INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
22nd session
Agenda item 6

92FUND/EXC.22/14
24 October 2003
Original: ENGLISH

RECORD OF DECISIONS OF THE TWENTY SECOND SESSION OF THE EXECUTIVE COMMITTEE

(held from 20 to 24 October 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.22/1.

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	Finland	Norway
Antigua and Barbuda	Germany	Panama
Argentina	Grenada	Portugal
Australia	Ireland	Qatar
Bahamas	Japan	Russian Federation
Belgium	Latvia	Trinidad and Tobago
China (Hong Kong Special Administrative Region)	Malta	Tunisia
	Morocco	Turkey
Colombia	Netherlands	United Arab Emirates
Cyprus	New Zealand	Vanuatu
Denmark	Nigeria	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:

Ghana

Other States

Brazil	Democratic People's Republic of Korea	Malaysia
Chile		Peru
Côte d'Ivoire	Ecuador	

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
European Commission
Central Commission for Navigation on the Rhine (CCNR)

International non-governmental organisations:

Comité Maritime International(CMI)
Conference of Peripheral Maritime Regions (CPMR)
Cristal Ltd
Federation of European Tank Storage Associations (FETSA)
Friends of the Earth International (FOEI)
International Association of Independent Tanker Owners (INTERTANKO)
International Group of P & I Clubs
International Salvage Union (ISU)
International Tanker Owners Pollution Federation Ltd (ITOPF)
Oil Companies International Marine Forum (OCIMF)

3 Incidents involving the 1992 Fund

3.1 Overview

The Executive Committee took note of document 92FUND/EXC.22/2, which contained summaries of the situation in respect of all 20 incidents dealt with by the 1992 Fund since the Committee's 18th session, held in October 2002.

3.2 Incident in Germany

3.2.1 The Executive Committee took note of the developments in respect of this incident set out in document 92FUND/EXC.22/3.

3.2.2 It was recalled that the German authorities had taken legal action against the owner and his insurer of the ship *Kuzbass* suspected of having caused pollution in Germany in 1996. It was also recalled that the shipowner and his insurer had maintained that the pollution did not originate from the *Kuzbass*. It was further recalled that a Court of first instance had held the owner of the *Kuzbass* and his insurer jointly and severally liable for the pollution damage, but that they had appealed against the judgement.

3.3 Incident in Sweden

3.3.1 The Executive Committee took note of the information contained in document 92FUND/EXC.22/4 concerning this incident.

3.3.2 The Committee recalled that in September 2000 persistent oil had landed on the shores of two islands to the north of Gotland in the Baltic Sea and on several islands in the Stockholm archipelago and that the Swedish authorities had undertaken clean-up operations. It was recalled that investigations by the Swedish authorities had indicated that the oil could have been discharged within the Swedish Exclusive Economic Zone to the east of Gotland, possibly from the Maltese tanker *Alambra*, which had passed the area at the assumed time of the oil spill on a ballast voyage to Tallinn (Estonia). It was noted that according to the Coastguard, analyses of oil samples from the polluted islands matched those taken from the *Alambra*. The Committee further noted that the shipowner and his insurer had maintained that the oil did not originate from the *Alambra*.

3.3.3 It was noted that the Swedish authorities had incurred costs in respect of clean-up operations totalling SEK 5.3 million (£400 000) and that therefore the aggregate amount of the claims would fall well below the limitation amount applicable to the *Alambra,* 32 684 760 SDR (£27.6 million).

3.3.4 It was noted that the Swedish authorities had made available to the 1992 Fund the results of the analyses of samples of oil carried on board the *Alambra* and of samples of oil found on several Swedish islands and that, after examination of the results, the Director had concurred with the conclusion of the authorities that the pollution samples matched closely those taken from the *Alambra*.

3.3.5 The Committee noted that in September 2003 the Swedish Government had taken legal action in the Stockholm District Court against the shipowner and his insurer maintaining that the oil in question originated from the *Alambra* and claiming compensation of SEK5.3 million (£400 000) for clean-up costs. It was also noted that the Government had taken legal action against the 1992 Fund as a protective measure to prevent its claim against the Fund becoming time barred, invoking the liability of the 1992 Fund to compensate the Government if neither the shipowner nor the insurer were to be held liable to pay compensation.

3.3.6 It was noted that, if the Swedish Government's action against the shipowner and the insurer were unsuccessful, to pursue successfully a claim against the Fund, the Government would have to prove that the damage resulted from an incident involving a ship as defined in the 1992 Civil Liability Convention.

3.3.7 The Committee further noted that the 1992 Fund had submitted its response to the Court requesting that the action against the Fund should be suspended until the final judgment had been rendered in respect of the action against the shipowner and his insurer. It was also noted that the Fund had informed the Court that it shared the Swedish Government's view that the *Alambra* was the most likely source of oil pollution.

3.3.8 The Swedish delegation informed the Committee that the Government's statement of claim had been filed on 2 September 2003 and that the writ of summons had been issued on 19 September 2003. That delegation stated that the Court had not yet served the claim on the shipowner, but that there was no reason to believe that he would not accept service in due course. The Swedish delegation expressed the view that the technical evidence linking the vessel to the pollution would carry considerable weight and that the prospects of a successful outcome of the legal action were good.

3.4 *Erika*

3.4.1 The Executive Committee took note of the developments regarding the *Erika* incident as set out in document 92FUND/EXC.22/5.

3.4.2 It was noted that, as at 7 October 2003, 6 785 claims totalling FFr1 318 million or €201 million (£143 million) had been submitted to the Claims Handling Office in Lorient. It was also noted that 6 420 claims totalling FFr1 145 million or €175 million (£124 million), i.e. 95% of the total number of claims received, had been assessed at a total of FFr637 million or €97 million (£69 million). It was further noted that 730 claims, totalling FFr138 million or €21 million (£15 million), had been rejected, that 30 claimants whose claims totalled FFr16 million or €2.5 million (£1.7 million) had contested the rejection and that their claims were being reassessed in the light of additional documentation provided by the claimants.

3.4.3 The Committee noted that payments of compensation had been made in respect of 5 359 claims (including interim payments) for a total of FFr457 million or €70 million (£50 million), out of which the shipowner's insurer had paid FFr84 million or €13 million (£9 million) and the 1992 Fund FFr373 million or €57 million (£41 million), and that payments had thus been made in respect of 79% of all claims. It was also noted that 365 claims totalling FFr174 million or €26.5 million (£18.8 million) were either in the process of being assessed or were awaiting claimants providing further information necessary for the completion of the assessment.

3.4.4 It was noted that in the clean-up sector 84% of the claims had been assessed, that claims submitted by some communes could not be assessed until the claimants had provided the additional information and documentation requested by the 1992 Fund and that all the other pending claims in this category were being examined. The Committee noted that in the category 'property damage' only 61% of the claims had been assessed but that 38%, submitted by salt producers in Guérande and Noirmoutier, could not be assessed until the claimants had submitted technical evidence in support of these claims and the expert appointed by the Court in St Nazaire had completed his examination as to whether or not it would have been feasible to produce salt in 2000 in Guérande meeting the criteria relating to quality and protection of human health (cf document 92FUND/EXC.20/3, section 6).

Limitation proceedings

3.4.5 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 insurer. It was 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

3.4.6 The Executive Committee took note of the court actions relating to some 610 claims set out in section 4 of document 92FUND/EXC.22/5.

