



## 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 €98 million (£481 million)<sup><1></sup> have been received by the Claims Office in Spain and claims totalling €4 million (£65 million) by the Claims Office in France. The Portuguese Government has submitted a claim for €3.3 million (£2.3 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 (£118 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, agreements have been reached with the great majority of the workers in the fisheries sector and payments totalling some €75 million (£52 million) have been made to them under the Royal Decree.

The 1992 Fund has been informed that 1 004 claims have also been presented under this legislation. These claims will be assessed by the Consorcio de Compensacion de Seguros, 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 (£265 million). The Director made an interim assessment of the claim, arriving at a figure of €107 million (£74 million), and on this basis a payment was made of 15% of that amount, ie €16 050 000 (£11.1 million).

<1> Conversion of currencies in this document has been made on the basis of exchange rates as at 22 February 2005 except in respect of payments made by the 1992 Fund where the conversion has been made at the rate on the date of payment.

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 (£209 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, bringing the total amount paid by the 1992 Fund to the Spanish Government to €7 555 000 (£39.9 million).

The Spanish Government has subsequently submitted further claims. The total amount claimed by the Spanish Government is €35 million (£369 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 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 west coast of 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 The *Prestige* was entered with the London Steamship Owners Mutual Insurance Association (London Club).
- 1.5 For details of the clean-up operations and the impact of the spill reference is made to 92FUND/EXC.24/5, 92FUND/EXC.24/5/Add.1 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 co-ordination 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 was left in the aft section, which was 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 (£71 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 22 February 2005 the Claims Handling Office in La Coruña had received 716 claims totalling €98 million (£481 million). These include a claim for €132 million (£91 million) from a group of 58 associations from Galicia, Asturias and Cantabria representing 13 600 fishermen and shellfish harvesters and four claims from the Spanish Government. The first claim from the Spanish Government was for €83.7 million (£265 million), submitted in October 2003, the second for €44.6 million (£31 million), submitted in January 2004, the third for €5.5 million (£59 million), submitted in April 2004 and a fourth claim in December 2004 for €46.5 million (£32 million). The first, second and third claims included items for the cost of clean-up operations in the Atlantic National Park amounting to €1.9 million (£8.2 million) in total. These items have been withdrawn since funding for these operations has been obtained from another source. This withdrawal, together with subsequent amendments, has reduced the total of the amount claimed by the Spanish Government to €34.7 million (£369 million).
- 4.2 The claims submitted by the Spanish Government relate to costs incurred until the end of April 2004 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.
- 4.3 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	226	2 441 473
Clean-up	16	4 161 279
Mariculture	12	8 026 408
Fishing and shellfish gathering	147	134 288 947
Tourism	10	612 472
Fish processors/vendors	257	12 394 672
Miscellaneous	44	1 402 843
Spanish Government	4	534 695 110
<b>Total</b>	<b>716</b>	<b>698 023 204</b>

- 4.4 The first claim received from the Spanish Government was assessed on an interim basis by the Director in December 2003 at €107 million (£74 million). As regards payments to the Spanish Government, reference is made to section 10.
- 4.5 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 four 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. These discussions have been delayed for various reasons, *inter alia*, an internal re-organisation of the government department that was responsible for dealing with issues relating to the *Prestige* incident.

- 4.6 Of the 712 other claims submitted, 54% have been assessed. Many of the remaining claims lack sufficient supporting documentation and such documentation has been requested from the claimants. Three hundred and fourteen of these other claims for €20.1 million (£13.9 million) have been approved for €1.7 million (£1.2 million) and interim payments totalling €25 586<sup><2></sup> (£17 650) have been made at 15% of the assessed amounts in respect of 45 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. One hundred and twenty-one claims have been rejected, the majority because the claimant has not demonstrated that a loss had been suffered.
- 4.7 At the Executive Committee's May 2004 session the Spanish delegation stated that 67 towns had requested compensation totalling €37.6 million (£26 million) and that the four affected autonomous regions had estimated their damage at €150 million (£103 million). The delegation also stated that the claimed amounts were awaiting approval by the State before payments would be made to these public authorities. The 1992 Fund has not yet received claims from these towns and autonomous regions.

