



INCIDENTS INVOLVING THE 1992 FUND

PRESTIGE

Note by the Director

Summary:

The shipowner's P&I insurer and the 1992 Fund have established Claims Handling Offices in La Coruña (Spain) and Bordeaux (France). Claims totalling €38 million (£572 million)^{<1>} have been received by the Office in Spain and claims totalling €108 million (£74 million) have been received by the Office in France. The Portuguese Government has submitted claims for €4.3 million (£3.0 million) in respect of clean-up and preventive measures in Portugal.

The total amount of the accepted claims arising from the *Prestige* incident will significantly exceed the total amount of compensation available, 135 million Special Drawing Rights corresponding to €71.5 million (£117 million). In May 2003 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 insurer.

The Spanish Government introduced legislation in the form of Royal Decrees that made available funds to compensate in full the victims of the pollution. According to information provided by the Spanish Government, agreements have been reached with the great majority of the workers in the fisheries sector and payments totalling some €8million (£60 million) have been made to them under the Royal Decrees.

With the assistance of the experts engaged by the 1992 Fund and the shipowner's insurer, the Director provisionally assessed the total amount of the admissible claims in each of the three States concerned as at 1 September 2005 at €280 million (£191 million). On the basis of an analysis of the opinions of those experts, the Director considered that it was unlikely that the final admissible claims would exceed €573 million (£391 million).

At its October 2005 session the Executive Committee decided: a) that the level of the 1992 Fund's payments should be increased to 30% of the loss or damage actually suffered by the respective claimants; b) that an amount of

<1> In this document conversion of currencies has been made on the basis of exchange rate as at 31 January 2006 (€ = £0.6823) except in respect of payments made by the 1992 Fund where the conversion has been made at the rate on the date of payment.

€133 840 000, representing the total amount payable by the 1992 Fund, minus a reserve of 10%, should be apportioned between the three States concerned in the following manner: Spain 85.9%, France 13.55%, Portugal 0.55%; c) to authorise the Director to pay the Spanish Government €57 365 000 (£39 million) and d) that the increase in the level of payments and the payment to the Spanish State were subject to the Governments concerned providing certain undertakings and guarantees.

In January 2006 the French Government provided the required undertaking. The Portuguese Government has confirmed that it will not provide the required guarantee and that it will as a consequence only require payment of 15% of the assessed amount of its claim. The Spanish Government is expected to provide the required undertaking and bank guarantee in the near future, on receipt of which the Director will be able to implement the Committee's decision.

Action to be taken: Information to be noted.

1 The incident

- 1.1 On 13 November 2002 the Bahamas registered tanker *Prestige* (42 820 GT), carrying 76 972 tonnes of heavy fuel oil, began listing and leaking oil while some 30 kilometres off Cabo Finisterre (Galicia, Spain). On 19 November, whilst under tow away from the coast, the vessel broke in two and sank some 260 kilometres west of Vigo (Spain), the bow section to a depth of 3 500 metres and the stern section to a depth of 3 830 metres. The break-up and sinking released an estimated 25 000 tonnes of cargo. Over the following weeks oil continued to leak from the wreck at a declining rate. It was subsequently estimated by the Spanish Government that approximately 13 800 tonnes of cargo remained in the wreck.
- 1.2 Due to the highly persistent nature of the *Prestige's* cargo, released oil drifted for extended periods with winds and currents, travelling great distances. The west coast of Galicia (Spain) was heavily contaminated and oil eventually moved into the Bay of Biscay affecting the north coast of Spain and France.
- 1.3 Major clean-up operations were carried out at sea and on shore in Spain. Significant clean-up operations were also undertaken in France. Clean-up operations at sea were undertaken off Portugal.
- 1.4 For details of the clean-up operations and the impact of the spill reference is made to documents 92FUND/EXC.24/5, 92FUND/EXC.24/5/Add.1 and 92FUND/EXC.25/3/1.
- 1.5 The *Prestige* had insurance for oil pollution liability with the London Steamship Owners' Mutual Insurance Association (London Club).
- 1.6 Between May 2004 and September 2004 some 13 000 tonnes of cargo were removed from the forepart of the wreck. Approximately 700 tonnes were left in the aft section.

2 Claims Handling Offices

In anticipation of a large number of claims, and after consultation with the Spanish and French authorities, the London Club and the 1992 Fund established Claims Handling Offices in La Coruña (Spain) and Bordeaux (France).

3 Claims for compensation

Spain

- 3.1 As at 31 January 2006 the Claims Handling Office in La Coruña had received 836 claims totalling €838 million (£572 million). These include a claim for €132 million (£90 million) from a group of

58 associations from Galicia, Asturias and Cantabria representing 13 600 fishermen and shellfish harvesters and seven claims from the Spanish Government totalling €653.5 million (£446 million) submitted during the period October 2003 – June 2005^{<2>}.