3.4.7 It was noted that settlements had been concluded in respect of 209 claimants whose claims 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

3.4.8 It was recalled that the maximum amount available for compensation under the 1992 Civil Liability Convention and the 1992 Fund Convention was 135 million Special Drawing Rights (SDR) per incident, including the sum paid by the shipowner and his insurer (Article 4.4 of the

1992 Fund Convention) and that this amount 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 also recalled that 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). The Committee recalled that the Director's calculation had given 135 million SDR = FFr1 211 966 811 corresponding to (€184 763 149) (£117 million), that this calculation had been endorsed by the Committee at its April 2000 session and by the Assembly at its October 2000 and October 2001 sessions.

Payment in respect of the French Government's claims

3.4.9 It was recalled that the claims by the French Government and Total Fina Elf could be discarded for the purpose of establishing the 1992 Fund's level of payments, since these claims would be pursued only if and to the extent that all other claims had been paid in full, provided however, that the French Governments' claim would take precedence over the claims of Total Fina Elf.

3.4.10 It was also recalled that the Director had on 25 April 2003 decided, as authorised by the Executive Committee, to increase the Fund's level of payments from 80% to 100% of the amount of the damage actually suffered by the respective claimants as assessed by the 1992 Fund and the shipowner's insurer or decided by the French Courts in final judgments.

3.4.11 The Director stated that although there remained considerable uncertainties as to the total amount of the established claims, this uncertainty had been reduced since April 2003 and that it might therefore be possible in the near future to make payments in respect of the French Government's claim. The Executive Committee decided to authorise the Director to make such payments to the extent that he considered there was a sufficient margin between the total amount of compensation available and the Fund's exposure in respect of other claims.

Recourse actions by the 1992 Fund

3.4.12 It was recalled that, pending the outcome of the ongoing investigations into the cause of the incident, the Executive Committee had, at its October 2002 session, authorised the Director to take recourse actions, as a protective measure, before the expiry of the three-year time 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)*
RINA Spa (classification society)
Registro Italiano Navale (classification society)

3.4.13 It was also recalled that the Executive Committee had at its October 2002 session noted that the results of the investigations into the cause of the incident might give grounds for the 1992 Fund to take recourse action against parties other than those referred to above, but that the Director had informed the Committee that no decision was required in this regard at that stage, since the three-year time bar period did not apply to such other parties.

3.4.14 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 he had decided that the 1992 Fund should take recourse action, as a protective measure, against Bureau Veritas. The Committee noted that this

action had been brought in the Civil Court (Tribunal de Grande Instance) in Lorient in December 2002.

3.4.15 The Committee recalled that a criminal investigation into the cause of the incident was being carried out by an examining magistrate in Paris. It was recalled that, during 2000, charges had been brought against, *inter alia*, the deputy manager of Centre Régional Opérationnel de Surveillance et de Sauvetage (CROSS) and three officers of the French Navy who were responsible for controlling the traffic off the coast of Brittany, and that if they were found guilty there might be grounds for the 1992 Fund to take recourse action against the French State. It was noted, however, that it was not possible for the Fund to decide whether there were grounds for such an action until the investigations into the cause of the incident had been completed.

3.4.16 The Committee noted that under French law the general time bar period in commercial matters was– subject to many exceptions – ten years. It was noted that the 1992 Fund's French lawyers had advised the Fund that, in matters involving the liability of public bodies, in order to prevent a claim for compensation becoming time-barred, such a claim should be notified to the French Administration by 31 December of the fourth year after the event giving rise to a claim, i.e. in the case of the *Erika* incident by 31 December 2003. The Committee also noted that according to the advice of the Fund's lawyer, unless the French Administration accepted liability within two months of being notified of a claim by the 1992 Fund, the Fund might have to take legal action against the French State in the administrative courts within two months in order to prevent a potential claim against the State becoming time-barred. It was noted that, in view of the uncertainty of the outcome of the above-mentioned investigations into the cause of the incident, the Director had considered that the 1992 Fund should take the necessary steps to prevent a possible claim against the French State from becoming time-barred.

3.4.17 The French delegation stated that the interpretation by the 1992 Fund's lawyers in respect of the procedures to be followed to prevent claims against public bodies becoming time-barred was not precisely correct, but that the matter was best dealt with through an exchange of correspondence between the Fund and the French authorities.

3.4.18 In response to a query about the various time bar provisions referred to in the document the Director stated that the reason for taking action against the parties referred to in paragraph 3.4.12 within three years of the date of the incident was that it could be argued that the Fund's action was being taken under the 1992 Conventions for which the time bar period was three years from the date when the damage occurred. He further stated that in respect of any action by the Fund against other parties the period of the time bar would be in accordance with national law, which in the case of France was normally 10 years, the exception being claims against public bodies where it was four years.

3.4.19 A number of delegations expressed the view that it was important that the 1992 Fund protected its rights to pursue recourse actions and that where time bar provisions were involved it was better to be safe than sorry.

3.4.20 The Executive Committee instructed the Director to take the necessary steps to prevent a possible future claim by the 1992 Fund against the French State becoming time barred.

3.4.21 In his summing up the Chairman once again expressed the Fund's appreciation of the decision by the French Government not to pursue its claim until it was clear that all other victims could be certain of having their claims met in full.

3.5 *Al Jaziah 1* and *Zeinab* incidents

3.5.1 The Executive Committee took note of the information concerning the *Al Jaziah 1* and *Zeinab* incidents, which involved both the 1992 and the 1971 Funds, contained in document 92FUND/EXC.22/6 (cf document 71FUND/AC.12/13/7).

Al Jaziah 1

3.5.2 It was noted that claims totalling £1.4 million had been submitted in relation to clean-up and pollution prevention and that these claims had been settled at £1.1 million. The Committee noted that all further claims had become time barred on 24 January 2003 and that therefore the Funds would not be required to make any further compensation payments.

3.5.3 The Committee recalled that the Abu Dhabi Public Prosecutor had brought criminal proceedings against the master of the *Al Jaziah 1.* It was recalled that the Court had held, *inter alia*, that the vessel had caused damage to the environment and that it did not fulfil basic safety requirements, was not fit to sail, had many holes in the bottom and had not been authorised by the Ministry of Communications of the UAE to carry oil. It was further recalled that the conclusion of the Court was that the sinking of the vessel had been due to these deficiencies and that the master had been fined Dhs 5 000 (£850) for causing damage to the environment.

3.5.4 It was recalled that, at their October 2002 sessions, the governing bodies of the 1971 and 1992 Funds had considered the question of whether to pursue recourse action against the owner of the *Al Jaziah 1*. The Committee recalled that in the view of the Funds' lawyers in the UAE the findings of the criminal court regarding the vessel's unseaworthiness would be persuasive in any civil action against the shipowner in the UAE. It was also recalled that it was the Director's view that the shipowner must have known or ought to have known that the ship was unseaworthy and that the sinking of the vessel was therefore due to the fault or privity of the shipowner. It was further recalled that, in the Director's view, the shipowner was not entitled to limit his liability, pursuant to Article V.2 of the 1969 Civil Liability Convention, and that any attempt by the shipowner to limit his liability should be opposed by the Funds.

3.5.5 It was recalled that the Funds' lawyers had expressed the view that there were reasonably good prospects for the Funds to obtain a favourable judgement against the shipowner and that it was likely that he would not be entitled to limit his liability. It was also recalled, however, that in the Funds' lawyers' view, the Funds might encounter considerable difficulties in enforcing a judgement against the assets of the defendant and that it was in any event uncertain whether the defendant would have sufficient assets to enable the Funds to recover any substantial amount.

3.5.6 The Committee recalled that at the October 2002 sessions most delegations had expressed the view that the question of whether or not to pursue a recourse action against the shipowner raised an important issue of principle and that the IOPC Funds should play a part in discouraging the operation of sub-standard ships and enforcing the 'polluter pays principle'.

