



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 €744 million (£511 million)^{<1>} have been received by the Claims Office in Spain and claims totalling €95 million (£65 million) have been received by the Claims Office in France. The Portuguese Government has submitted a claim 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 €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 €88million (£60 million) have been made to them under the Royal Decree.

The 1992 Fund has been informed that 971 claims have also been presented under this legislation. These claims will be assessed by the Consorcio de Compensación 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 (£264 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

<1> In this document conversion of currencies has been made on the basis of exchange rates as at 31 May 2005 (€1 = £0.6874) except in respect of payments made by the 1992 Fund where the conversion has been made at the rate on the date of 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 (£208 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 €57 555 000 (£39.9 million).

The Spanish Government has subsequently submitted further claims. The total amount claimed by the Spanish Government is €579 million (£398 million).

The Spanish and French authorities have recently made available to the 1992 Funds reports on their respective investigations into the cause of the incident.

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.

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 31 May 2005 the Claims Handling Office in La Coruña had received 729 claims totalling €744 million (£511 million). These include a claim for €132 million (£91 million) from a group of 58 associations from Galicia, Asturias and Cantabria representing 13 600 million fishermen and shellfish harvesters and four claims from the Spanish Government. The first claim from the Spanish Government was for €383.7 million (£264 million), submitted in October 2003, the second for €44.6 million (£31 million), submitted in January 2004, the third for €85.5 million (£59 million), submitted in April 2004, and the fourth submitted in two parts, the first in December 2004 and the second in April 2005, for €157.2 million (£108 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 brought the total of the amount claimed by the Spanish Government to €579.2 million (£398 million).
- 4.2 The claims submitted 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.
- 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	2 444 613
Clean-up	16	4 161 279
Mariculture	12	8 026 408
Fishing and shellfish gathering	153	134 309 297
Tourism	10	612 472
Fish processors/vendors	264	13 534 208
Miscellaneous	44	1 402 843
Spanish Government	4	579 241 534
Total	729	743 732 654

- 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 the claims submitted by the Government. The Spanish Government has provided a considerable number of additional documents and analysis of these is continuing.

- 4.6 The 1992 Fund's experts are examining the claim relating to the operation for removal of the oil from the wreck. Since this claim gives rise to a question of principle as regards admissibility, it will be submitted to the Executive Committee by the Director for consideration and decision.
- 4.7 Of the 725 other claims submitted, 60% have been assessed. Many of the remaining claims lack sufficient supporting documentation and such documentation has been requested from the claimants. Three hundred and forty-eight of these other claims for €16.2 million (£11 million) have been approved for €1.9 million (£1.3 million) and interim payments totalling €8 065 (£40 000)^{<2>} have been made at 15% of the assessed amounts in respect of 60 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 four claims for €4.1 million (£2.8 million) have been rejected, the majority because the claimant has not demonstrated that a loss had been suffered.
- 4.8 At the Executive Committee's May 2004 session the Spanish delegation stated that 67 municipalities had requested compensation totalling €37.6 million (£25.8 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 was made to these public authorities. In May 2005, 52 municipalities in Galicia signed agreements with the Spanish Government and a further three are expected to sign agreements in the near future. Another 20 municipalities in Asturias have accepted proposals made by the Spanish Government. The 1992 Fund has not received any claims from the towns or autonomous regions. The Spanish Government has not yet submitted subrogated claims relating to the compensation paid to the municipalities.

France

- 4.9 By 31 May 2005, the Claims Handling Office in Bordeaux had received 396 claims totalling €95 million (£65 million). 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	6 395 136
Mariculture	120	1 652 630
Shellfish gathering	3	116 810
Fishing boats	54	846 000
Tourism	158	17 353 052
Fish processors / vendors	7	282 608
Miscellaneous	12	766 850
French Government	1	67 499 154
Total	396	95 000 012

- 4.10 Of the 396 claims submitted to the Claims Handling Office, 66% have been assessed. Many of the remaining claims lack sufficient supporting documentation and such documentation has been requested from the claimants. Two hundred and nineteen claims have been approved for €4.5 million (£3.1 million) and interim payments totalling €243 730 (£166 000) have been made at 15% of the assessed amounts in respect of 79 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-three claims have been rejected, the majority because the claimants have not demonstrated that a loss had been suffered.