- 3.2 The claims by the Spanish Government relate to costs incurred in respect of at sea and onshore clean-up operations, removal of the oil from the wreck, compensation payments to fishermen and shellfish harvesters, tax relief for businesses affected by the spill, administration costs and costs relating to publicity campaigns. The claims originally included items for the cost of clean-up operations in the Atlantic National Park amounting to €1.9 million (£8.1 million) in total. These items have been withdrawn since funding for these operations had been obtained from another source.
- 3.3 The table below provides a breakdown of the different categories of claims received by the Claims Handling Office in La Coruña.

Category of claim	No. of claims	Amount claimed €
Property damage	231	2 715 532
Clean-up	17	4 335 197
Mariculture	13	19 066 101
Fishing and shellfish gathering	184	136 305 473
Tourism	14	688 303
Fish processors/vendors	305	19 605 002
Miscellaneous	65	1 463 152
Spanish Government	7	653 560 405
Total	836	837 739 165

- 3.4 The first claim received from the Spanish Government in October 2003 for €83.7 million (£262 million) was assessed on an interim basis by the Director in December 2003 at €107 million (£73 million). As regards payments to the Spanish Government, see section 9 below.
- 3.5 Since December 2003, a number of meetings have been held with representatives of the Spanish Government and a considerable amount of further information has been provided in support of its claims. Cooperation with representatives of the Spanish Government is continuing and progress is being made on the assessment of all the claims submitted by the Government.
- 3.6 Of the other claims submitted, 63% have been assessed. Many of the remaining claims lack sufficient supporting documentation and further documentation has been requested from the claimants. Four hundred and forty-seven of these other claims, totalling €7.2 million (£18.6 million), have been approved for €3.2 million (£2.2 million) and interim payments totalling €100 868 (£69 000) have been made at 15% of the assessed amounts in respect of 98 of the assessed claims. The level of payments is dealt with in section 9 below^{<3>}. The remaining approved claims await a response from the claimants or are being reassessed following claimants' disagreements with the assessed amounts. One hundred and fifteen claims totalling €2.6 million (£8.6 million) have been rejected, the majority because the claimant has not demonstrated that a loss had been suffered.
- 3.7 At the Executive Committee's May 2004 session the Spanish delegation stated that 67 towns had requested compensation totalling €7.6 million (£25.7 million) and that the four affected autonomous regions had estimated their damage at €150 million (£102 million). As at 31 January 2006, agreements had been reached between the Spanish Government and all the regions and almost all the towns affected by the spill. There are four towns with which agreements have not been reached.

<2> It is understood that the Spanish Government's claim is to be reduced by €5 million.

<3> Compensation payments made by the Spanish Government to claimants have been deducted when calculating the interim payments.

- 3.8 The Spanish delegation informed the Committee in June 2005 that the Spanish Government would submit claims for the costs incurred by autonomous regions and towns that had been paid by the Government and for the costs incurred in the disposal of the oily residues. That delegation stated that it expected to submit these claims together with the claims assessed by the Consorcio de Compensación de Seguros (Consorcio)^{<4>} (cf section 5) by the end of 2005 or early in 2006. No such claims had been submitted by 31 January 2006.

France

- 3.9 By 31 January 2006, 466 claims totalling €108 million (£74 million) had been received by the Claims Handling Office in Bordeaux. The table below provides a breakdown of the different types of claims.

Category of claim	No. of claims	Amount claimed €
Property damage	9	87 772
Clean-up	56	10 572 270
Mariculture	124	2 222 073
Shellfish gathering	3	116 810
Fishing boats	58	1 594 131
Tourism	193	24 648 451
Fish processors/vendors	9	301 446
Miscellaneous	13	899 561
French Government	1	67 499 154
Total	466	107 941 668

- 3.10 Of the 466 claims submitted to the Claims Handling Office, 79% had been assessed by 31 January 2006. Many of the remaining claims lack sufficient supporting documentation and such documentation has been requested from the claimants. Three hundred and twenty-four claims had been approved for €6.1 million (£4.2 million) and interim payments totalling €1 054 102 (£719 000) had been made at 15% of the assessed amounts in respect of 157 of the approved claims. The remaining approved claims await a response from the claimants or are being reexamined following claimants' disagreement with the assessed amount. Forty-four claims had been rejected, the majority because the claimants had not demonstrated that a loss had been suffered.
- 3.11 One hundred and eighteen claims had been submitted by oyster farmers totalling €1.2 million (£819 000) for losses allegedly suffered as a result of market resistance due to the pollution. The experts engaged by the London Club and the 1992 Fund had examined these claims and 108 of them, totalling €1 055 704 (£720 000), had been assessed at €325 275 (£222 000). Payments totalling €18 779 (£12 800) had been made in respect of 28 of these claims at 15% of the assessed amounts. The experts appointed by the London Club and the 1992 Fund are examining the remaining ten claims.
- 3.12 In September 2005 representatives of the 1992 Fund and the experts appointed by the Fund met the Association Interprofessionnelle pour le Développement de la Pêche Artisanale (ASSIDEPA), representing the fishery claimants, and the Centre de Gestion et de Comptabilité Agricole (CGCA), representing the oyster farmer claimants. The problems encountered in assessing the outstanding claims were discussed between these representatives and those of the 1992 Fund. A representative of each association was nominated to hold further discussions with the Fund's experts in order to complete the outstanding assessments as soon as possible. A meeting took place in December 2005 between the representative of the CGCA and the Fund's experts where additional information was provided.

