



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 €73.2 million (£458 million)^{<1>} have been received by the office in Spain and claims totalling €8.9 million (£59 million) by the office in France. The Portuguese Government has submitted a claim for €3.3 million (£2.2 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 €171.5 million (£114 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.

In June 2003 the Spanish Government introduced legislation in the form of a Royal Decree that made available funds to compensate in full the victims of the pollution. In July 2004 the legislation was modified to increase the amount available for compensation and to extend the period for which compensation is available. According to information provided by the Spanish Government in August 2004, agreements have been reached with the great majority of the workers in the fisheries sector and payments totalling some €75 million (£51 million) have been made to them under the Royal Decree.

The 1992 Fund has been informed that claims by 3 638 other claimants have also been presented under this legislation. These claims will be assessed by a state owned insurance organisation following the criteria used to apply the 1992 Civil Liability and Fund Conventions.

In October 2003 the Spanish Government submitted a claim for €383.7 million (£263 million). The Director made an interim assessment of the claim, arriving at a figure of €107 million (£75 million), and on this basis a payment was made of 15% of that amount, ie €16 050 000 (£11.1 million).

The Director also made a general assessment of the total of the admissible damage in Spain arising from the *Prestige* incident resulting in a total figure of at least €303 million (£213 million). Having made the assessment, and as authorised by the Assembly, the Director made a further payment of €41 505 000 (£28.8 million) against a guarantee provided by a Spanish bank,

<1> Conversion of currencies in this document has been made on the basis of exchange rates as at 21 September 2004 except in respect of payments made by the 1992 Fund where the conversion has been made at the rate on the date of payment.

bringing the total amount paid by the 1992 Fund to the Spanish Government to €57 555 000 (£39.9 million).

The Spanish Government has subsequently submitted further claims totalling €130.1 million (£88.5 million), bringing the total claimed by the Spanish Government to €13.8 million (£351 million).

Action to be taken: Consider the level of the 1992 Fund's payments

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 km off Cabo Finisterre (Galicia, Spain). On 19 November, whilst under tow away from the coast, the vessel broke in two and sank some 260 km west of Vigo (Spain), the bow section to a depth of 3500 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. Traces of oil were detected in the United Kingdom (the Channel Islands, Isle of Wight and Kent).
- 1.3 The *Prestige* was entered with the London Steamship Owners Mutual Insurance Association (London Club).
- 1.4 As regards the clean-up operations and the impact of the spill reference is made to documents 92FUND/EXC.24/5, 92FUND/EXC.24/5/1, 92FUND/EXC.24/5/2 and 92FUND/EXC.25/3/1.

2 Removal of the oil from the wreck

- 2.1 An International Technical Committee was set up by the Spanish Government under the coordination of the Spanish oil company Repsol YPF to consider possible methods of removing the oil from the wreck.
- 2.2 In December 2003, following trials in the Mediterranean and subsequently on the wreck site, the Spanish Government decided that the cargo remaining in the wreck should be removed using aluminium shuttle containers filled by gravity through holes cut in the tanks. A contract to remove the remaining oil from the *Prestige* was signed between the Spanish Government and Repsol YPF. The removal of the oil, which commenced in May 2004, was finalised in September 2004. Some 13 000 tonnes of cargo was removed from the forepart of the wreck. Approximately 700 tonnes is left in the aft section, which will be treated with biological agents aimed at accelerating the degradation of the oil.
- 2.3 The Spanish Government has estimated that the cost of the work was some €100 million (£68 million).

3 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).

4 Claims for compensation

Spain

- 4.1 As at 21 September 2004 the Claims Handling Office in La Coruña had received 633 claims totalling €676.6 million (£461 million). These include a claim for €31.6 million (£90 million) from a group of 58 associations from Galicia, Asturias and Cantabria representing 13 600 fishermen and shellfish harvesters and three claims from the Spanish Government. The first claim from the Spanish Government was for €383.7 million (£261 million), submitted in October 2003, the second for €44.6 million (£30 million), submitted in January 2004, and the third for €55.5 million (£38 million), submitted in April 2004. The claims by the Spanish Government relate to costs incurred until the end of December 2003 in respect of at sea and onshore clean-up operations, compensation payments to fishermen and shellfish harvesters, tax relief for businesses affected by the spill, administration costs and costs relating to publicity campaigns. One of the items claimed related to clean-up operations in the Atlantic National Park, amounting to €1.9million (£1.3 million). This item has been withdrawn since funding for these operations has been obtained from another source.
- 4.2 The table below provides a breakdown of the different categories of claims received by the Claims Handling Office in La Coruña.