*France*

- 4.8 By 22 February 2005, 385 claims totalling €3.6 million (£65 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	32	6 137 877
Mariculture	118	1 641 146
Shellfish gathering	3	116 810
Fishing boats	53	809 102
Tourism	150	16 339 765
Fish processors / vendors	7	282 608
Miscellaneous	12	768 616
French Government	1	67 499 154
<b>Total</b>	<b>385</b>	<b>93 682 850</b>

- 4.9 Of the 385 claims submitted to the Claims Handling Office, 65% have been assessed. Many of the remaining claims lack sufficient supporting documentation and such documentation has been requested from the claimants. One hundred and sixty-four claims have been approved for €2.3 million (£1.6 million) and interim payments totalling €202 344 (£140 000) have been made at 15% of the assessed amounts in respect of 58 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. Thirty claims have been rejected, the majority because the claimant has not demonstrated that a loss had been suffered.
- 4.10 One hundred and fourteen oyster farmers based in the Arcachon basin near Bordeaux have submitted claims totalling €1.2 million (£830 000) 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 have examined these claims. Ninety of these claims totalling €52 000 (£450 000) have been assessed at €200 326 (£138 000). Payments totalling €12 250 (£8 500) have been made in respect of eighteen of these claims at 15% of the assessed amounts. The experts appointed by the London Club and 1992 Fund are examining the remaining 24 claims.

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<sup><2></sup> Compensation payments made by the Spanish Government to claimants have been deducted when calculating the interim payments.

- 4.11 The Claims Handling Office has received 150 tourism-related claims totalling €16.3 million (£11.2 million). Ninety-three of these claims have been assessed at a total of €4.6 million (£3.2 million). Sixty claims have been approved for €2.0 million (£1.4 million) and interim payments totalling €174 125 (£120 000) have been made at 15% of the assessed amounts in respect of 28 claims.
- 4.12 In May 2004, the French Government submitted a claim for €67.5 million (£47 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. In 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. A formal request for further information has been sent to the French Government.
- 4.13 A further 32 claims, totalling €6.1 million (£4.2 million), have been submitted by local authorities for costs of clean-up operations. Twelve of these claims have been assessed at €194 805 (£134 000). Eight claims have been approved for €80 547 (£56 000) and interim payments totalling €7 455 (£5 000) have been made at 15% of the assessed amounts in respect of four claims.

#### *Portugal*

- 4.14 The Portuguese Government has 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 information in support of its claim. This information is being examined by the experts engaged by the London Club and the 1992 Fund.

### **5 Payments and other financial assistance by the Spanish Authorities**

- 5.1 The Spanish Government and regional authorities made payments of €40 (£28) 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 the Spanish Government adopted legislation in the form of a Royal Decree (Real Decreto-Ley) making available €160 million (£110 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 (£172 million). In addition, the Decree extended the period in 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 (£2.1 million). Claimants are required to submit claims for such losses by 31 March 2005.
- 5.5 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 or a scale. It was stated that some 5 000 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 was made by applying formulas which took 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 had been reached with the great majority of the workers in that sector and payments totalling some €75 million (£52 million) had been made to them under the Royal Decrees.
- 5.7 The 1992 Fund was informed by the Spanish Government in 2004 that claims which, under the Decrees, will be subject to individual assessment will be assessed 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 activities or natural disasters. In 2004, 844 claims had been received by the Consorcio relating to 3 698 persons. The Consorcio informed the 1992 Fund in February 2005 that 160 more claims had been submitted. It is likely therefore that the number of persons claiming compensation under the Decrees has increased.
- 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. In February 2005, the Consorcio informed the 1992 Fund that 1004 claims had been submitted under the Decrees. These claims have been categorised as follows:

<b>Category of claim</b>	<b>Number of claims</b>
Mariculture (property damage/loss of income)	97
Fishing (property damage & loss of income)	66
Fish & shellfish vendors (loss of income)	310
Fish & shellfish processors (loss of income)	78
Employees fisheries sector (loss of income)	105
Tourism (loss of income)	85
Land (damage & loss of income during clean-up operations)	71
Property damage	13
Miscellaneous	19
Claims recently submitted (uncategorised)	160
<b>Total</b>	<b>1 004</b>

- 5.9 The total amount claimed is €198 million (£137 million).
- 5.10 The Consorcio have requested the assistance of the experts appointed by the London Club and the 1992 Fund in the assessment of 37 of these claims. Many 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 a joint assessment of one claim and this claim has been approved by the 1992 Fund and the London Club. Further assessments are in progress.