<4>

A state-owned insurance organisation set up to pay claims for damage not normally covered by commercial insurance policies, such as damage due to terrorist activities or natural disasters.

- 3.13 The Claims Handling Office had received 193 tourism-related claims totalling €24.6 million (£117 million). One hundred and fifty-four of these claims had been assessed at a total of €8.1 million (£5.5 million). One hundred and forty-two claims had been approved for €7.8 million (£5.3 million) and interim payments totalling €54 000 (£583 000) had been made at 15% of the assessed amounts in respect of 80 claims.
- 3.14 In May 2004, the French Government submitted a claim for €67.5 million (£46 million) in relation to the costs incurred for clean-up and preventive measures. The 1992 Fund and the London Club have provisionally assessed the claim at €1.2 million (£21.3 million). A request for further information was sent to the French Government in August 2005 in order to enable the experts appointed by the 1992 Fund and the London Club to complete the assessment.
- 3.15 A further 56 claims, totalling €10.6 million (£7.2 million), had been submitted by local authorities for costs of clean-up operations. Twenty-four of these claims had been assessed at €3.5 million (£2.4 million). Eighteen claims had been approved for €83 607 (£671 000) and interim payments totalling €45 444 (£99 000) had been made in respect of sixteen claims at 15% of the assessed amounts.

Portugal

- 3.16 In December 2003 the Portuguese Government submitted a claim for €3.3 million (£2.3 million) in respect of clean-up and preventive measures. A meeting was held in July 2004 between representatives of the 1992 Fund and representatives of the Government departments involved. In February 2005, the Portuguese Government provided the 1992 Fund with additional documentation in support of its claim. The additional documentation included a supplementary claim for €1.0 million (£680 000), also in respect of clean-up and preventive measures. The claims have been provisionally assessed at €1.86 million (£1.3 million). Further information has been requested from the Portuguese Government.

4 Time bar

- 4.1 Under the 1992 Civil Liability Convention, rights to compensation from the shipowner and his insurer are extinguished (time-barred) unless legal action is brought within three years of the date when the damage occurred (Article VIII). As regards the 1992 Fund Convention, rights to compensation from the 1992 Fund are extinguished unless the claimant either brings legal action against the Fund within this three-year period or notifies the Fund within that period of an action against the shipowner or his insurer (Article 6). Both Conventions also provide that in no case shall legal actions be brought after six years from the date of the incident.
- 4.2 In September 2005 individual letters about the time bar issue were sent to all those who had submitted claims to the Claims Handling Offices in Spain and France and with whom settlements had not been reached by that time. Advertisements were placed in the national and local press in Spain and France drawing attention to the time bar issue. In respect of the *Prestige* incident it may be uncertain as to from which day the three year time bar period starts to run for the individual claimant (ie the day when the respective claimant's loss occurred). In view of the uncertainty as to the starting point of the time bar period, it was suggested in the letters and in the advertisements that the claimants should assume that the time bar period commenced on the day of the incident (i.e. 13 November 2002) in order to avoid any risk of the claims becoming time-barred. It was also made clear that even if claimants had taken legal action, this would not prevent further discussions concerning their claims for the purpose of reaching an out-of-court settlement.

5 Payments and other financial assistance by the Spanish Authorities

- 5.1 The Spanish Government and regional authorities made payments of €40 (£27) per day to all those directly affected by the fishing bans. These included shellfish harvesters, inshore fishermen and associated onshore workers with a high dependence on the closed fisheries, such as fish vendors, fishing net repairers and employees of fishing co-operatives, fish markets and ice factories. Some

of these payments have been included in subrogated claims by the Spanish authorities pursuant to Article 9.3 of the 1992 Fund Convention.