Category	Number of claims	Amount claimed €
Property damage	222	2 434 808
Clean-up	17	4 165 594
Mariculture	12	8 026 408
Fishing and shellfish gathering	145	134 263 917
Tourism	10	612 472
Fish processors/vendors	183	9 151 529
Miscellaneous	40	788 777
Spanish Government	3	513 810 969
Total	632	673 254 473

- 4.3 The first claim received from the Spanish Government was assessed on an interim basis by the Director in December 2003 at €107 million (£75 million). As regards payments to the Spanish Government, reference is made to section 11.
- 4.4 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 three of the claims submitted by the Government. Discussions are being held to explore ways of speeding up the examination of the large volume of documents relating to the onshore clean-up operations.
- 4.5 Two hundred and seventy-nine other claims totalling €18 223 561 (£12.4 million) have been assessed at €1 218 339 (£829 400). Many of the remaining claims lack sufficient supporting documentation and such documentation has been requested from the claimants. Interim payments totalling €17 386 (£11 800) have been made at 15% of the assessed amounts in respect of 36 of the assessed claims. One hundred and seventeen claims have been rejected, the majority because the claimant has not demonstrated that a loss had been suffered. Twenty-nine claims are being examined by the London Club and the Fund. The remaining claims await a response from the claimants or are being reexamined following claimants' disagreement with the assessed amount.

France

- 4.6 By 21 September 2004, 294 claims totalling €86.9 million (£59 million) had been received by the Claims Handling Office in Bordeaux. The table below provides a breakdown of the different categories of claims received.

Category	Number of claims	Amount claimed €
Property damage	9	87 772
Clean-up	29	6 089 308
Mariculture	99	631 944
Shellfish gathering	3	116 810
Fishing boats	33	433 000
Tourism	110	11 759 706
Fish processors/vendors	4	162 186
Miscellaneous	8	125 000
French Government	1	67 499 154
Total	296	86 904 880

- 4.7 Ninety-nine oyster farmers based in the Arcachon basin near Bordeaux have submitted claims totalling €31 944 (£430 000) for losses allegedly suffered as a result of market resistance due to the pollution. These claims have been examined by the experts engaged by the London Club and the 1992 Fund. Forty-seven of these claims totalling €285 149 (£194 000) have been assessed at €14 305 (£78 000). The experts appointed by the London Club and 1992 Fund are examining the remaining 52 claims.
- 4.8 One hundred and ninety-seven claims have been submitted mainly by businesses in the tourism sector and in respect of clean up. One hundred and four claims for €6.8 million (£4.6 million) have been assessed at €3.2 million (£2.2 million). The remaining 93 claims are being examined.
- 4.9 Payments totalling €6 438 (£66 000) have been made at 15% of the assessed amount in respect of 25 claims.
- 4.10 In May 2004, the French Government submitted a claim for €7.5 million (£46 million) in relation to the costs incurred for clean up and preventive measures. Experts appointed by the 1992 Fund and the London Club are assessing this claim. On 1 October 2004 representatives of the Fund and the Fund's experts met with representatives of the French Government to discuss the assessment process and what further information was required for the assessment to be completed.

Portugal

- 4.11 The Portuguese Government has submitted a claim for €3.3 million (£2.2 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. As a result of that meeting, the Portuguese Government has undertaken to provide additional information in support of its claim.

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, and it is expected that further subrogated claims will be presented.

- 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 the Spanish Government adopted legislation in the form of a Royal Decree (Real Decreto-Ley) making available €160 million (£109 million) to compensate in full the victims of the pollution. To receive compensation the claimants had to submit their claims by 31 December 2003, had to 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. The Decree provides that the assessment of claims will be made following the criteria used to apply the 1992 Civil Liability and Fund Conventions.
- 5.4 In July 2004 another Royal Decree increased the funds available for compensation to €249.5 million (£170 million). In addition, the Decree extended the period for which persons in the fishing, shellfish harvesting and aquaculture sectors could claim for losses suffered directly as a result of the incident to include 2004. The funds available for compensation of losses occurring during 2004 are limited by the Decree to €3 million (£2 million). Claimants are required to submit claims for such losses by 31 March 2005.
- 5.5 At the 24th session of the Executive Committee held in February 2004, 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 objective estimates or a scale. It was stated that some 5000 claims of other groups would be subject to individual assessments.
- 5.6 The Spanish Government has informed the 1992 Fund that under the system for dealing with the claims in the fisheries sector the assessment is made by applying formulas which take into account factors such as size of fishing vessels, the number of crew and the duration of the fishing ban. According to information provided by the Spanish Government in August 2004, agreements have been reached with the great majority of the workers in that sector and payments totalling some €75 million (£51 million) have been made to them under the Royal Decrees.
- 5.7 The 1992 Fund has been informed that claims by 3 638 persons made under the Decrees will be subject to individual assessment by the Consorcio de Compensación de Seguros (the Consorcio), 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 activity or natural disasters.
- 5.8 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. The Consorcio has provided details of the claims submitted as follows:

Category	Number of claims	Number of claimants
Mariculture (property damage & loss of income)	30	1910
Fishing (property damage & loss of income)	55	737
Fish & shellfish vendors (loss of income)	366	412
Fish & shellfish processors (loss of income)	62	86
Other business (loss of income)	143	157
Employees fisheries sector (loss of income)	76	214
Tourism (loss of income)	18	18
Land (damage & loss of income during clean-up operations)	71	71
Property damage	10	13
Miscellaneous	18	20
Total	849	3 638

- 5.9 The total amount claimed is €170.6 million (£116 million). It is expected that further discussions will take place between the Consorcio and the 1992 Fund throughout the assessment process.
- 5.10 At the Executive Committee's May 2004 session the Spanish delegation stated that 67 towns had requested compensation totalling €37.6 million (£25.6 million) and that the four affected autonomous regions had estimated their damage at €150 million (£102 million). The delegation also stated that the claimed amounts were awaiting approval by the State before payments were made to these public authorities. Details of these claims are awaited.

6 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 €2 777 986 with the Criminal Court in Corcubión (Spain) for the purpose of constituting the limitation fund.

7 Maximum amount available under the 1992 Fund Convention

- 7.1 The maximum amount of compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention is 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). 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.
- 7.2 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 €71 520 703 (£117 million).

8 Level of payments

Consideration by the Executive Committee in May 2003

- 8.1 Unlike in previous cases, the insurer of the *Prestige* (the London Club) has decided not to make individual compensation payments up to the shipowner's limitation amount following legal advice that if the Club were to make payments to claimants in line with past practice, it was 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.
- 8.2 At its 21st session 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 London Club. The Committee further decided that the 1992 Fund should, in view of the particular circumstances of the *Prestige* case, make payments to claimants, although the London Club would not pay compensation directly to them (document 92FUND/EXC.21/5, paragraphs 3.3.32 and 3.3.34).

Consideration by the Executive Committee in October 2003 and February 2004

- 8.3 At its 22nd and 23rd sessions in October 2003 and February 2004 the Executive 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% (document 92FUND/EXC.22/14, paragraph 3.7.24 and 92FUND/EXC.24/8, paragraph 3.4.43).

Consideration by the Executive Committee in May 2004

- 8.4 At the Executive Committee's 25th session held in May 2004, the Executive Committee noted that the Spanish Government had estimated the total damage in Spain to be €34.8 million (£568 million). It was recalled that the overall losses in France had been estimated by the French Government to be in the range of €145.2 to 202.3 million (£99 – 138 million), although the maximum losses were expected to be around €176 million (£120 million). It was also recalled that the Portuguese delegation had stated that the total amount of the damage in Portugal was some €3.3 million (£2.2 million).
- 8.5 In view of the figures provided by the Governments of the three States concerned and the remaining uncertainties as to the level of admissible claims, the Executive Committee decided to maintain the current level of payments at 15% of the loss or damage suffered by the respective claimants (document 92FUND/EXC.25/6, paragraph 3.2.26).

Review by the Executive Committee of the level of payments at the October 2004 session

- 8.6 The Director has not received any further information from the Spanish, French and Portuguese Governments on the overall impact of the incident. On the basis of the figures currently available and in view of the remaining uncertainties as to the level of admissible claims, the Director feels unable to propose an increase in the level of payments beyond 15% of the loss or damage suffered by the respective claimants.
- 8.7 Any further information received on the costs of the incident will be presented to the Executive Committee in an addendum.

9 Court actions

Spain

- 9.1 Some two thousand claimants have joined the legal proceedings before the Criminal Court in Corcubi3n (Spain). No details of the losses have been provided to the Court. One hundred and forty-nine of these claimants have submitted claims to the Claims Handling Office in La Coru3a.

It is expected that some of these claimants who have settled with the Spanish Government under the Royal Decrees referred to in section 5 will withdraw their claims from the court proceedings.

- 9.2 In July 2004 the Spanish Government submitted a request to the Court in Corcubión for the release to it of the €2 777 986 (£15.5 million) deposited with the Court for the purpose of constituting the limitation fund. In its request the Spanish Government argued that the Court should release this amount to it since it was paying compensation to the victims of the spill.
- 9.3 The 1992 Fund and other parties in the legal proceedings before the Court in Corcubion submitted pleadings opposing the request. In its pleadings the 1992 Fund argued that, in accordance with the 1992 Civil Liability Convention, the limitation fund should be distributed by the Court between all claimants who are entitled to obtain compensation for pollution damage in proportion to their established claims. The Fund pointed out that the incident also impacted France and Portugal and that victims of pollution damage in those countries were entitled to a proportion of the limitation fund.
- 9.4 In July 2004 the Court in Corcubión rejected the Spanish Governments request on procedural grounds. The Spanish Government appealed against this decision but on 4 October 2004 the appeal was withdrawn.