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

- 4.11 One hundred and seventeen oyster farmers based in the Arcachon basin near Bordeaux have submitted claims totalling €1.04 million (£715 000) 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-four of these claims totalling €701 934 (£483 000) have been assessed at €206 866 (£142 000). Payments totalling €15 170 (£10 400) have been made in respect of 26 of these claims at 15% of the assessed amounts. The experts appointed by the London Club and 1992 Fund are examining the remaining 23 claims.
- 4.12 The Claims Handling Office has received 158 tourism-related claims totalling €17.3 million (£11.9 million). Ninety-three of these claims have been assessed at a total of €3 million (£3.4 million). Seventy-eight claims have been approved for €3.5 million (£2.4 million) and interim payments totalling €206 280 (£142 000) have been made at 15% of the assessed amounts in respect of 36 claims.
- 4.13 In May 2004, the French Government submitted a claim for €67.5 million (£46.4 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.
- 4.14 A further 32 claims, totalling €6.4 million (£4.4 million), have been submitted by local authorities for costs of clean-up operations. Thirteen of these claims have been assessed at €84 054 (£669 000). Nine claims have been approved for €83 162 (£470 000) and interim payments totalling €8 516 (£5 800) have been made in respect of four claims at 15% of the assessed amounts.

Portugal

- 4.15 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 million (£680 000) also in respect of clean-up and preventive measures. The documentation provided 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 (£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 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 were limited by the Decree to €3 million (£2 million). Claimants were 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 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 payments totalling some €88 million (£60 million) had been made to them under the Royal Decrees. It is expected that the claims which had been 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 11.1).
- 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. As at 31 May 2005, 971 claims had been received by the Consorcio relating to some 3 700 persons.
- 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 claims received by the Consorcio have been categorised 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

- 5.9 The total amount claimed is €229.9 million (£158 million).
- 5.10 The Consorcio has requested the assistance of the experts appointed by the London Club and the 1992 Fund in the assessment of 190 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 joint assessments of 13 claims; the 1992 Fund and the London Club have approved nine of them.

Sixty-six claims included in the 190 claims with which the Consorcio has requested assistance have also been submitted directly to the Claims Office and have been approved by the London Club and 1992 Fund. Details of 65 of these assessments have been provided, with the approval of the claimants, to the Consorcio. 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 (£793 000). 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 €22 777 986 (£15.7 million). On 28 May 2003 the shipowner deposited €22 777 986 with the Criminal Court in Corcubión (Spain) for the purpose of constituting the limitation fund.

8 Maximum amount available under the 1992 Conventions

- 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 by the Assembly 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 the P&I Clubs had done 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 shipowner 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, May 2004 and October 2004

- 9.3 At its October 2003, February 2004, May 2004 and October 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, 92FUND/EXC.25/6, paragraph 3.2.26 and 92FUND/EXC.26/11, paragraph 3.7.30)

Consideration by the Executive Committee at the March 2005 session

- 9.4 At the March 2005 Session, the French delegation referred to informal meetings held between France, Portugal and Spain, the last of which had been attended by a representative of the 1992 Fund, to consider the claims situation in the three States. That delegation stated that in its view, on the basis of the exchanges of information at the last meeting, the actual losses suffered in the three States were much less than those originally predicted, such that it ought eventually to be possible to increase the level of payments from 15% to 30%. The French delegation requested the 1992 Fund to refine its assessment of the overall losses by June 2005 to enable the Executive Committee to take a decision on whether or not the level of payments could be increased.
- 9.5 The Director stated that whilst the 1992 Fund could carry out a refined assessment of the overall losses as requested by the French delegation, in his view, it was the Fund's claims exposure, currently in excess of €1 000 million (£687 million), that determined the level of payments. He expressed the view that while this situation remained, the only way of increasing the level of payments would be to follow the same procedure as that in the United Kingdom following the *Sea Empress* incident and in France following the *Erika* incident, whereby the States had agreed to stand last in the queue with regard to their own claims.
- 9.6 One delegation, whilst stating that it was important to complete the claims assessment before the third anniversary of the incident when the time bar provisions would apply, expressed concern about the reference to claims being assessed using a formulaic approach (cf paragraph 5.5 above), bearing in mind the importance of equal treatment of all claims. The Director stated that although the Consorcio had decided to assess some claims according to a formula or scale, the Fund would continue to assess claims individually or in groups of similar claims on their merits, including subrogated claims
- 9.7 A number of delegations considered that, whilst regrettable, it was necessary to maintain the level of payments at 15% of proven losses for the time being, recognising that such a level would be unacceptable in the long term.
- 9.8 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.28/8, paragraph 3.4.34).