**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. The Government will subrogate the rights of the claimants against the London Club and the 1992 Fund up to the amounts paid.
- 6.2 The Government set up a Commission to administer the scheme and determine the amount to be paid to each claimant. The Commission decided that as regards claims where an agreement as to the quantum had been reached between the claimant and the London Club and the 1992 Fund, the Commission would pay 85% of the agreed amount. In cases where no agreement as to the quantum has been reached, the Commission determines the losses and the amount to be paid.
- 6.3 The Commission has approved payments to 175 claimants for a total of €1 153 621 (£0.8 million). Payments for this amount were made in January 2005.

**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 (£15.7 million). On 28 May 2003 the shipowner deposited €2 777 986 with the Criminal Court in Corcubi6n (Spain) for the purpose of constituting the limitation fund.

**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 (£118 million).

**9 Level of payments**

*Consideration by the Executive Committee in May 2003*

- 9.1 Unlike in previous cases, the insurer of the *Prestige* (the London Club) 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 ship owner set up the limitation fund, with the result that the Club could end up paying twice the limitation amount.
- 9.2 At its May 2003 session 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 3.2.32 and 3.2.34).

*Consideration by the Executive Committee in October 2003, February 2004 and May 2004*

- 9.3 At its October 2003, February 2004 and May 2004 sessions 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% (documents 92FUND/EXC.22/14, paragraph 3.7.24, 92FUND/EXC.24/8, paragraph 3.4.43 and 92FUND/EXC.25/6, paragraph 3.2.26)

*Consideration by the Executive Committee at the October 2004 session*

- 9.4 At the October 2004 session of the Executive Committee the delegations of Spain and France reported that they had held consultation meetings on the handling of the *Prestige* case in order to explore the possibilities of improving the settlement of claims. Those delegations expressed the view that the compensation level of 15% had left the victims in an unsatisfactory situation.
- 9.5 The Spanish delegation stated that, as a result of the arrangement put in place to compensate victims, the Spanish administration had been directly affected by the low level of payments since it had incurred very considerable expenditure to combat the effects of the incident and provide compensation to the victims.
- 9.6 The French delegation stated that in France the announcement of the 15% level, which was the lowest in the history of the 1971 and 1992 Funds, had triggered reactions of incomprehension and hostility towards the international system. In the French delegation's view, despite the losses observed, the small number of claims submitted could be explained by the fact that, for many businesses, a 15% compensation level did not cover the extra cost of submitting a claim for compensation and the time spent answering subsequent queries from the experts.
- 9.7 It was stated that both Governments considered that increasing the compensation level should be a priority for the 1992 Fund for the coming year, particularly with the approaching three-year time bar on claims. In these Governments' view, in order to enable the victims who had not yet done so to submit a claim in time, it was necessary to send them a clear message so that they could judge, by reference to the financial loss they considered they had suffered and to what might be recovered, whether or not to take legal action before November 2005. Both delegations stated that the claimants should be made aware as soon as possible of the possibility of being compensated, for it would be particularly damaging for the image of the Fund if any significant increases in the level of payments were to be decided after the expiry of the time bar period, leaving a number of victims without any possibility of taking appropriate action.
- 9.8 The Spanish and the French delegations urged the Fund to take all necessary steps for the expeditious handling of the claims received (which represented a significant proportion of each State's estimated losses) in order to be able to determine realistically the possibility of increasing the level of compensation payments at the next session of the Committee and that to this end, they had renewed their undertaking to provide the Fund's experts with such explanations as they may need.
- 9.9 The Director stated that on the basis of the figures presented by the Governments of the three countries affected by the incident, the potential total claims exposure was some €1 038 million (£716 million) and that it was therefore, in his view, not possible to increase the level of payments beyond 15% at this stage. He pointed out that, in accordance with the position taken by the IOPC Funds' governing bodies, the level of payments would have to be determined in the light of the potential exposure of the 1992 Fund and not on the basis of the Fund's assessment of the claims.
- 9.10 A number of delegations stated that whilst they agreed that the current level of payment of 15%, the lowest in the Funds' history, was most unfortunate for claimants, the 1992 Fund had no option but to maintain it at this level for the time being, but that it should be kept under review at every available opportunity.



