.17 It was recalled that, at its 2nd session in October 1997, 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) had taken the decision which made payments of claims possible and that if the Record of Decisions had not been 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). It was also recalled that in its decision in the *Nakhodka* case the Assembly explicitly had 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 in connection with the *Erika* incident (document 9FUND/EXC.6/5, paragraph 3.29, document 92FUND/A.5/28, paragraph 20.2 and document 92FUND/A.6/28, paragraph 21.4).
- 3.2.18 The Committee recalled that, following the same principles in the *Prestige* incident, it had decided at its 20th session in February 2003 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 that session, ie 7 February 2003 (document 92FUND/EXC.20/7, paragraph 3.4.66). The Committee noted that the rate of exchange on 7 February 2003 was 1 Euro = 0.78707700 SDR and that as a result 135 million SDR corresponded to €171 520 703 (£112 million).

Level of payments

- 3.2.19 The Executive Committee recalled that, unlike in previous cases, the insurer of the *Prestige*, the London Club, had not agreed to make payments up to the shipowner's limitation amount. It was recalled that at the Committee's session in February 2003 the representative of the London Club had stated that it had received legal advice in Spain 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. The Committee also recalled the Club's representative statement that despite lengthy discussions between the Club's legal advisers and lawyers representing the Spanish State, the Club had not been convinced that a double payment situation could be avoided, and that this had 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.
- 3.2.20 It was further recalled that at the February 2003 session a number of delegations had expressed the view 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, and that it would therefore be necessary for the Fund to make payments from the outset since the concerns of the victims of pollution damage were 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.

- 3.2.21 The representative of the London Club stated that the Club had continued with its dialogue with the Spanish authorities. It was noted that the Club intended to deposit the limitation amount in a Spanish court in the near future. It was further noted that the amount would be deposited in cash so as to enable the court to distribute the money when required.
- 3.2.22 It was recalled that at the February 2003 session the Executive Committee had considered that it was not possible at that stage to make any meaningful assessment of the magnitude of the total amount of the established claims arising from the *Prestige* incident and had 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 (document 92/FUND/EXC.20/7, paragraph 3.4.61).
- 3.2.23 The Committee noted that it was necessary to strike a balance between the importance of the 1992 Fund's paying compensation as promptly as possible to victims of oil pollution damage and the need to avoid an overpayment situation.
- 3.2.24 In his analysis of the situation, the Director expressed the view that in respect of an incident of the magnitude of the *Prestige*, which had affected three Member States and thousands of individuals and businesses, and had resulted in large costs to the Governments and public authorities of the countries concerned, it was important that the international community, through the 1992 Fund, showed its solidarity to the extent that the 1992 Fund Convention allowed the Fund to do so.
- 3.2.25 The Director recalled that the following estimates of the losses in Spain and France had been given by the Spanish and French delegations:

<u>Spain</u>	Clean-up costs	€61 million
	Operations relating to the wreck	€7-72 million
	Payments made by the authorities to victims	€40 million
	Fishery and mariculture	€102 million
	Miscellaneous	€ million
	Total Spain	€62-677 million
<u>France</u>	Clean-up costs	€78 million
	Environmental damage	€ million
	Fishery and mariculture	€6 million
	Tourism	€1-100 million
	Total France	€104-193 million
	Grand Total	€766-870 million (£547-621 million)

- 3.2.26 It was noted that the Spanish and French delegations had emphasised that these figures were preliminary estimates and that there were great uncertainties, especially as regards potential losses in the tourism sector.
- 3.2.27 The Director mentioned that the Spanish authorities had not included any allowance for tourism losses, but that he considered, in the light of the Fund's experts' estimates, that some €40 million should be reserved for possible losses in Spain in that sector. The Director expressed his concern regarding the Spanish delegation's estimate of the costs of operations relating to the wreck, bearing in mind that a decision had yet to be made on the method to be used. In view of these uncertainties, the Director considered that it would be prudent to include an additional amount of

€100 million (£71 million) to give a sufficient safety margin, giving a total figure for the incident of around €1 000 million (£709 million). The Director stated that on the basis of this global figure it would be possible to set the level of payments at around 17%. He expressed the view, however, that it would be necessary to fix any payment level at a round figure and that he considered therefore that if the Committee were to decide on a level of payment, it should be set at 15% of the loss or damage actually suffered by the respective claimants. He recognised that a payment level of 15% was very low and suggested that it would be for the Committee to decide whether such a low level was meaningful. He made the point that it was likely that some of the uncertainties regarding the level of claims would be eliminated, or at least reduced, by early autumn of 2003, which might make it possible to increase the level of payments at the Committee's October 2003 session.