- 5.2 The Spanish Government has also provided aid to other individuals and businesses affected by the oil spill in the form of loans, tax relief and waivers of social security payments.
- 5.3 In June 2003 and July 2004 the Spanish Government adopted legislation in the form of two Royal Decrees (Real Decreto-Ley) making available a total amount of €249.5 million (£170 million) to compensate in full certain categories of victims of the pollution. To receive compensation the claimants had to renounce the right to claim compensation in any other way in relation to the *Prestige* incident and had to transfer their rights of compensation to the Spanish Government. The Decrees provide that the assessment of claims will be made following the criteria used to apply the 1992 Civil Liability and Fund Conventions.
- 5.4 At the February 2004 session of the Executive Committee the Spanish delegation mentioned that the Spanish Government had received almost 29 000 claims for compensation from victims of the *Prestige* incident who wished to use the payment mechanism set out in the first Royal Decree. It was also mentioned that of those claims, some 22 800 related to groups of workers in the fisheries sector which would be assessed by means of a system using either a formula ('estimación objetiva') or a scale. It was stated that some 5000 claims of other groups would be subject to individual assessments.
- 5.5 In May 2005 the Spanish Government informed the 1992 Fund that agreements had been reached with some 19 500 workers in the fisheries sector and that payments totalling some €8 million (£60 million) had been made to them under the Royal Decrees. It is expected that the claims lodged in the legal proceedings before the Criminal Court in Corcubión (Spain) on behalf of these workers will be withdrawn following their settlement with the Spanish Government under the Royal Decrees (cf paragraph 12.1).
- 5.6 The 1992 Fund was informed by the Spanish Government in 2004 that claims which under the Decrees would be subject to individual assessment would be assessed by the Consorcio. As at 31 January 2006, 971 claims had been received by the Consorcio relating to some 3 700 persons.
- 5.7 Since the Royal Decrees provide that the assessment of claims will be made following the criteria used to apply the 1992 Civil Liability and Fund Conventions, meetings have been held between representatives of the Consorcio and of the 1992 Fund to discuss the criteria. As at 31 December 2005 the Consorcio had provided details of the claims submitted as follows:

Category of claim	Number of claims
Mariculture (property damage & loss of income)	103
Fishing (property damage & loss of income)	179
Fish & shellfish vendors (loss of income)	310
Fish & shellfish processors (loss of income)	79
Employees fisheries sector (loss of income)	109
Tourism (loss of income)	86
Land (damage & loss of income during clean-up operations)	72
Property damage	14
Miscellaneous	19
Total	971

The total amount claimed is €29.9 million (£157 million).

5.8 The Consorcio has requested the assistance of the experts appointed by the London Club and the 1992 Fund in the assessment of 241 of these claims for a total of €47.8 million (£32.6 million). A number of the claims that have been referred to these experts are not supported by sufficient evidence to demonstrate the loss claimed. The Consorcio has requested further evidence and information from the claimants. The experts of the Consorcio and the experts appointed by the London Club and the 1992 Fund have made joint assessments of 192 claims. One hundred and seventy-nine of these claims, for €3.7 million (€9.3 million), have been approved by the 1992 Fund and the London Club for €1.98 million (£1.4 million). One hundred and thirty-four claims included in the 241 claims with which the Consorcio has requested assistance have also been submitted directly to the Claims Office. Details of 83 of the joint assessments have been provided, with the approval of the claimants, to the Consorcio. Further assessments are being carried out.

6 Payments and other financial assistance by the French Authorities

6.1 The French Government has introduced a scheme to provide payments in excess of the amounts paid by the 1992 Fund to claimants in the fishery and shellfish harvesting sectors who made a request to that effect by 13 December 2004. Payments were made in January 2005 to 175 claimants for a total amount of €1.15 million (£785 000).

6.2 The French Government has informed the Director that these payments were advances on the payments to be made by the 1992 Fund and are to be repaid by the claimants and that the Government will not pursue subrogated claims against the 1992 Fund in respect of the payments made.

7 Shipowner's liability

The limitation amount applicable to the *Prestige* under the 1992 Civil Liability Convention is approximately 18.9 million SDR or €2 777 986 (£15.5 million). On 28 May 2003 the shipowner deposited this amount with the Criminal Court in Corcubión (Spain) for the purpose of constituting the limitation fund required under the 1992 Civil Liability Convention.

8 Maximum amount available under the 1992 Fund Convention

8.1 The maximum amount of compensation under the 1992 Civil Liability Convention and the 1992 Fund Convention is 135 million SDR per incident, including the sum paid by the shipowner and his insurer (Article 4.4 of the 1992 Fund Convention). This amount should be converted into the national currency 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.

8.2 Applying the principles laid down in the *Nakhodka* case, the Executive Committee decided in February 2003 that the conversion in the *Prestige* case 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 Committee's Record of Decisions of that session, ie 7 February 2003. As a result 135 million SDR corresponds to €171 520 703 (£117 million).

9 Level of payments

Consideration up to March 2005

9.1 At the Executive Committee's 21st session, held in May 2003, it was 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 1992 Fund and the London Club. At its October 2003, February 2004, May 2004, October 2004 and March 2005 sessions 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% (documents 92FUND/EXC.22/14, paragraph 3.7.24, 92FUND/EXC.24/8, paragraph 3.4.43, 92FUND/EXC.25/6, paragraph 3.2.26, 92FUND/EXC.26/11, paragraph 3.7.30 and 92FUND/EXC.28/8, paragraph 3.4.34).