- 9.11 In view of 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.26/11, paragraph 3.7.30).

*Review by the Executive Committee of the level of payments at the March 2005 session*

- 9.12 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.
- 9.13 Any further information received on the costs of the incident will be presented to the Executive Committee in an addendum.

## **10 Payments to the Spanish Government**

- 10.1 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 wished 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.
- 10.2 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 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) 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.
- 10.3 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 by the Spanish Government.
- 10.4 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.
- 10.5 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 and on that basis the 1992 Fund made a payment of €16 050 000 (£11.1 million), corresponding to 15% of the interim assessment.
- 10.6 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, and concluded that the admissible damage would be at least €303 million.

- 10.7 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, €16 050 000. That payment was made against the provision by the Spanish Government of a bank guarantee covering the above-mentioned difference (ie €41 505 000) 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.
- 10.8 The payment to the Spanish State totalling €7 555 000 (£39 914 906) was made on 17 December 2003.

## 11 Court actions

### *Spain*

- 11.1 Some 2000 claimants have joined the legal proceedings before the Criminal Court in Corcubión (Spain). No details of the losses suffered have been provided to the Court. Two hundred and eight of these claimants have submitted claims to the Claims Handling Office in La Coruña. It is expected that claimants who have settled with the Spanish Government under the Royal Decrees will withdraw their claims from the court proceedings.
- 11.2 In July 2004 the Spanish Government submitted a request to the Court in Corcubión for the release to it of the €2 777 986 (£16 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.
- 11.3 The 1992 Fund and other parties in the legal proceedings before the Court in Corcubión submitted pleadings opposing the request.
- 11.4 In July 2004 the Court in Corcubión rejected the Spanish Government's request on procedural grounds. The Spanish Government appealed against this decision but on 4 October 2004 the appeal was withdrawn.

### *France*

- 11.5 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.
- 11.6 In July 2003 five oyster farmers commenced summary proceedings against the shipowner, the London Club and the 1992 Fund before the Commercial Court in Marennes d'Oleron requesting provisional payments of amounts totalling approximately €400 000 (£276 000). 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*

- 11.7 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 (£370 million) and estimated later to exceed US\$1 000 million (£529 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.

- 11.8 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.
- 11.9 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 (£26 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 has been transferred to the New York Court dealing with the claim by the Spanish State referred to in paragraph 11.7.

## **12 Recourse action by the 1992 Fund against ABS**

- 12.1 At its October 2004 session the Executive Committee considered whether the 1992 Fund should take recourse action against the American Bureau of Shipping (ABS) in the United States, where the defendant was incorporated, or in Spain where the major part of the pollution damage occurred. The Director's analysis of the issues involved and the Executive Committee's considerations are summarised in the Record of Decisions of that session (document 92FUND/EXC.26/11, paragraphs 3.7.42 – 3.7.72).
- 12.2 The Executive Committee decided that the 1992 Fund should not take recourse action against 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 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 (document 92FUND/EXC.26/11, paragraph 3.7.71).
- 12.3 The Committee stated that this decision was without prejudice to the Fund's position *vis-à-vis* legal actions against other parties.