- 3.2.28 The Director emphasized that the figures he had provided were rough estimates, as were the figures given by the Spanish and French delegations, and that no attempt had been made to address the issue of admissibility against the Fund's criteria. He added that all claims, whether submitted by a claimant who had suffered loss or damage, or claimed in subrogation, would be assessed against these criteria and that all relevant factors would be taken into account.
- 3.2.29 Most delegations supported the Director's proposal for a level of payments at 15% of the loss or damage actually suffered by each claimant as assessed by the experts of the London Club and the 1992 Fund. In supporting the proposal, some delegations acknowledged that 15% represented a very low level of payments, but that it could nevertheless help to alleviate financial hardship, particularly in the case of small businesses.
- 3.2.30 The Portuguese observer delegation stated that it supported the idea of rapid payment of compensation. However, in that delegation's view, because of the uncertainty regarding the total claims, there was a need for caution. The delegation stated that, based on the explanation of the Director, it could support the proposal to set the level of payments at 15%.
- 3.2.31 Some delegations proposed that the Director should be authorised to increase the level of payments if and to the extent he considered it safe to do so. The Director stated that, in view of the importance of this issue, he considered that the level of payments should be decided by the Committee and not by the Director.
- 3.2.32 The Executive Committee decided that the 1992 Fund's payments should, for the time being, be limited to 15% of the loss or damage actually suffered by the respective claimants as assessed by the experts engaged by the Fund and the London Club.
- 3.2.33 With regard to the position of the London Club the Director considered that it would be appropriate in this case, contrary to Fund practice and established policy in the past, to make payments from the outset, although the London Club, for the reasons set out in paragraph 3.2.19 above, would not make any payments directly to victims, since, in his view, the concerns of the victims were paramount.
- 3.2.34 The Executive Committee decided that the 1992 Fund should, in view of the particular circumstances of the *Prestige* case, make payments to claimants, although the London Club would not pay compensation directly to the claimants.
- 3.2.35 The French delegation pointed out that whilst no one could reasonably challenge the decision to limit the level of payments to 15% at this stage, it would be very difficult to explain this to claimants in France, especially in view of the fact that the level of payments in respect of the *Erika* incident had commenced at 50%. In that delegation's view, it would be necessary for the Fund to increase the level of payments as soon as possible to avoid the demise of the Fund. The French delegation stated that it favoured the approach adopted by the United Kingdom and French Governments following the *Sea Empress* and *Erika* incidents whereby claims in the private sector were paid before those of the public sector, but that it was necessary for the other affected States

to adopt the same approach. It was that delegation's view that it was inevitable that the Fund would have to revert to this issue to avoid such low level of payments to victims in the long term and that it would be for the affected States to take the responsibility to ensure that victims received adequate compensation.

- 3.2.36 The Spanish delegation expressed its appreciation to those delegations that had supported the proposal to establish an initial level of payments, albeit at a very low level. That delegation stated that whilst it would have preferred a higher level, it recognised that it would be imprudent to do so bearing in mind that delegation's own estimate of the global losses. That delegation also stated that it had given thought to ways of ensuring that private claimants in Spain received full payments of compensation, but that it was unacceptable to require funds from the public sector in one country to contribute to the funding of private sector claimants in another country.
- 3.2.37 The Director made the point that, in the case of an incident of the magnitude and the complexity of the *Prestige* incident, progress could only be made if there was close co-operation between the Governments of the States concerned and between these Governments and the 1992 Fund. He referred to the great value of the co-operation between the French Government and the Fund in the *Erika* case. He hoped that the discussions between the Spanish, French and Portuguese Governments would continue for the purpose of finding innovative solutions to facilitate payments. He added that, if the Governments concerned so wished, the Fund Secretariat would be pleased to assist in such discussions.
- 3.2.38 One delegation asked whether the 1992 Fund would face the same difficulties in respect of subrogation as the London Club had indicated (cf paragraph 3.2.19). The Director replied that, in his view, the Fund's position was different since Article 9.1 of the 1992 Fund Convention explicitly gave the Fund a right of subrogation against the shipowner and his insurer.
- 3.2.39 Attention was drawn to Article 4.3 of the 1992 Fund Convention under which the 1992 Fund may be exonerated wholly or partially from its obligation to pay compensation to a particular person in case the pollution damage suffered by him resulted wholly or partly from the act or omission done with intent to cause damage by that person or from the negligence of that person. It was noted, however, that the Fund would not be exonerated in respect of preventive measures. The Director made the point that these issues would have to be addressed at a later stage.
- 3.2.40 In summing up the very extensive discussion on the *Prestige* incident, the Chairman noted that the positive decision of the Committee to fix the level of payments at 15% was a step in the right direction, given the complexity of the case and the uncertainties as to the total amount of the claims.