3.5.7 It was recalled that the governing bodies of the 1971 and 1992 Funds had decided that the Funds should pursue recourse action against the shipowner and that in so deciding it had been recognised that the decision to pursue a recourse action in this particular case represented a deviation from the Funds' policy of basing their decisions in part on the prospects of recovery in the event of a favourable judgement. (documents 92FUND/EXC.18/14, paragraph 3.5.9 and 71FUND/AC.9/20, paragraph 15.10.9)

3.5.8 The Executive Committee noted that the Funds had commenced legal action in the Abu Dhabi Court of first instance against the shipowning company and its sole proprietor in January 2003, requesting that the defendants should be ordered to pay Dhs 6.4 million (£1.1 million) to the Funds, the amount to be distributed equally between the 1971 Fund and the 1992 Fund.

3.5.9 It was noted that the defendants had filed pleadings in May 2003 arguing that the Funds had not submitted admissible legal evidence in respect of the incident or details of the alleged losses suffered by the parties who had subrogated their rights to the Funds, that none of those persons had filed any claims directly against the shipowner under UAE law, that the subrogation of the claimants' rights had not been done correctly under UAE law and that these rights had not existed legally as the claimants had not exercised their right to claim against the shipowner under the Civil Liability Convention.

3.5.10 It was also noted that the Funds had submitted a reply maintaining that the shipowner had failed to set up a limitation fund in accordance with the 1969 Civil Liability Convention or the 1992 Civil Liability Convention and that the Funds had paid compensation to those who had suffered pollution damage instead of waiting for the shipowner to provide compensation under the Civil Liability Convention, since there was no indication that the shipowner had any intention to pay compensation. It was further noted that the Fund had argued that the subrogation of the claimants' rights was based on Article 9 of the Fund Conventions and not on UAE law, which required a court judgement for a party to acquire subrogated rights in order to be able to commence proceedings against a third party. The Committee noted that the Funds had also presented the Court with further evidence in relation to the incident and the losses caused, including documents issued by various government authorities.

Zeinab

3.5.11 The Committee recalled that the Georgian-registered vessel *Zeinab,* suspected of smuggling oil from Iraq, had sunk about 16 miles from the Dubai coastline in April 2001. It was recalled that the *Zeinab* had not been entered with any classification society or covered by any liability insurance.

3.5.12 It was noted that claims in relation to clean-up and pollution prevention measures had been settled at £1.0 million. It was also noted that no further claims had been submitted and that claims arising from this incident would be time barred on or shortly after 14 April 2004.

3.5.13 It was recalled that the 1971 Fund's liability for compensation and indemnification for incidents occurring between 25 October 2000 and 24 May 2002, the date when the 1971 Fund Convention ceased to be in force, was covered by insurance, subject to a deductible of 250 000 SDR for each incident. It was also recalled that in July 2002 the Administrative Council had decided that the relevant date for conversion of this amount into Pounds Sterling should be the date of the incident, ie 14 April 2001, and that on the basis of the SDR: pounds sterling exchange rate on 12 April 2001, 1 SDR=£0.88130, (13, 14, 15 and 16 April being non-banking days), the deductible under the policy would be £220 325 (document 71FUND/AC.8/6, paragraph 3.5.6).

3.5.14 It was noted that, since the 1971 Fund's payments had exceeded the deductible, the 1971 Fund had recovered £220 000 from the insurer and that it was expected that further amounts paid by the 1971 Fund in excess of the deductible would be recovered from the insurer shortly.

3.5.15 The Executive Committee noted that the Funds had carried out an investigation into the identity and whereabouts of the owner of the *Zeinab*. It was noted that available documents had confirmed that the registered shipowner was an Iraqi national and that there was evidence that the shipowner was a shareholder of two other companies unrelated to shipping in the UAE.

3.5.16 The Committee noted that the UAE immigration authorities had confirmed that the shipowner had left the UAE in March 2002, that there was no record of him returning to the UAE since and that there were indications that the shipowner was living in Baghdad (Iraq).

3.5.17 Most delegations shared the Director's view that, as long as the shipowner was not living in UAE but probably in Iraq, it would not be meaningful to take recourse action against him.

3.5.18 Some delegations expressed the view that the fact that the shipowner was probably living in Iraq should not in itself prevent the Funds from taking recourse action against him outside the UAE provided that he had assets against which a favourable judgement could be enforced.

3.5.19 It was decided that the matter should be reconsidered by the 1992 Fund before the expiry of the three-year time bar period (14 April 2004) in case the shipowner were to return to the UAE. It was also decided that the Director should investigate further the financial standing of the two

companies in which the shipowner allegedly held shares as well as whether he still held the shares and if so their value.

3.6 *Slops*

3.6.1 The Executive Committee took note of the information contained in document 92FUND/EXC.22/7 concerning the *Slops* incident.

3.6.2 The Executive Committee recalled that, at its in July 2000 session, it 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).

3.6.3 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 of €1 536 528 (£1 001 000) and €786 329 (£512 400) respectively, plus interest, for the costs of clean-up operations and preventive measures.

3.6.4 It was also recalled that these companies had later taken legal actions against the 1992 Fund in the same court claiming compensation for the cost of clean-up and pollution prevention for the same amounts. The Committee recalled 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 recalled 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 recalled that the *Slops* did not have any liability insurance under the 1992 Civil Liability Convention. The Committee also recalled that the companies had maintained 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*, and that, since the owner was manifestly incapable of satisfying their claims, they were entitled to compensation from the 1992 Fund for their costs.

3.6.5 It was further recalled that at its July 2002 session, 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).

3.6.6 The Committee recalled that the Court of first instance had rendered its judgements in December 2002. It was recalled 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 recalled 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 recalled 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. The Committee also recalled that the Court had ordered the 1992 Fund to pay the two companies the amounts claimed, plus legal interest from the date of service of the writ (12 February 2002) to the date of payment plus costs.

3.6.7 It was recalled that the Executive Committee had decided at its February 2003 session that the 1992 Fund should appeal against the judgement of the first instance Court (document 92FUND/EXC.20/7, paragraph 3.5.15).

3.6.8 The Executive Committee noted that the 1992 Fund had appealed against the judgement requesting the Court of Appeal to reject the claims and arguing *inter alia* that the Court of first instance had erroneously considered that the *Slops* was at the time of the incident carrying oil. It was further noted that the Fund had maintained that a document issued by the Ministry of Merchant Marine proved beyond doubt that the *Slops*, which constituted a floating industrial unit for the processing of oil residues and separating them from water, had operated continuously as such a unit from May 1995 and had been permanently anchored since then without any propulsion equipment and that, in view of these facts, the *Slops* could not be considered to fall within the definition of 'ship' in the 1992 Conventions. It was also noted that the 1992 Fund had maintained that the *Slops* did not have the liability insurance required under Article VII.1 of the 1992 Civil Liability Convention, that this requirement had never been imposed by the Greek authorities upon the *Slops* and that the Greek authorities were obliged under Article VII.10 not to permit a vessel flying the Greek flag to carry out commercial activities without a certificate of such insurance (cf document 92FUND/EXC.22/7, paragraph 3.20).

3.6.9 It was noted that the companies had not yet submitted any pleadings to the Court of Appeal.

3.6.10 A number of delegations stated that it was important that the 1992 Fund pursued the appeal vigorously, since the first instance Court's interpretation of the definition of 'ship' was incorrect in that the word 'carriage' in the definition referred to the transport as opposed the storage of oil. The point was made that the registration of the *Slops* as a tanker was not decisive, but the fact that the Greek authorities had exempted the *Slops* from the obligation to carry liability insurance under the 1992 Civil Liability Convention was a strong indication that the *Slops* was not a 'ship' for the purposes of that Convention.