Payments to the Spanish Government as decided by the 1992 Fund Assembly in October 2003

- 9.2 At the Executive Committee's October 2003 session the Spanish delegation proposed that the 1992 Fund should, subject to certain safeguards, make advance payments on account to the Spanish Government and the Governments of other affected States which wished to receive such advance payments. In view of importance of the issue and the ramifications involved, the Committee referred the matter to the Assembly.
- 9.3 Taking into account the exceptional circumstances of the *Prestige* incident, the Assembly decided as follows (document 92FUND/A.8/30, paragraph 20.29):
- (a) Subject to a general assessment by the Director of the total of the admissible damage in Spain arising from the *Prestige* incident, the Director was authorised to make a payment of the balance between 15% of the assessed amount of the claim submitted on 2 October 2003 and 15% of that claim as submitted (15% of €83.7 million = €7 555 000), subject also to the Spanish Government providing a guarantee from a financial institution, not from the Spanish State, which would have the financial standing laid down in the 1992 Fund's Internal Investment Guidelines so as to protect the 1992 Fund against an overpayment situation.
 - (b) Such a guarantee should cover the difference between 15% of the assessed amount of the claim submitted on 2 October 2003 and 15% of that claim as submitted (15% of €83.7 million = €7 555 000). The terms and conditions of the guarantee should be to the satisfaction of the Director.
 - (c) If the payment amount were to be reduced by the Committee, the difference should be repaid by the Spanish Government.
 - (d) Should any other State having suffered losses relating to the *Prestige* incident seek the same solution for payments on the same terms, such a request should be submitted to the Executive Committee.
- 9.4 With the assistance of a number of experts, the Director made an interim assessment of the Spanish Government's claim. On the basis of the documentation provided, he arrived at a preliminary assessment of €107 million (£73 million) and on that basis the 1992 Fund made a payment of €6 050 000 (£11.1 million), corresponding to 15% of the interim assessment.
- 9.5 The Director, with the assistance of a number of experts, also carried out a general assessment of the total of the admissible damage in Spain, and concluded that the admissible damage would be at least €303 million (£207 million).
- 9.6 On that basis, and as authorised by the Assembly, the Director made an additional payment of €1 505 000 (£28.5 million), corresponding to the difference between 15% of €83.7 million or €7 555 000 and 15% of the preliminarily assessed amount of the Government's claim, €6 050 000. That payment was made against the provision by the Spanish Government of a bank guarantee covering the above-mentioned difference (ie €1 505 000) from the Instituto de Credito Oficial, a Spanish bank with high standing in the financial market, and an undertaking by the Spanish Government to repay any amount of the payment decided by the Executive Committee or the Assembly.
- 9.7 The payment to the Spanish State totalling €7 555 000 (£39 914 906) was made on 17 December 2003.

Consideration at the June 2005 session

- 9.8 In June 2005 the Executive Committee considered an approach put forward by the Director after discussions with the delegations of France, Portugal and Spain, which was based on an increase in the level of payments, an apportionment between the three States of the amount available for

compensation and certain undertakings and guarantees to be provided by these States against overpayment.

- 9.9 The Committee instructed the Director to make a detailed proposal on the basis of his proposed approach, after consultations with the three delegations concerned and taking into account the points raised during the discussion, covering the legal and technical aspects, to be considered by the Committee at its October 2005 session (document 92FUND/EXC.29/6, paragraph 3.2.78).

Detailed proposal by the Director

- 9.10 At its October 2005 session the Executive Committee considered a proposal by the Director which addressed the following five issues:
- Estimate of the likely final amount of the admissible claims in respect of the damage in each of the three States concerned.
 - A revision of the level of payments on the basis of that estimate.
 - A provisional apportionment between the three States of the maximum amount payable by the 1992 Fund on the basis of the total amount of the admissible claims as established by the assessments carried out to date.
 - The provision of undertakings and guarantees by the Governments of France, Portugal and Spain.
 - A final apportionment between the three States of the maximum amount payable by the 1992 Fund on the basis of the final settlement of all claims arising from the incident, whether as a result of agreements with the claimants or as a result of final judgements by a competent court.
- 9.11 With the assistance of the experts engaged by the 1992 Fund and the London Club, the Director had made a provisional assessment of the total amount of the admissible claims in each of the three States concerned as at 1 September 2005.
- 9.12 Based on the total amount of the admissible claims thus assessed, the Director proposed the following provisional apportionment between the three States of the maximum amount payable by the 1992 Fund of approximately €48.7 million (£101 million), (ie 135 million SDR minus the limitation amount of €2.8 million (£15.6 million) applicable to the *Prestige*).

State	Amounts claimed	Assessed amounts	Provisional apportionment
Spain	€834 000 000	€241 000 000	85.90%
France	€97 000 000	€8 000 000	13.55%
Portugal	€4 300 000	€1 530 000	0.55%
Total	€935 300 000	€280 530 000	100.00%

- 9.13 The Director proposed that in order to minimise the risk of the 1992 Fund having to call upon the Portuguese or Spanish Governments to return a part of the payment made on the basis of a provisional apportionment, the 1992 Fund should at this stage base the provisional apportionment on 90% of the amount available for compensation from the Fund, ie €33.8 million (£91 million). He proposed therefore that the balance, €14.9 million (£10 million), should be distributed between the three States once the final apportionment has been established.