Review by the Executive Committee of the level of payments at the June 2005 session

- 9.9 As requested by the French delegation at the Committee's March 2005 session, the Director is making an attempt to estimate the overall losses in the three countries concerned. The Director will revert to this issue in an addendum to this document, together with a proposal as to the level of payments.

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 €383.7 million = €57 555 000), 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 €383.7 million = €57 555 000). Further, it was decided that the terms and conditions of the guarantee should be to the satisfaction of the Director.
- 10.3 The Assembly 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 €383.7 million or €57 555 000 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 €57 555 000 (£39 914 906) was made on 17 December 2003.

11 Court actions

Spain

- 11.1 Some 2020 claims have been lodged in the legal proceedings before the Criminal Court in Corcubión (Spain). Two hundred and eight of these claims involve persons who have submitted claims directly to the London Club and 1992 Fund through the Claims Office in La Coruña. 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.

France

- 11.2 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.
- 11.3 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 (£275 000). 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. No such claims have been received.

United States

- 11.4 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 (£385 million) and estimated later to exceed US\$1 000 million (£550 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.
- 11.5 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 grounds that the Spanish State was entitled to sovereign immunity. ABS is seeking reconsideration by the Court or permission to appeal.
- 11.6 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 (£27.5 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 11.4.

12 Recourse action by the 1992 Fund against ABS

- 12.1 At its October 2004 session the Executive Committee decided that the 1992 Fund should not take recourse action against ABS in the United States and deferred any decision on recourse action against ABS in Spain until further details surrounding the cause of the *Prestige* incident had come to light. The Committee explicitly 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).
- 12.2 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 (document 92FUND/EXC.26/11, paragraph 3.7.71).

13 Investigations into the cause of the incident

13.1 The Bahamas Maritime Authority

The Bahamas Maritime Authority (ie the authority of the flag State) has carried out an investigation into the cause of the incident. A brief summary of the report on the investigation was presented to the Executive Committee at its March 2005 session (document 92FUND/EXC.28/5, section 13.1). The discussion of the report at the session is reflected in the Record of Decisions (document 92FUND/EXC.28/8, paragraphs 3.4.52 – 3.4.60).

Spain

13.2 The Spanish Ministry of Public Works

Main report

13.2.1 The Spanish Ministry of Public Works (Ministerio de Fomento) has carried out an investigation into the cause of the incident through the Permanent Commission on the Investigation of Maritime Casualties (the Commission) that has the task of determining the technical causes of maritime accidents. The report of the investigation, which was made available to the 1992 Fund in April 2005, extends to some 420 pages and contains a narrative of events, an analysis of the evidence, conclusions, recommendations and appendices. The report does not address blame or liability.

13.2.2 The report states, *inter alia*, that the Commission calculated the shear forces and bending moments^{<3>} experienced by the vessel on three occasions, namely: just prior to the damage occurring; after the starboard ballast tanks had flooded and; after the port side ballast tanks had been filled to correct the list brought about by the flooding of the starboard tanks. In the report it is stated *inter alia* that:

- The maximum bending moment just prior to the damage occurring was within the calm water maximum allowed by the vessel's classification society, the American Bureau of Shipping (ABS).
- After the starboard tanks had flooded the maximum bending moment exceeded the calm water maximum by 28.4%.
- Once the port side tanks had been filled the maximum bending moment exceeded the calm water maximum by 70.4%.

The maximum shear force on all three occasions was within that admissible according to ABS.

13.2.3 The Commission identified four possibilities as regards the cause of the incident: impact with floating objects; impact by waves; internal explosion; and structural failure. The Commission dismissed the first possibility on the basis that a floating object without its own propulsion would not have sufficient mechanical energy to produce damage of this type. The second possibility was dismissed on the basis that wave impact would not cause damage to a hull that was not weakened, since, in deep water, waves have little significant horizontal displacement. The possibility of an explosion was dismissed since the sides of the tank were sunken inward, the deck, the weakest part of the structure, showed no sign of an explosion and the crew statements made no mention of an explosion or flames or smoke.

<3>

Internal forces that are induced in the structure depending on the way the vessel is loaded.

The Commission reached the conclusion that the cause of the casualty was a structural failure in the area of No. 2 starboard-aft and No. 3 starboard wing tanks as a result of a local loss of strength due to deformation, detachment or fracture of the longitudinal shipside frames, which caused a loss of rigidity in the shell plates and their consequent deformation, which could have caused a large breach and even a detachment of those plates.