3.6.11 A number of delegations referred to 1992 Fund Resolution Nº8 adopted in May 2003, which stated that national courts in States Parties to the 1992 Conventions should take into account the decisions of the governing bodies of the 1992 Fund and the 1971 Fund relating to the interpretation and application of the Conventions. It was agreed that this Resolution should be brought to the attention of the Court of Appeal.

3.7 *Prestige*

3.7.1 The Executive Committee took note of the information contained in document 92FUND/EXC.21/3 regarding the *Prestige* incident which occurred on 13 November 2002, the clean-up operations in Spain, France and Portugal, and the impact of the spill in those countries. It was noted that the oil had reached as far as the Dover Strait causing intermittent and light contamination of the French and English coasts of the English Channel.

3.7.2 The Committee also took note of the information contained in document 92FUND/EXC.22/8/2 submitted by the Spanish delegation, which contained up to date information on the impact of the pollution, the clean-up operations, the plan for removal of the remaining oil in the wreck, the economic consequences of the spill, legal actions, international initiatives and the recent Royal Decree relating to compensation payments adopted by the Spanish Government.

3.7.3 The Bahamas observer delegation thanked the delegation of Spain for the information contained in document 92FUND/EXC.22/8/2, which clarified the current relationship between their two countries with respect to the formal investigations into the loss of the *Prestige*. The Bahamas delegation stated that it agreed with the Spanish delegation that there was now a very constructive dialogue between the two parties, which could only enhance their respective investigations. The Bahamas delegation further stated that contrary to the impression that might be inferred by the wording of paragraph 6.1 of the document, the Bahamas had tried since

November 2002 to establish lines of communication with the Spanish authorities, but that for reasons now understood, a formal response to the request by the Bahamas was not received until the summer of 2003. It was mentioned that since then the Bahamas had entered into close dialogue with Spain and looked forward to moving ahead with this during planned meetings in November 2003.

3.7.4 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 recalled 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.

3.7.5 It was noted that the limitation amount applicable to the *Prestige* under the 1992 Civil Liability Convention was approximately 18.9 million SDR or €22 777 986 (£16.2 million) and that in May 2003 the shipowner had deposited this amount with the Criminal Court in Corcubión (Spain) for the purpose of constituting the limitation fund.

Claims situation in Spain

3.7.6 The Executive Committee noted that as at 8 October 2003 the Claims Handling Office in La Coruña had received 321 claims totalling €530 million (£376 million). The Committee noted in particular that on 2 October 2003 the Spanish Government had submitted a claim for a total of €383.7 million (£272 million) relating to costs incurred until the end of July 2003 in respect of at sea and on shore clean up operations, compensation payments to fishermen and shellfish harvesters made by the Central Government, tax relief for businesses affected by the spill, administration costs and costs relating to publicity campaigns.

3.7.7 The Committee also noted that 969 claimants had joined the legal proceedings before the Court in Corcubión, which was conducting investigations into the cause of the incident, but that no details of their alleged losses had been provided to the Court. It was noted that some of these claimants had submitted claims to the Claims Handling Office in La Coruña.

Payments and other financial assistance by the Spanish Authorities

3.7.8 The Committee noted that the Spanish Government and regional authorities had made payments of some €40 (£26) per day to all those directly affected by the fishing bans as well as providing aid to other individuals and businesses affected by the oil spill in the form of waivers of social security payments. It was noted that some of these payments had been included in subrogated claims by the Spanish authorities pursuant to Article 9.3 of the 1992 Fund Convention and that further subrogated claims were expected in the near future.

3.7.9 It was noted that the Spanish State had made available to victims of the pollution credit facilities totalling €100 million (£71 million) and that the loans were provided through the Instituto de Credito Oficial (ICO), a financial agency of the State. The Committee further noted that the Spanish State had requested the 1992 Fund to assist with the evaluation of the loss or damage suffered by those seeking loans and that as the damage covered by these loans would eventually form the basis of claims against the Fund either directly or in subrogation, the Fund had agreed to assist the Spanish State in carrying out such evaluations. It was noted that as at 8 October 2003, the Claims Handling Office in La Coruña had received requests to assess the losses suffered by 41 loan applicants totalling €250 351 (£178 000), although in the majority of instances it had been necessary to request further information to allow an evaluation to be carried out.

3.7.10 The Committee noted that in June 2003 the Spanish Government had adopted legislation in the form of a Royal Decree (Real Decreto-Ley) making an appropriation of €160 million (£113 million) to compensate in full the victims of the pollution and that under this Decree the Spanish Government would acquire by subrogation the rights of those victims who decided to claim under this legislation. It was noted that to receive compensation the claimants must renounce the right to claim compensation in any other way in relation to the *Prestige* incident and transfer their rights of compensation to the Spanish Government. It was also noted that the Decree provided that the assessment of claims would be made following the criteria used to apply the 1992 Civil Liability and Fund Conventions, although the procedure for the assessment of the claims submitted under this Royal Decree had not yet been decided.

Claims situation in France

3.7.11 It was noted that by 8 October 2003 the Claims Handling Office in Bordeaux had received 123 claims totalling €3.2 million (£2.3 million) in addition to enquiries and expressions of intent to claim from potential claimants, such as persons engaged in oyster cultivation and marketing and local authorities.

3.7.12 The Committee noted that at the request of a number of communes, the Administrative Court in Bordeaux had appointed experts to establish the extent of the pollution at various locations in the affected area. The Committee also noted that summary proceedings had been commenced against the shipowner, the London Club and the 1992 Fund in July 2003 by five oyster farmers before the Court of Commerce in Marennes requesting provisional payments of amounts totalling approximately €400 000 (£284 040) and that a hearing was scheduled for November 2003.

Claims in respect of Portugal

3.7.13 The Committee noted that claims were expected in respect of clean-up and preventive measures in Portugal and that the Portuguese authorities had so far not submitted any claims but had indicated that the clean-up costs amounted to some €2.6 million (£1.8 million).

Claims in respect of the United Kingdom

3.7.14 The Committee also noted that depending on whether much more oil came ashore in the United Kingdom, the United Kingdom Government and local authorities might submit a claim for costs resulting from any clean-up of United Kingdom shores.

Maximum amount available under the 1992 Fund Convention

3.7.15 The Executive Committee recalled that it had decided at its February 2003 session that the conversion of the maximum amount available under the 1992 Conventions, 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 also recalled that the rate of exchange on 7 February 2003 had been 1 Euro = 0.78707700 SDR and that as a result 135 million SDR corresponded to €171 520 703 (£122 million).

Level of payments

3.7.16 The Executive Committee recalled that, unlike in previous cases, the insurer of the *Prestige*, the London Club, had decided not to make payments up to the limitation amount applicable to the ship. It was also recalled that at the Committee's February 2003 session the representative of the London Club had drawn 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. It was further recalled that the representative had stated that the London Club had 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.

3.7.17 It was further recalled that at the February 2003 session a number of delegations had 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 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.

3.7.18 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 be limited to provisional payments under Internal Regulation 7.9 (document 92/FUND/EXC.20/7, paragraph 3.4.61).

3.7.19 It was recalled that at its May 2003 session the Executive Committee took note of the preliminary figures given by the Spanish and French delegations as to the total losses in their respective countries and the Director's observations thereon.

3.7.20 The Executive Committee recalled that at its May 2003 session, it had decided that the 1992 Fund's payments should 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 (document 92FUND/EXC.21/5, paragraph 3.2.32) and that in view of the particular circumstances of the *Prestige* case, the 1992 Fund should make payments to claimants, even though the London Club would not pay compensation directly to them (document 92FUND/EXC.21/5, paragraph 3.2.34).