## **13 Investigations into the cause of the incident**

### **13.1 The Bahamas Maritime Authority**

- 13.1.1 The Bahamas Maritime Authority (ie the authority of the flag State) has carried out an investigation into the cause of the incident. The report of the investigation, which was published in November 2004, extends to 267 pages and contains an executive summary, a narrative of events, an analysis of evidence, conclusions, recommendations and appendices. As regards the cause of the incident, the report concludes, *inter alia*, that it is likely that the initial failure was in the side structure of 3 starboard wing tank, followed by a failure in 2 starboard after wing tank, probably in the bulkhead between the two tanks.
- 13.1.2 According to the report, there is a lack of firm evidence to assist in finally deciding the cause of the initial failure of the hull, but the probable cause of the initial breach of the hull was a large wave revealing a weakness in 3 starboard wing tank. In the report it is stated that the weakness was probably one of, or more likely a combination of two or more of the following factors: ship-to-ship transfer damage sustained in St. Petersburg<sup><3></sup>; fatigue; stresses due to large quantities of

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<3> The ship acted as a storage ship for 131 days, from 22 June to 30 October 2002, while moored at St Petersburg (Russian Federation) prior to the final voyage. During that time barges delivered oil to the ship and tankers came alongside to load. The ship would have been at risk of contact damage by vessels coming alongside to discharge or load cargo.

new metal being attached to old steelwork; and/or corrosion. It is further stated that there may possibly have been some damage to one of the cargo tanks adjoining 3 Starboard wing tank.

- 13.1.3 The report points out that videos taken during the towage of the ship show that waves continually pounded into the tank for prolonged periods and that roll and pitch motions caused water to flow rapidly in and out of the tank that resulted in unusually high fluctuating pressure loading. Tank structures are not designed, it is said, to withstand such forces.
- 13.1.4 Classification Society rules require that vessels be subjected to an extensive survey every five years. These are known as 'Special Surveys'. The report of the Bahamas Maritime Authority states that the vessel's 5th Special Survey had been carried out in China in 2001, 18 months before the incident, apparently to the highest current industry standards.
- 13.1.5 The report mentions that the Annual Survey, carried out in Dubai in 2002 six months before the incident had been checked by the Bahamas Maritime Authority. It is noted that an internal inspection of 2 Starboard after wing tank should have been carried out but that this was not done. The report concludes, however, that since the structure of 2 Starboard after wing tank appeared to have survived all of the additional stresses that the incident imposed upon it except for the bulkhead between the two tanks, it is probable that an inspection in Dubai would not have revealed any significant problems.
- 13.1.6 The report states that the Port State Control, SIRE<sup><4></sup> and other inspections carried out before the incident gave no cause for concern about the general condition of the ship and no reason to believe that special internal inspection of any tank was necessary.
- 13.1.7 As regards actions taken after the damage to the hull had occurred, the Bahamas Maritime Authority concludes, *inter alia*, that:
- It is certain that the ship could have survived being taken to a place of refuge and that once at such a position, a proper assessment could have been made of the condition of the ship and the best way to ensure that any risk of further pollution was minimised.
  - The provision of a place of refuge could well have resulted in a much more favourable outcome and prevented the subsequent large-scale pollution of a long stretch of coastline.
  - Looking at the charge of causing pollution, it is difficult to blame the Master for the initial damage to his ship. The Master would have had no way of anticipating or acting to prevent the event. He had acted in a proper seamanlike manner during the severe weather prior to the incident, slowing to an appropriate speed.

### 13.2 The Spanish Ministry of Transport and Public Works

The Spanish Permanent Commission of Investigation into Maritime Accidents (Comisión Permanente de Siniestros Marítimos), under the Authority of the Spanish Ministry of Transport and Public Works (Ministerio de Fomento), is carrying out an investigation into the cause of the incident.

### 13.3 The Criminal Court in Corcubión

- 13.3.1 The Criminal Court in Corcubión 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.

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<4> The 'Ship Inspection Report Program' launched by the Oil Companies International Marine Forum (OCIMF) in 1993 to address specifically concerns about substandard tanker shipping.

13.3.2 On 3 February 2005 the Court informed the parties to the criminal proceedings that it had received a report by the Spanish Permanent Commission of Investigation into Maritime Accidents. A copy of the report has been requested by the 1992 Fund.

13.4 France

As regards France, an examining magistrate in Brest is carrying out a criminal investigation into the cause of the incident.

13.5 The 1992 Fund's involvement

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

**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;
  - (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.
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