9.14 The Director therefore proposed the following apportionment be made between the three States:

State	Assessed amounts	Apportionment (%)	Apportionment (amounts) (rounded figures)
Spain	€241 000 000	85.90%	€115 000 000
Portugal	€1 530 000	0.55%	€740 000
France	€38 000 000	13.55%	€18 100 000
Total	€280 530 000	100.00%	€133 840 000

9.15 The Director stated that the level of the IOPC Funds' payments had been in the past been determined on the basis of the total amount of presented and possible future claims against the Funds and not on the basis of the Funds' assessment of the admissible losses. He expressed the view that, on the basis of the figures presented by the Governments of the three States affected by the incident, the total amount of the claims could be as high as €1 050 million (£716 million) and that it was likely that the level of payments would have to be maintained at 15% for several years unless a new approach were taken. The Director therefore proposed that, instead of the usual practice of determining the level of payments on the basis of the total amount of claims already presented and possible future claims, it should be determined on an estimate of the final amount of admissible claims against the 1992 Fund established either as a result of agreements with claimants or by final judgements of a competent court.

9.16 On the basis of an analysis of the opinions of the joint experts engaged by the London Club and the 1992 Fund, the Director considered that it was unlikely that the final admissible claims would exceed the following amounts:

State	Amount (rounded figures)
Spain	€500 000 000
France	€70 000 000
Portugal	€3 000 000
Total	€573 000 000

9.17 The Director therefore considered that the level of payments could be increased to 30% <5>.

9.18 The Director expressed the view, however, that the 1992 Fund should be provided with appropriate undertakings and guarantees from the three States concerned to ensure that the 1992 Fund was protected against an overpayment situation and that the principle of equal treatment of victims was respected. In his view guarantees should be given, not by the State concerned, but by financial institutions having the financial standing laid down in the 1992 Fund's Internal Investment Guidelines. On the basis of discussions with representatives of the three States the proposal envisaged that the Spanish and Portuguese Governments would provide bank guarantees. The French Government would instead undertake to accept a reduction in the compensation to which it would be entitled, up to the amount of its admissible claim, to protect the 1992 Fund against overpayment to claimants having suffered damage in France, if the Executive Committee were to decide to reduce the level of payments.

9.19 As regards the final apportionment between the three States of the maximum amount payable by the 1992 Fund, the Director proposed that once all claims arising from the incident had been settled, whether as a result of agreements with the claimants or as a result of final judgements by a competent court, he would inform the Executive Committee of the total amount of admissible claims in respect of the three States concerned. The Committee would then decide, taking into account the distribution of the shipowner's limitation fund deposited with the Criminal Court in Corcubi3n (Spain) as decided by the courts, on any reapportionment between the three States

<5> €171.5 million / €573 million = 29.9%

concerned of the total amount payable by the 1992 Fund. The Committee would then make the necessary adjustments so that the correct proportion of the total amount of compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention were received in respect of each of the three States, using the retained amount or the balance thereof. The 1992 Fund would have the possibility to request repayments from the Spanish and Portuguese Governments and to invoke the bank guarantees provided by these Governments, if required.

Consideration by the Executive Committee in October 2005

- 9.20 The French, Portuguese and Spanish delegations pointed out that the Director's proposal would benefit the victims of the pollution, carried no financial risks for the 1992 Fund but would enhance the Fund's credibility with claimants by showing that it was prepared to show flexibility and adapt to new circumstances and challenges.
- 9.21 A number of delegations supported the proposal and expressed the view that it was in the best interest of the victims and that they were satisfied with the guarantees protecting the 1992 Fund against overpayment. Several delegations expressed reservations regarding the possibility that the proposed solution would be seen as a precedent and some delegations expressed concerns that not all States would be able to provide the necessary financial guarantees required and that this could result in not all States and victims being treated equally.
- 9.22 The Executive Committee agreed to the Director's proposal as to the increase in the level of payments, the distribution of the amount payable by the 1992 Fund and the provisions of undertakings and guarantees by the Governments of France, Portugal and Spain and decided as follows (document 92FUND/EXC.30/10, paragraph 3.7.3):

1. The level of the 1992 Fund's payments should be increased from 15% to 30% of the loss or damage actually suffered by the individual claimant as assessed by the experts appointed by the 1992 Fund and the London Club.
2. The amount of €133 840 000, representing the total amount payable by the 1992 Fund, minus a reserve of 10%, should be apportioned between the three States concerned as set out in the following table:

State	Apportionment (%)	Apportionment (amounts) (rounded figures)	Bank guarantees ^{<6>}
Spain	85.90%	€15 000 000	€78 850 000
Portugal	0.55%	€740 000	€10 500
France	13.55%	€8 100 000	-
Total	100.00%	€133 840 000	-