3.7.21 It was noted that based on the figures given by the Spanish, French and Portuguese Governments at the present session the total costs of the incident could be estimated at some €990 million (£703 million) but that the Director still had concerns regarding the Spanish Government's figures in respect of the costs of operations relating to the wreck of the *Prestige*, bearing in mind that no decision had been made on the method to be used for the removal of the remaining oil from the wreck. It was further noted that the Director felt 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 of €1 100 million (£781 million).

3.7.22 The French delegation confirmed the figures presented by the Director in respect of the estimates of the damage in France, although on the basis of information on tourism losses in three Departments in Aquitaine the overall losses in the tourism sector were now estimated to fall in the range of €64 – 86 million (£45 – 61 million). The French delegation stated that victims in France felt very disappointed by the decision to limit the level of payments to 15%. That delegation also stated that claimants were therefore discouraged from presenting claims since the only way of obtaining significant levels of compensation would be to pursue claims against other parties through criminal proceedings. The French delegation further stated that the French Government was not in a position to stand last in the queue, as it had done in the *Erika* incident, unless other affected States were to do the same.

3.7.23 The United Kingdom delegation stated that the contamination of its coastline had been minimal and that it was unlikely that the damage would be significant.

3.7.24 The Committee decided that, in view of the remaining uncertainties as to the level of admissible claims, the level of payments should be maintained at 15% of the loss or damage suffered by the respective claimants.

Proposal by the Spanish delegation in respect of advance payment

3.7.25 Before inviting the Spanish delegation to introduce document 92FUND/EXC.22/8/1 the Chairman stated that the proposal made in the document was a very important one that deserved sufficient time for delegations to consider. He therefore proposed that the Committee should have a general discussion on the proposal after it had been presented by the Spanish delegation, but that a final decision should be deferred until later in the week.

3.7.26 The Spanish delegation introduced document 92FUND/EXC.22/8/1 in which it had proposed that the 1992 Fund should make advance payments on account to the Spanish Government and to the Governments of other affected States. It was noted that the proposal contained the following elements:

> The Executive Committee should authorise the advancing "on account" to the Government or Governments of the affected States which wished to receive such on account payments, sums that would be estimated by the Director on the basis of the assessment of the damage. Such advances could vary over time in accordance with how the situation evolved in the various countries.
>
> The advances would be subject to the following conditions:
>
> (a) They would be advances "on account". Consequently, should it transpire from the final settlement that a particular State had been advanced more than it was entitled to, the State in question should return the corresponding overpayment. A State receiving advances should provide the necessary guarantees in that respect.
>
> (b) The 1992 Fund should in any event follow its customary practice when conducting evaluations in accordance with its criteria and, on the basis of such assessments, determine the final settlements and, thereunder, the sums due to all and each of the affected parties.
>
> (c) In no case should 100% of the Fund's available resources be committed to advance payments. A sufficient percentage should be retained to enable the Fund to honour payments to those affected parties who made direct claims to it.

3.7.27 The Spanish delegation stated that since the damage far exceeded the amount of compensation available under the 1992 Conventions there was no way in which the level of payments by the Fund could be increased beyond 15% of the proven losses and that the measures that had been adopted by the Spanish Government would enable all claimants to receive 100% of their proven losses as assessed by the 1992 Fund in accordance with the Fund's criteria.

3.7.28 A number of delegations expressed their appreciation for the innovative approach proposed by the Spanish Government, the primary aim of which was to ensure that claimants received prompt and full compensation. Other delegations stated that the proposal needed very careful consideration, since it had been submitted very late and since it represented a considerable departure from the Fund's policy which could have profound implications for the future of the Fund. Some delegations asked for clarification of the legal basis of the proposal.

3.7.29 Some delegations expressed a preference for the well tried and tested method followed in some previous major incidents in the United Kingdom, the Republic of Korea and France whereby the Governments of those countries had agreed to stand last in the queue with respect to their own claims thereby enabling the Funds to make substantial payments to other claimants.

3.7.30 In response to a question as to the extent to which the level of payments could be increased if the French and Spanish Governments agreed to stand last in the queue, the Director stated that if all the claims in respect of clean-up costs by central and local government, as well as subrogated claims, were included the Fund should be able to make substantial payments, probably in excess of 50%.

3.7.31 Two delegations supported the proposal by Spain in principle, although one of the delegations stressed the need to have sufficient safeguards in place to avoid an overpayment situation, particularly since the full extent of the damage in Spain and the other countries affected was still uncertain.

3.7.32 In response to a query from one delegation about whether the Conventions allowed payments on account, the Director stated that the Conventions did not address the issue beyond the requirement to treat all claimants equally and the need to prevent an overpayment situation.

3.7.33 The Director referred to four previous cases where guarantees had been made against a possible overpayment situation. It was noted that the first occasion was following the *Haven* incident when the French Government decided to mortgage its own accepted claim in order to facilitate the payment by the 1971 Fund of claims by a number of municipalities and departments. It was further noted that two Italian contractors that had undertaken clean-up operations of oil spilled from the *Haven* had received payment of their approved claims in full against bank guarantees. It was also noted that the Spanish oil company REPSOL had had its claim arising from the *Aegean Sea* incident paid in full against a bank guarantee although payments to other claimants were pro-rated at 40%. It was further noted that in the fourth case, which related to a claim by the Venezuelan oil company Petroleos de Venezuela S.A. (PDVSA) arising from the *Nissos Amorgos* incident, the 1971 Fund Executive Committee had reversed its previous policy of paying claims against bank guarantees on the grounds that it was inconsistent with the requirement to treat all claimants equally, since it favoured those claimants that had sufficient financial resources to provide guarantees at the expense of poorer claimants.

3.7.34 The Executive Committee considered a proposal submitted by the Chairman (document 92FUND/EXC.22/8/Add.1). The Committee noted that the claim submitted by the Spanish Government referred to in paragraph 3.7.6 was being assessed by the 1992 Fund, and that following the procedure used in a number of previous major incidents, on the basis of that assessment, the Director would make an interim payment to the Spanish Government at the level decided by the Executive Committee in May 2003, ie 15% of the established losses.

3.7.35 The Committee considered the question of whether to authorise the Director to make a payment to the Spanish Government in excess of the level of payments decided in May 2003 subject to the following conditions:

(a) The amount to be paid to the Spanish Government should not exceed €60 million so as to ensure that sufficient funds remained available, should other Member States affected by the incident wish to make a similar request and in order to be able to meet claims from other claimants in Spain as well as claims from claimants in France, Portugal and the United Kingdom.

(b) The Government of Spain should provide a guarantee from a financial institution, not from the Spanish State, which would have a financial standing laid down in the 1992 Fund's Internal Investment Guidelines so as to protect the 1992 Fund against an overpayment situation.

(c) The guarantee should cover the difference between the €60 million paid by the Fund and the level of payments finally established by the Executive Committee.

(d) The terms and conditions of the guarantee should be to the satisfaction of the Director.

3.7.36 The Spanish delegation thanked the Chairman for the proposal, which in that delegation's view offered a compromise solution, which was transparent, upheld the principle of equal treatment of claimants and was consistent with the provisions of the 1992 Conventions. That delegation stated that it supported fully the Chairman's proposal and withdrew its own proposal.

3.7.37 A number of delegations, including the observer delegation of Portugal, supported the Chairman's proposal, which in their view provided an innovative solution to one of the major problems faced by the Fund, namely the rapid payment of compensation to victims.

3.7.38 A number of delegations considered that the proposal deserved due consideration, but expressed serious reservations, since it involved making payments to the Spanish Government in excess of the agreed level of 15%, which deviated from the requirement that all claimants should be treated equally. Those delegations also expressed concerns about the Fund appearing to act as a bank, since it was never intended to operate in that way. Some delegations questioned the method of calculation of the additional amount requested by Spain as indicated in the proposal.