13.2.4 The Commission based its conclusions on the following factors:

- Video film taken by the submarine *Nautille* showed that the shell plating of the *Prestige* had become detached on the starboard side at the weld line six metres below the main deck.
- Part of the structure of the affected tanks had been replaced at Guangzhou (China)^{<4>} because the thickness was found to be below the minimum permissible under classification society rules.
- The area affected by the damage, and which had been partially repaired, had over the years been subject to thermal and mechanical fatigue; thermal because fuel oil is a cargo that is transported at high temperatures (up to 90°C) and mechanical because of the age of the ship.
- Replacement of longitudinal frames had been carried out with profiles produced and welded manually since prefabricated frames were not available on the local market. Although it is accepted in the report that this technique is valid, the mechanical characteristics of the sections made this way are said to be of inferior quality.
- The thickness of replacement plates was in some cases less than the originals and, although within the reduction permitted by ABS, could provoke an excessive stress concentration in the areas of joint.
- The ship had been modified to allow cargo tanks to be used for clean ballast, including those tanks that were affected by damage. This, added to the fact that the adjacent cargo tanks carried cargo at temperatures up to 90°C, meant that those tanks were subject to a higher degree of corrosion.
- The bad weather prevailing in the area.
- The deficient state of maintenance of the ship.
- The repeated berthing of ships alongside *Prestige* during the four-month stay at St Petersburg^{<5>}, requiring the use of special fenders, could have weakened the area of her side.

Additional report

- 13.2.5 On 27 May 2005, the Spanish Ministry of Public Works provided the 1992 Fund with a copy of the conclusions in an addendum to the report referred to in paragraph 13.2.1. In the addendum it is concluded that, in the opinion of the Spanish Maritime Administration, the chain of errors, omissions and negligence in the inspections of the *Prestige* was the cause of the ship's critical condition and consequently of the final outcome. It is further stated that the Bahamas Maritime Authority seemed to have deliberately ignored this, creating the impression that the master or the salvage team had complete freedom to choose between various options. It is also stated that, meanwhile, the Spanish coast was seriously threatened and the authorities were taking measures

<4>

The vessel underwent repairs, and special survey, at Guangzhou in May 2001

<5>

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.

to protect it without reliable information concerning the real condition of the ship. The conclusions to the addendum are attached in full in the Annex to this document.

13.3 The Criminal Court in Corcubión

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.

France

13.4 The French Ministry of Transport and the Sea

13.4.1 The French Ministry of Transport and the Sea (Secrétariat D'État aux Transports et à La Mer) has carried out a preliminary investigation into the cause of the incident through the General Inspectorate of Maritime Affairs – Bureau of investigations – accidents/sea (Inspection General des Services des Affaires Maritimes – Bureau enquêtes – accidents / mer (BEAmer)).

13.4.2 The investigation was carried out to establish the circumstances and causes of the incident and to learn those lessons which might prevent further accidents of a similar type. The purpose of the investigation was not to establish criminal fault or individual or collective civil liability. The report by BEAmer extends to some 259 pages and contains details of the background of the vessel, a narrative of events, an analysis of evidence, conclusions, recommendations and appendice.

13.4.3 The report can be briefly summarised as follows.

13.4.4 As regards the cause of the incident, the report states that since the investigators only had access to the documents provided by the classification society and the flag state, they could not base their conclusions on tangible evidence.

13.4.5 The report concludes that, on the basis of the information available, the loss of the *Prestige* appears to be due to a series of successive factors, namely:

- Factors linked to conditions of the market for maritime transport of heavy fuels, leading to carriage of a substantial part of such heavily polluting products in old and pre-MARPOL ships.
- Factors concerning the design of these ships at their date of construction and problems with aging resultant on the ships being brought into compliance with the provisions of MARPOL
- Possible factors causing the initial damage: impact by a floating object (thought unlikely); violent wave impact; failure of the hull or; a combination of these factors
- Successive repairs, which could indicate structural weakness in the bulkhead between wing tanks 2 and 3 which, in pre-MARPOL vessels, are more susceptible to corrosion, weakening of the internal structure of wing tanks 2 and 3 due to use of the vessel for transshipment operations at St Petersburg and insufficient repairs, notably while at Guangzhou in 2001
- Enlargement of the initial damage because of: forces on the structure produced by the sea before the damage was reported, additional forces on the damaged structure generated by filling the port ballast tanks and towage operations and maintaining the ship at sea in a delicate condition after the initial damage, linked to difficulties in reception (configuration of the coast, limited means of towage).