3. The Director was authorised to pay the Spanish Government €57 365 000 (£39 million), subject to the Spanish Government undertaking to compensate all claimants who had suffered pollution damage in Spain for amounts no less than 30% of the loss or damage, repay to the 1992 Fund any amount due by it to the Fund if the Executive Committee were to decide to reduce the proportion payable by the Fund for damage in Spain and provide the 1992 Fund with a bank guarantee to cover the difference between the amount paid to it by the Fund and 15% of the assessed amount.
4. The Director was authorised to pay the Portuguese Government €740 000 (£505 000), subject to the Portuguese Government undertaking to repay to the 1992 Fund any amount due by it to the Fund if the Executive Committee were to decide to reduce the proportion payable by the Fund for damage in Portugal, to indemnify the Fund for any

^{<6>} The amounts of the bank guarantees correspond to the differences between the apportioned amounts and 15% of the assessed amounts, ie Spain €15 000 000 - €6 150 000 (€21 million at 15%) = €78 850 000; Portugal €740 000 - €29 500 (€1 530 000 at 15%) = €10 500.

amounts that it had paid to other claimants for pollution damage in Portugal and to provide the 1992 Fund with a bank guarantee to cover the difference between the amount paid to it by the Fund and 15% of the assessed amount.

5. The Director was authorised to pay each claimant in France, except the French Government, 30% of the loss or damage as assessed by the 1992 Fund or as decided by a final judgement rendered by a competent court, subject to the French Government undertaking to accept a reduction in the compensation to which it would be entitled, up to the amount of its admissible claim, to protect the 1992 Fund against overpayment to claimants having suffered damage in France, if the Executive Committee were to decide to reduce the level of payments.
6. The bank guarantees to be provided by the Portuguese and Spanish Governments should be given by a financial institution which would have the financial standing laid down in the 1992 Fund's Internal Investment Guidelines and fulfil the other criteria and generally be to the satisfaction of the Director.

Developments after the October 2005 session

- 9.23 The Portuguese Government informed the 1992 Fund in December 2005 that it would not provide any bank guarantee and would as a consequence only request payment of 15% of the assessed amount of its claim.
- 9.24 In January 2006 the French Government gave the required undertaking in respect of its own claim.
- 9.25 Meetings were held in London with the representatives of the Spanish Government in November 2005 and January 2006 to consider the wording of the required undertaking and bank guarantee to be provided by the Government. It is expected that the Spanish Government will provide the undertaking and guarantee in the near future.
- 9.26 Once the Spanish Government has provided the required undertaking and guarantee the Director will implement the Executive Committee's decision, ie increase the level of payments to 30% and make the payment of €7 365 000 (£39 million) to the Spanish State.

10 Claim for the costs of removing the oil from the wreck

The Director will revert to this issue in an addendum to this document.

11 Investigations into the cause of the incident

The Bahamas Maritime Authority

- 11.1 An investigation into the cause of the incident was carried out by the Bahamas Maritime Authority (ie the authority of Flag State). The report of the investigation was published in November 2004 and a summary of the findings was presented at the March 2005 session of the Executive Committee (document 92FUND/EXC.28/5, paragraphs 13.1.1 – 13.1.7).

The Spanish Ministry of Public Works

- 11.2 The Spanish Ministry of Public Works (Ministerio de Fomento) carried out an investigation into the cause of the incident through the Permanent Commission on the Investigation of Maritime Casualties that has the task of determining the technical causes of maritime accidents. A brief summary of the report's conclusion on the investigation was presented to the Executive Committee at its June 2005 session (document 92FUND/EXC.29/4, paragraphs 13.2.1 – 13.2.5).

The Criminal Court in Corcubi3n

- 11.3 The Criminal Court in Corcubi3n in Spain is carrying out an investigation into the cause of the incident in the context of criminal proceedings. The Court is investigating the role of the master of the *Prestige*, of a civil servant who was involved in the decision not to allow the ship into a port of refuge in Spain and a manager of the ship's management company.

The French Ministry of Transport and the Sea

- 11.4 The French Ministry of Transport and the Sea (Secr3tariat D'3tat aux Transports et 3 La Mer) carried out a preliminary investigation into the cause of the incident through the General Inspectorate of Maritime Affairs – Bureau of investigations – accidents/sea (Inspection g3n3rale des services des affaires maritimes – Bureau enqu3tes – accidents / mer (BEAmer)). A brief summary of the report on the investigation was presented to the Executive Committee at its June 2005 session (document 92FUND/EXC.29/4, paragraphs 13.4.1 – 13.4.10).

Examining magistrate in Brest

- 11.5 An examining magistrate in Brest is carrying out a criminal investigation into the cause if the incident.

The 1992 Fund's involvement

- 11.6 The 1992 Fund continues to follow the ongoing investigations through its Spanish and French lawyers.

12 Court actions

Spain

- 12.1 Some 2 020 claims have been lodged in the legal proceedings before the Criminal Court in Corcubi3n (Spain). Two hundred and thirteen of these claims involve persons who have submitted claims directly to the London Club and 1992 Fund through the Claims Office in La Coru3a. No details of the losses suffered have been provided to the Court. It is expected that claimants who have settled with the Spanish Government under the Royal Decrees will withdraw their claims from the court proceedings.
- 12.2 The Spanish Government has taken legal action in the Criminal Court in Corcubi3n on its own behalf and on behalf of regional and local authorities as well as on behalf of 971 other claimants. A number of other claimants have also taken legal action in that Court. The Court is examining whether these claimants are entitled to join the proceedings.