3.7.39 Some delegations stated that the proposal did not represent a compromise solution, but was merely a clarification of the original proposal by Spain. These delegations further stated that if the total claim submitted by the Spanish Government were to be assessed as admissible in full, they would have no difficulty approving payment of the claim at the agreed level of 15%, but that they could not support any payment without a prior assessment.

3.7.40 The Chairman stated that in the light of the debate that had taken place with respect to the proposal set out in the document he had, with the help of a number of delegations, prepared a revised document. The Chairman further stated that, in view of the great importance of the issue and the enormous ramifications involved, he proposed that the 1992 Fund's supreme body, the Assembly, should consider the document. The Executive Committee endorsed the Chairman's proposal.

3.8 *Victoriya*

The incident

3.8.1 The Executive Committee noted that on 30 August 2003 the Russian tanker *Victoriya* had suffered a fire and explosion at a terminal near Syzran on the Volga River, Russian Federation, while loading crude oil and that a significant but unknown quantity of the oil had been spilled into the river (cf document 92FUND/EXC.22/9).

3.8.2 It was noted that the *Victoriya* was insured for pollution liabilities with Terra Nova Protection and Indemnity (Terra Nova), which, although not a member of the International Group of P & I Clubs, had agreed to follow the spirit of the Memorandum of Understanding signed by the 1992 Fund and the International Group of P&I Clubs, 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.

3.8.3 It was noted that the shipowner had engaged a number of contractors to undertake clean-up operations and prevent the further escape of oil from the vessel including the transfer of all remaining cargo on board the vessel. It was further noted that attempts were being made to ensure that the clean-up operations would be completed before the river froze over in late November.

3.8.4 The Committee noted that one bank of the river Volga, which was some 10 km wide at the incident location, and a number of islands had been oiled intermittently over a length of some 55 km downstream of the terminal. It was noted that there were many charted and uncharted islands over this length of river, which were surrounded by marshes, most of which had not been polluted by oil, although light staining of vegetation had occurred in some places. It was noted, however, that a few marsh areas had been more severely impacted such that one month

after the incident there remained traces of free oil floating between the plants. It was also noted that a number of amenity areas in the vicinity of Syzran, including public and private beaches, slipways and piers of recreational boats clubs, had been oiled either as a direct result of the spill or during the clean-up operations.

3.8.5 It was noted that a local fishing and fish processing company with exclusive commercial fishing rights in the waters downstream of the incident location may have suffered some interruption to its activities during the period that free oil had been present on the river. It was further noted that there were a number of full-time subsistence fishermen who operated in the affected area, although apparently they were not allowed to sell their catches.

3.8.6 The observer delegation of the Russian Federation expressed its appreciation to the International Tanker Owners Pollution Federation Limited (ITOPF) for its valuable assistance in connection with this incident.

Applicability of the 1992 Conventions

3.8.7 In response to a question regarding the recent trading activity of the vessel, the observer delegation of the Russian Federation stated that since October 2002 it had been trading in Turkey, Greece and the Ukraine and that at the time of the incident the *Victoriya* had been enroute to a non-Russian port in the Black Sea.

3.8.8 It was noted that the *Victoriya* was registered by the Russian Maritime Register of Shipping for river and sea navigation and that the vessel traded regularly in the Mediterranean, Black Sea and Baltic Sea areas. It was pointed out that the vessel had not been adapted or appropriated for trading exclusively in rivers and that it still operated regularly as a sea-going vessel.

3.8.9 The Committee noted that the incident had taken place on the Volga River some 1 300 km inland from the Caspian Sea and the Sea of Azov which gave rise to the question of whether the 1992 Conventions applied to pollution damage arising from incidents occurring in inland waters, including non-tidal reaches of rivers. The Committee also noted that Article II (a) (i) of the 1992 Civil Liability Convention and Article 3 (a) of the 1992 Fund Convention provided that the Conventions applied exclusively to pollution damage caused in the territory, including the territorial sea, of a Contracting State and that under general principles of public international law, the concept of 'territory' of a State covered inland waters, including rivers.

3.8.10 Some delegations expressed reservations about applicability of the 1992 Conventions, drawing attention to the preamble of the 1992 Civil Liability Convention, which referred specifically to pollution posed by the worldwide maritime carriage of oil, and to the exclusion of inland waters from the scope of application of the United Nations Convention on the Law of the Sea.

3.8.11 Most delegations, whilst noting the unusual nature of the incident with respect to its location in the upper reaches of a river, nevertheless considered that the 1992 Conventions were applicable, since the *Victoriya* was a sea-going vessel and the pollution damage had been caused in the territory of a Contracting State.

3.8.12 One delegation proposed that the 1992 Fund should decide whether the 1992 Conventions applied to pollution damage in rivers. A number of delegations considered that to do so in the abstract could have far reaching consequences and that it would be preferable to consider incidents in rivers on a case by case basis. The Director pointed out that the intersessional Working Group established by the Assembly to consider the adequacy of the 1992 Conventions would be considering the definition of 'ship' under the 1992 Conventions and that it might be possible to extend the discussion to the issue of the geographical scope of the Conventions

3.8.13 The Committee decided that the 1992 Civil Liability Convention and the 1992 Fund Convention applied to the *Victoriya* incident.

Claims for compensation

3.8.14 The Executive Committee noted that the limitation amount applicable to the *Victoriya* 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. The Committee nevertheless decided to authorise 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.

3.9 *Buyang and Hana* incidents

3.9.1 The Executive Committee took note of the information contained in document 92FUND/EXC.22/10 in respect of the *Buyang* and *Hana* incidents.

Buyang

3.9.2 The Committee recalled that the *Buyang* was insured for pollution liabilities with the Korea Shipping Association (KSA), which had accepted the 1992 Fund's proposal to apply the Memorandum of Understanding signed by the 1992 Fund and the International Group of P&I Clubs under which 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 and that therefore the parties had appointed a team of Korean surveyors and experts to undertake this work on their behalf.

3.9.3 The Committee noted that the limitation amount applicable to the *Buyang* under the 1992 Civil Liability Convention was 3 million SDR (£2.6 million).

3.9.4 The Committee noted that, although the total amount of the claims was close to the limitation amount applicable to the *Buyang*, it appeared unlikely that the 1992 Fund would be required to make any compensation payments. The Committee noted, however, that some contribution would be made by the Fund towards costs incurred in connection with the use of experts appointed jointly by the 1992 Fund and KSA.

Hana

3.9.5 The Executive Committee noted that the Korean coastal tanker *Hana*, whilst moored alongside a landing wharf on Youngdo Island, Busan, had been struck by the *Haedong*, another coastal tanker. It was noted that, as a result of the collision, the shell plating of one of the *Hana*'s cargo tanks had been breached and around 34 tonnes of medium fuel oil was spilled.

3.9.6 The Committee noted that the *Hana* was insured for pollution liabilities with the Korea Shipping Association (KSA), which had decided to co-operate on the same basis as that agreed in respect of the *Buyang* incident (cf paragraph 3.9.2 above). The Committee noted that a team of Korean surveyors and experts had therefore been jointly appointed by the KSA and the 1992 Fund.

3.9.7 The Committee noted that the limitation amount applicable to the *Hana* under the 1992 Civil Liability Convention was 3 million SDR (£2.6 million).

3.9.8 The Committee noted that, on the basis of the level of claims submitted so far, it appeared unlikely that the 1992 Fund would be called on to make any compensation payments, but that some contribution would be made by the Fund towards joint costs incurred in connection with the use of experts appointed jointly by the Fund and KSA.