3.3 Buyang

The incident

- 3.3.1 The Executive Committee noted that, on 22 April 2003 the Korean tanker *Buyang* (187 GT), laden with 90 tonnes of marine diesel oil and 260 tonnes of heavy fuel oil, had struck a submerged rock under the Geoje Grand Bridge between Tongyeong City and Geoje Island, Republic of Korea. The Committee noted that two of the vessel's cargo tanks, one of which had been empty, the other containing 140 tonnes of heavy fuel oil, had been holed and an estimated 35-45 tonnes of heavy fuel had been lost from the laden tank.
- 3.3.2 The Committee noted that the *Buyang* was insured for pollution liabilities with the Korea Shipping Association (KSA), and that although KSA was not a member of the International Group of P&I Clubs, the Association had agreed with the 1992 Fund's proposal to apply the Memorandum of Understanding signed by the 1992 Fund and the International Group, whereby the two parties would jointly instruct surveyors and experts to monitor the clean-up and assist with the assessment of claims for compensation for pollution damage. The Committee also noted

that a team of Korean surveyors and experts had been appointed to undertake this work on behalf of the KSA and the 1992 Fund.

Clean-up operations

- 3.3.3 It was noted that on 22 April 2003 a fleet of 10 marine police patrol vessels and pollution response vessels had been mobilised to contain oil around the vessel and to combat the oil that had escaped, and that on 23 April 2003 a further nine marine police vessels and one pollution response vessel belonging to the Korean Marine Pollution Response Corporation (KMPRC) had participated in the clean-up response.
- 3.3.4 It was also noted that on 23 April the owner of the *Buyang* had engaged an oil spill clean-up contractor to provide cleaning materials and that the contractor had subsequently hired a work force of 65 local labourers and three fishing vessels from village fishing association to commence shoreline clean-up operations and a further 13 fishing vessels to join the at sea clean-up response.
- 3.3.5 It was also noted that on 25 April the local government office on Hansan Island had deployed an offshore response team comprising 15 local government employees and 30 local inhabitants. It was further noted that offshore clean-up operations had been terminated on 26 April and that shoreline clean-up operations were expected to take about one month to complete.

Impact of the spill

- 3.3.6 The Committee noted that the oil had impacted a number of islands between Geoje Island and Tongyoung polluting several sand and pebble beaches and that some of the oil had encountered rafts of floating seaweed before stranding, which had increased the volume of oily waste to be collected for disposal.
- 3.3.7 The Committee also noted that a large number of fish cage culture and other mariculture facilities had been impacted by oil, that the oil had affected a number of village fishing grounds and that a substantial fleet of fishing vessels had been contaminated, which would interrupt fishing pending the cleaning of the vessel's hulls.

Claims for compensation

- 3.3.8 It was noted that the limit of liability applicable to the *Buyang* under the 1992 Civil Liability Convention was 3 million SDR (£2.6 million) and that it was too early to predict whether the total claims arising from this incident would exceed this amount.
- 3.3.9 The Korean delegation expressed its appreciation to the 1992 Fund for preparing an informative document on the incident at such short notice. That delegation noted that although the incident was not a serious one, it had occurred in an area that was important for fishing and mariculture. The delegation stated that, although the level of damages may be limited, it was grateful that the Fund was monitoring the situation and was prepared to pay claims for compensation if that proved necessary.
- 3.3.10 A number of delegations expressed their appreciation that the vessel's insurer had agreed to cooperate with the 1992 Fund on the monitoring of the incident and the assessment and approval of claims for compensation.
- 3.3.11 The Executive Committee authorised the Director to settle claims arising from the incident to the extent that they did not give rise to issues of principle not previously considered by the Funds' governing bodies.

4 **Any other business**

The Executive Committee noted that the Committee's 22nd session would be held during the week of 20 October 2003.

5 **Adoption of the Record of Decisions**

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.21/WP.1, was adopted, subject to certain amendments.