France

- 12.3 At the request of a number of communes, the Administrative Court in Bordeaux appointed experts to establish the extent of the pollution at various locations in the affected area.
- 12.4 The French Government and 217 other claimants have taken legal action against the shipowner, the London Club and the 1992 Fund in 15 courts in France, requesting compensation totalling some 310 million (375 million), including 367.7 million (346 million) claimed by the Government.

Portugal

- 12.5 The Portuguese Government has taken legal action in the Maritime Court in Lisbon against the shipowner, the London Club and the 1992 Fund claiming compensation for 3.3 million (3.0 million).

United States

- 12.6 The Spanish State has taken legal action against the American Bureau of Shipping (ABS), the classification society of the *Prestige*, before the Federal Court of first instance in New York requesting compensation for all damage caused by the incident, estimated initially to exceed US\$700 million (£393 million) and estimated later to exceed US\$1 000 million (£561 million). The Spanish State has maintained *inter alia* that ABS had been negligent in the inspection of the *Prestige* and had failed to detect corrosion, permanent deformation, defective materials and fatigue in the vessel and had been negligent in granting classification.
- 12.7 ABS denied the allegation made by the Spanish State and in its turn took action against the State, arguing that if the State had suffered damage this was caused in whole or in part by its own negligence. ABS made a counterclaim and requested that the State should be ordered to indemnify ABS for any amount that ABS may be obliged to pay pursuant to any judgement against it in relation to the *Prestige* incident. The New York Court dismissed the counterclaim by ABS on the ground that the Spanish State was entitled to sovereign immunity. ABS is seeking reconsideration by the Court or permission to appeal.
- 12.8 As part of the discovery procedure in the New York litigation, ABS requested production by the Spanish State of all documents and material forming part of the file of the Criminal Court in Corcubión investigating the *Prestige* incident, as well as all the documents and material reviewed by the Spanish Permanent Commission for the Investigation of Maritime Accidents. The Spanish State responded, asserting that the requested documents and material were protected from disclosure by privilege under Spanish procedural law. ABS opposed the assertion of privilege. In a decision rendered in August 2005, after having taken into account the various competing interests involved, the judge supervising discovery denied the Spanish State's assertion of privilege and ordered the production of the documents. The judge then denied Spain's motion for reconsideration. The Spanish State may appeal against this decision.
- 12.9 In September 2005, the Spanish State submitted a petition to the Criminal Court in Corcubión maintaining that these documents and material were privileged under Spanish procedural law and could not be provided to ABS and requested the Criminal Court to take a decision on this issue. In a decision rendered in September 2005, the Court decided that these documents and material were privileged to the parties who had joined in the criminal proceedings and should therefore not be made available to ABS. It follows from the decision that ABS could get access to the documents and material by joining the proceedings as an interested party.
- 12.10 In August 2005 ABS submitted a request to the New York Court for a summary judgement dismissing the Spanish State's complaint. The Court has not yet taken a decision on the request.
- 12.11 Regional authorities of the Basque Region (Spain) took legal action against ABS in the Federal Court of first instance in Houston, Texas, claiming compensation for clean-up costs and payments made to individuals and businesses for US\$50 million (£28 million). The authorities argued *inter alia* that ABS had been in breach of its duty to inspect the *Prestige* adequately and had classified the vessel as seaworthy when it was not. This legal action was transferred to the New York Court dealing with the claim by the Spanish State referred to above. Since the Spanish Government has compensated the Basque Region, it is likely that this action will be withdrawn in the near future. However, as of 31 January 2006 the action had not been formally withdrawn.
- 12.12 ABS had previously sought permission from the New York Court to file an indemnity claim against the Spanish State, seeking recovery of any amount for which it may be held liable to the Basque Region. If the Basque Region's action against ABS is withdrawn, the counter claims will also probably be withdrawn.

13 Recourse action by the 1992 Fund against ABS

- 13.1 In October 2004 the Executive Committee decided that the 1992 Fund should not take recourse action against the American Bureau of Shipping (ABS) in the United States. It further decided to

defer any decision on recourse action against ABS in Spain until further details surrounding the cause of the *Prestige* incident came to light. The Committee stated that this decision was without prejudice to the Fund's position *vis-à-vis* legal actions against other parties (document 92FUND/EXC.26/11, paragraphs 3.7.42 – 3.7.72).

- 13.2 The Director was instructed to follow the ongoing litigation in the United States, monitor the ongoing investigations into the cause of the incident and take any steps necessary to protect the 1992 Fund's interests in any relevant jurisdiction.

14 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document; and
- (b) to give the Director such instructions in respect of matters dealt with in this document as it may deem appropriate.