3.9.9 The delegation of the Republic of Korea stated that there had been four small incidents in Korea and expressed its appreciation to the 1992 Fund for its swift action. That delegation expressed its concerns for the victims who were local villagers working on a subsistence basis and the

owners of small businesses with limited financial resources. That delegation requested the 1992 Fund to take all measures to ensure that claims were settled quickly and that claimants received full compensation and expressed the Korean Government's willingness to co-operate with the Fund in order to avoid the undue delays experienced in the past. The Korean delegation expressed the hope that the damage suffered would be covered substantially by the shipowner's insurer, but that nevertheless it believed that the Fund could play a pivotal role in expediting the settlement of claims.

3.10 Other incidents

3.10.1 The Executive Committee noted the information contained in document 92FUND/EXC.22/11 in respect of the *Dolly*, *Natuna Sea* and *Baltic Carrier* incidents as well as in respect of the incidents in Spain, Guadeloupe and the United Kingdom. The Committee also took note of the developments contained in the document in respect of the *Spabunker IV* incident as outlined below.

Spabunker IV

3.10.2 The Executive Committee noted that the Spanish bunker barge *Spabunker IV* had sunk in heavy seas in Algeciras Bay (Spain) and that one member of the crew had been lost as a result of the sinking.

3.10.3 It was noted that only small quantities of oil had been released from the wreck, most of which had dissipated before reaching nearby shorelines, that two areas of shoreline in Gibraltar had been lightly polluted and that these shorelines had been cleaned under the direction of the Gibraltar port authority.

3.10.4 It was further noted that the Spanish Maritime Safety Agency (Sociedad de Salvamento y Seguridad Maritima, SASEMAR) had mobilized a considerable amount of equipment and that in the event very little of it had been deployed due to the limited quantity of oil spilled. The Committee noted that some defensive booming of river inlets and port entrances had been carried out in Spain and Gibraltar. The Committee also noted that SASEMAR had appointed a salvage company to remove the remaining cargo from the wreck on the seabed, that the removal had been completed successfully without further loss of oil and that the salvors thereafter raised the wreck.

3.10.5 It was noted that the limitation amount applicable to the *Spabunker IV* under the 1992 Civil Liability Convention was 3 million SDR (€4.9 million or £2.6 million).

3.10.6 The Committee noted that claims had been submitted by the Spanish Government for €5.4 million (£3.8 million) in respect of removing the oil from the wreck and wreck removal, that further claims totalling €628 000 (£438 000) had been submitted by private claimants for costs of clean-up and preventive measures in Spain and that the authorities in Gibraltar had submitted claims totalling £18 350 in respect of clean-up and preventive measures.

3.10.7 It was noted that, although the total amount of the claims exceeded the limitation amount applicable to the *Spabunker IV*, the claim by the Spanish Government related to operations that had a dual purpose, namely preventive measures and wreck removal. The Committee noted that this claim was being assessed.

3.10.8 The Committee noted the Director's view that it was unlikely that the 1992 Fund would be called upon to make any compensation payments arising from the *Spabunker IV* incident but nevertheless decided to authorise the Director to settle claims arising out of this incident to the extent that they did not give rise to issues of principle not previously considered by the Funds' governing bodies.

3.11 *Duck Yang* and *Kyung Won* incidents

3.11.1 The Executive Committee took note of the information contained in document 92FUND/EXC.22/13 in respect of the *Duck Yang* and *Kyung Won* incidents, which both occurred on 12 September 2003.

Duck Yang

3.11.2 The Committee noted that the mooring ropes of the Korean tanker *Duck Yang* had parted whilst in the port of Busan (Republic of Korea) as a result of strong winds and heavy seas created by the typhoon 'Maemi', striking a barge and the quay wall of the port's central pier before turning on its side and sinking. The Committee also noted that the ship's master and chief engineer had been reported missing. It was noted that an estimated 300 tonnes of heavy fuel oil had been lost from two cargo tanks whose manhole covers were open and another cargo tank whose shell plating had punctured. It was further noted that the shipowner had engaged a local salvage company, which had successfully righted the vessel by means of floating cranes, and that the remaining oil on board had been transferred to another tanker.

3.11.3 The Committee noted that the *Duck Yang* was insured for pollution liabilities with the Korea Shipping Association (KSA), which had decided to co-operate on the same basis as that agreed in respect of the *Buyang* and *Hana* incidents (cf paragraphs 3.9.2 and 3.9.6 above). The Committee noted that a team of Korean surveyors and experts had therefore been jointly appointed by the KSA and the 1992 Fund.

3.11.4 It was noted that on 13 September 2003 the Marine Police, the Navy and several commercial contractors had mobilised a fleet of 27 pollution response vessels to combat the oil that had escaped, that on water clean-up operations had been completed after seven days, but that the cleaning of piers, breakwaters and other man-made structures was not expected to be completed until mid-October.

3.11.5 It was noted that the oil had become widely scattered throughout the port of Busan resulting in the contamination of the hulls of over 100 vessels. It was also noted that cleaning the hulls of some vessels had proved difficult due to restricted accessibility between vessels and quay walls and changes in vessels' freeboards as cargo was loaded or discharged. It was further noted that a number of piers had been so heavily contaminated that vessels had been prevented from going alongside until they had been cleaned.

3.11.6 The Committee noted that, as a result of the confinement of the oil within the port areas, impact on fisheries had been minimal but that a number of raw seafood restaurants that abstracted seawater into their holding tanks had suffered business interruption due to the presence of oil.

3.11.7 The Executive Committee noted that the limitation amount applicable to the *Duck Yang* under the 1992 Civil Liability Convention was 3 million SDR (£2.6 million).

3.11.8 It was noted that the aggregate clean-up costs incurred up to 1 October 2003, including the cleaning of hulls of vessels, had been estimated at about Won 3 000 million (£1.6 million). It was also noted that claims were expected from stevedore companies, the pilot association and tug operators for loss of income due to interruption of the port during clean-up operations, and from the owners of raw seafood restaurants for loss of earnings.

3.11.9 The Committee noted that it was too early to predict whether the total of the admissible claims arising from this incident would exceed the limitation amount applicable to the *Duck Yang*.

3.11.10 The Executive Committee decided to authorise 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.

Kyung Won

3.11.11 The Executive Committee noted that the Korean tank barge *Kyung Won* (144 GT), whilst moored near the port of Gwangyang, Namhae Island, Republic of Korea, had stranded on the breakwater of the village of Yu Po during the passing of the typhoon 'Maemi'. It was noted that approximately 100 tonnes of heavy fuel oil had escaped from a cracked cargo tank before a contractor had been able to seal the cracks and transfer the remaining oil. The Committee noted that on 14 September the barge had been towed to a shipyard in Busan for repairs.

3.11.12 It was noted that the 1992 Fund had appointed a team of Korean surveyors and experts to monitor the clean-up operations and investigate the potential impact of the pollution on fisheries and mariculture.

3.11.13 It was also noted that on 13 September the Marine Police, a private clean-up contractor and the Korean Marine Pollution Response Corporation (KMPRC) had deployed 31 response vessels to undertake clean-up operations at sea. It was noted that these operations had been terminated after four days, the remaining oil having had stranded on shorelines. It was further noted that three contractors, working under the direction of KMPRC, had participated in shoreline clean-up operations with the assistance of local labour. It was noted that these operations were expected to take a minimum of two months to complete.