France

- 9.5 At the request of a number of communes, the Administrative Court in Bordeaux has appointed experts to establish the extent of the pollution at various locations in the affected area.
- 9.6 In July 2003 five oyster farmers commenced summary proceedings against the shipowner, the London Club and the 1992 Fund before the Commercial Court of Marennes d'Oleron requesting provisional payments of amounts totalling approximately €400 000 (£272 000). In July 2004, the Court rendered a summary judgement in which it rejected the request on the grounds that the claimants had not provided sufficient evidence to justify summary proceedings. In its judgement, the Court invited the claimants to submit their claims to the Claims Handling Office in Bordeaux.

United States

- 9.7 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 (the New York Court) requesting compensation for all damage caused by the incident, estimated initially to exceed US\$700 million (£390 million) and estimated later to exceed US\$1 000 million (£680 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.
- 9.8 ABS denied the allegation made by the Spanish State and in its turn took action against the State, arguing that if the State 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 grounds that the Spanish State was entitled to sovereign immunity. ABS is seeking reconsideration by the Court or permission to appeal.
- 9.9 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 was in breach of its duty to inspect the *Prestige* adequately and had classified the vessel as seaworthy when it was not. This legal action has been transferred to the New York Court dealing with the claim by the Spanish State referred to in paragraph 9.7.

10 Investigations into the cause of the incident

- 10.1 The Criminal Court in Corcubión (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.
- 10.2 The Permanent Commission of Investigation of Maritime Incidents, under the authority of the Spanish Ministry of Infrastructure and Public Works, is gathering the necessary information to be able to issue a report on the *Prestige* incident. Given the scale of the incident, it will take some time for the investigation to be completed.
- 10.3 As regards France, an examining magistrate in Brest is carrying out a criminal investigation into the cause of the incident.
- 10.4 The 1992 Fund is following these investigations through its Spanish and French lawyers.

11 Payments to the Spanish Government

- 11.1 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 wish to receive such advance payments. In view of the importance of the issue and the ramifications involved, the Executive Committee decided to refer the matter to the Assembly.
- 11.2 Taking into account the exceptional circumstances of the *Prestige* incident, the Assembly decided as follows (document 92FUND/A.8/30, paragraph 20.29):
- (a) The Assembly authorised the Director, subject to a general assessment by the Director of the total of the admissible damage in Spain arising from the *Prestige* incident, to make a payment of the balance between 15% of the assessed amount of the claim submitted on 2 October 2003 by the Spanish Government and 15% of that claim as submitted (15% of €83.7 million = €7 555 000) and also subject to the Government of Spain 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) The Assembly decided that 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). Further, it was decided that the terms and conditions of the guarantee should be to the satisfaction of the Director.
 - (c) The Assembly instructed the Director to provide full information on assessments and payments under paragraph (a) and to provide explanations when required by any Member State.
 - (d) The Assembly also decided that the Executive Committee should review, at its next session, the payments made. It was also decided that if the Committee reduced the payment amount, the difference should be repaid.
 - (e) It was further decided that if any other State having suffered losses relating to the *Prestige* incident were to seek the same solution for payments on the same terms, such a request should be submitted to the Executive Committee.
- 11.3 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 €16 050 000 (£11.1 million), corresponding to 15% of the interim assessment.

- 11.4 In addition, 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, which concluded that the admissible damage would be at least €303 million (£206 million). On that basis, and as authorised by the Assembly, the Director made an additional payment of €41 505 000 (£28.8 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 a bank guarantee covering the above mentioned difference (ie €41 505 000) by Instituto de Crédito Oficial, a Spanish bank with high standing in the financial market, and an undertaking by the Spanish Government to repay any amount or amounts decided by the Executive Committee or the Assembly up to €41 505 000. Under the terms of the guarantee, the bank will, up to the amount of the guarantee, pay to the Fund the amount or amounts requested by the Director without him having to show the Fund's right to repayment.
- 11.5 The payment to the Spanish State totalling €7 555 000 (£39 914 906) was made on 17 December 2003.
- 11.6 The payments made to the Spanish Government were reviewed by the Executive Committee at its 24th session in February 2004.

12 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document;
 - (b) to consider the level of payments; and
 - (c) to give the Director such instructions in respect of the handling of this incident and of claims arising therefrom as it may deem appropriate.
-