3.11.14 The Committee noted that approximately 14 km of shoreline, along which 17 fishing villages were located, had been polluted by oil. It was noted that shorelines consisted of a mixture of sand, pebbles and rocks as well as breakwaters and sea walls. It was also noted that fishing and mariculture activities undertaken in the area included intertidal harvesting of marine products, inshore fishing with vessels, and set nets, shellfish culture farms and onshore hatcheries producing a range of marine products. It was further noted that many of these activities had also suffered the direct effects of the typhoon.

3.11.15 The Committee also noted that, although claims for the costs of clean-up operations and compensation claims in respect of losses in the fishery and mariculture sectors were anticipated, it was not possible to estimate the magnitude of the claims at this stage.

3.11.16 The Committee noted that at the time of the incident the *Kyung Won* was not entered with any classification society and did not carry any liability insurance and that it appeared that the liability insurance had been terminated in May 2002 when the shipowner had become bankrupt. It was noted that the former employees of the shipowner had been continuing to operate the vessel as a bunkering barge.

3.11.17 The Executive Committee decided to authorise the Director to settle claims for compensation arising out of the *Kyung Won* incident to the extent that they did not give rise to issues of principle not previously considered by the Funds' governing bodies.

3.11.18 It was noted that the since *Kyung Won* was not insured for pollution liabilities it was unlikely that the shipowner would have the financial resources to make any significant compensation payments. The Committee decided therefore that the 1992 Fund should pay settled claims even if the shipowner had not made any payments.

4 Lessons learned from the *Nakhodka* incident

4.1 The Executive Committee took note of the information contained in document 92FUND/EXC.22/12 (document 71FUND/AC.12/14).

4.2 The Committee noted that at its October 2002 session the 1971 Fund Administrative Council had endorsed a proposal by the Director that he should submit a report to the governing bodies at their October 2003 sessions on the points raised by the Japanese delegation and other related

issues after a further examination of what lessons could be learned from the *Nakhodka* incident (documents 92FUND/EXC.18/14, paragraph 3.3.33 and 71FUND/AC.9/20, paragraph 15.6.33).

4.3 The Committee noted that in his Report the Director had acknowledged the excellent work of all of the experts and claims office staff engaged by the UK Club and the Funds to deal with the claims arising from the *Nakhodka* incident and that no criticism of their objectivity and professionalism should be inferred from the statements in document 921FUND/EXC.22/12 or the lessons learned and the conclusions drawn.

4.4 The Committee noted that a number of lessons had been learned in the handling of claims arising from the *Nakhodka* incident in the light of which different procedures had been put in place for dealing with claims arising from the *Erika* and *Prestige* incidents and that these procedures might also be applicable in the event of another major incident in Japan. The Committee noted the main lessons learned and conclusions for improvements:

(i) There was a shortage of marine surveyors in Japan who had the necessary expertise to assess claims in respect of the costs of clean-up and preventive measures, had a sufficiently good knowledge of the English language and would be willing and able to work for the 1992 Fund and the shipowner's insurer on a full time basis for a minimum of three years. In order to enable the Fund's experts to focus their efforts on the assessment of claims so as to speed up the overall process it was concluded that they should, to the extent possible, not be used to manage and run the Claims Handling Office. The Funds had already adopted this policy in the setting up of such Offices in France and Spain in response to the *Erika* and *Prestige* incidents. The primary role of the managers and staff appointed to run these offices was to facilitate the submission and prompt processing of claims for pollution damage and the payment of compensation. Although the Claims Handling Office in these cases served as a focal point for claimants, the staff were not authorised to make assessments of claims nor to express any opinions to the claimants regarding the admissibility of their claims or on the amounts claimed.

(ii) One of the most time consuming parts of the claims handling process was the scrutinising and collation in an electronic format of the voluminous amounts of documents submitted by claimants. It was concluded that claimants should be given greater assistance by the Secretariat in the presentation of their claims and be encouraged to submit them in electronic format. It should be recognised, however, that the processing of claims submitted in a language other than one of the 1992 Fund's official languages would still take considerable time in the case of large incidents involving thousands of claims.

(iii) The production of assessment reports was also very time-consuming due to the level of detail contained in the reports. It was concluded that the Fund should provide experts with generic report formats for different categories of claims to ensure that the assessments were presented in a uniform way and with only the level of detail required by the Fund and shipowner's insurer to process claims. Such generic reports had already been prepared for recent incidents in respect of some fishery and other economic loss claims and these reports should be extended to include all types of claims.

(iv) Fishery claims were assessed by the same group of surveyors that had dealt with claims for clean-up costs, thereby adding to their already heavy workload. Japan and the Republic of Korea were the only Fund Member States where the Fund and the insurer had tended to rely on marine surveyors to undertake the assessment of fishery claims. Although these surveyors had considerable experience in dealing with such claims, the limited pool of qualified people inevitably resulted in delays in completing assessments. It was concluded that if a major incident were to result in a large number of individual fishery claims, the Fund and the insurers should consider recruiting Japanese fishery experts to assess claims in the future. The Technical Guidelines, which were being developed by the Funds' experts, should be of assistance in this regard (cf document 92FUND/A.8/24).

(v) As indicated above, prior to the *Nakhodka* incident the marine surveyors who had undertaken the assessments of claims in the tourism sector had no previous experience of such claims and this inevitably contributed to delays in completing the assessments. In the event of another incident in Japan involving a large number of claims in the tourism sector, the Fund should consider engaging people with specialised accounting skills recognising that it would still be necessary to provide training and supervision. The 1992 Fund's experience of having had to deal with some 3 500 tourism claims arising from the *Erika* incident showed that people with accounting experience, as well as being in greater supply than marine surveyors, were better equipped to interpret the financial documentation provided in support of tourism claims.

4.5 A number of delegations expressed their appreciation for the objective information contained in the document and considered that similar reviews should be carried out following other major incidents. One delegation proposed that the findings of the study should be incorporated into the Funds' Annual Report and that they might also be examined by the intersessional Working Group which had been set up by the Assembly to consider the adequacy of the 1992 Conventions.

4.6 The Chairman of the intersessional Working Group stated that it was important to keep in mind that the purpose of the Working Group was to consider fundamental changes to the provisions of the Conventions and that the lessons learned from the claims handling process was a matter for the Funds' internal management procedures.

4.7 One delegation stated that it had not had sufficient time to consider the document in detail and proposed that a further discussion of the lessons learned would be appropriate at the next session of the governing bodies.

4.8 Another delegation noted that the question of cost recovery was an essential but often overlooked aspect of contingency planning for oil spills and that Member States could draw on the lessons learned in deciding what further steps they should take to facilitate this. The point was made that it could be useful for the Funds to interface with the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) Working Group established by the Marine Environment Protection Committee of IMO.

4.9 One delegation proposed that the Audit Body created by the 1992 Fund Assembly should carry out a review of the management of incidents by the Fund.

4.10 The Director stated that the intention was to carry out further reviews in the light of the experiences gained in dealing with the *Erika* and *Prestige* incidents and that this could lead to changes in the Funds' claims handling procedures. He suggested that once these reviews had been completed and the governing bodies had had a chance to discuss the lessons learned in more detail, it might be appropriate for the Audit Body to take them into account in the context of its risk management assessment.

4.11 The Executive Committee decided to revert to the issue of the lessons learned from the *Nakhodka* and other major incidents at a future session.

5 Future sessions

5.1 The Executive Committee decided to hold its 23rd session on 24 October 2003.

5.2 The Committee decided to hold further sessions during the weeks of 23 February and 24 May 2004, if required.

5.3 It was decided that the Committee would hold its normal autumn session during the week of 18 October 2004.

6 Any other business

No items were raised under this agenda item.

7 Adoption of the Record of Decisions

The draft Record of Decisions of the Executive Committee, as contained in document 92FUND/EXC.22/WP.1, was adopted, subject to certain amendments.