- 13.4.6 The report also notes that the action of the master in flooding the port side ballast tanks aggravated the situation^{<6>} and made towage over a long distance perilous. The investigators recognise, however, that the master probably did not have available the relevant information for making his decision because the stability calculator had been out of action since the initial sudden list occurred.^{<7>}
- 13.4.7 Concerning the actions of the shipowner, the report notes that liaison with the maritime authorities of the coastal state seem to have been through a ships' agent nominated by the shipowner and who made contact with the authorities three hours after the alarm was raised and this information was given to the shipowner by the master. The report also notes that, on the other hand, the designated person was immediately preoccupied with arranging a contract with a salvage company.
- 13.4.8 The report states that the actions of the salvor remain to be studied. The information requested from the salvors had not been supplied to BEAmer.
- 13.4.9 With regard to the decisions taken by the Spanish authorities to distance the ship from the coast, the report notes that the investigators had not received from the Spanish maritime authorities the information necessary to understand completely the decision process. The report states that admittedly the initial pollution was relatively minor and the ship held together for several days. However, the information provided by the shipowner and the classification society guaranteeing the strength of the ship does not seem to have been sufficient to satisfy the various coastal authorities, and in the eyes of the maritime authorities of the coastal state, the possible places of refuge in the Galician rías were not suitable to contain an eventual massive pollution.
- 13.4.10 The report notes finally that, since metallurgical analysis on a minimum of significant samples will not be carried out and made public, it does not seem possible to develop the conclusions further.

13.5 An examining magistrate in Brest

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

13.6 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.

* * *

<6> The maximum bending moment at time of departure from the loading post was 43% of the maximum permissible in calm water. This increased to 125% after the flooding of the starboard side tanks caused by the damage to the shell plating and then to 163% of the calm water limit when the port side ballast tanks were filled.

<7> As a result of the loss of electrical power that occurred when the ship listed to 30°.

ANNEX

Conclusions to the Addendum to the Report of the Spanish Maritime Administration on the Incident
involving the Tanker *Prestige* in the Finisterre Traffic Separation Scheme on
13 November 2002
[Translation from Spanish]

Introduction

At the time of the 79th session of the International Maritime Organization's Maritime Safety Committee, the Bahamas Maritime Authority (BMA) released its report entitled '*Report of the Investigation into the Loss of the Bahamian-Registered Tanker Prestige off the Northwest Coast of Spain on 19 November 2002*'.

The Spanish Maritime Administration presented the '*Report on the Incident involving the Prestige in the Finisterre Traffic Separation Scheme on 13 November 2002*' to the International Maritime Organization (IMO) to be reviewed by the Working Group on Casualty Statistics and Investigations of the Subcommittee on Flag State Implementation which has been given this task in order to propose to the Organisation measures aimed at improving maritime safety and preventing a repetition of similar accidents in the future.

In the opinion of the Spanish Maritime Administration, a thorough study of the technical history of the *Prestige* is essential to determine whether its condition was a determining cause of the incident and it is the flag State which should be able to provide all that information.

In order to study more closely the causes of the initial damage suffered by the *Prestige* on 13 November 2002, the Spanish Maritime Administration has carried out new studies on aspects that it considers relevant and analysed the technical information available concerning the ship, including that received from the BMA. Based on that information, it has prepared an addendum to the report of the Spanish Permanent Commission for the Investigation of Maritime Incidents, author of its initial report.

During its most recent meeting in March 2005, the International Maritime Organization's Maritime Incidents Study Group, recalling that its task is to propose to the Organization measures aimed at improving maritime safety and avoiding the repetition of similar accidents in the future, decided not to review the *Prestige* incident until it had received the addendum to the report of the Spanish Permanent Commission for the Investigation of Maritime Incidents.

A summary of the conclusions of the addendum is presented as follows:

1. The report produced by the Bahamas Maritime Authority (BMA) in London has been prepared on the basis of reports drawn up by others in order to reach their conclusions, principally those of the ship's classification society, the American Bureau of Shipping (ABS), and that of the auditors of the International Association of Classification Societies (IACS). IACS passed over numerous errors, omissions and negligence easily observable in the reports of the inspections carried out by ABS. As a result, the report prepared by the BMA cannot be considered to be independent or impartial
 - During the 2002 annual inspection in Dubai, ABS did not inspect no. 3 starboard ballast tank. This is precisely the tank where ABS, IACS and even the BMA believe that the initial damage occurred. It also did not inspect no. 2 starboard ballast tank. This broke the rules of ABS and IACS. This extremely important omission is simply described in the BMA report as a misunderstanding due to the language.
 - In the ABS report dated 25 May 2002, which covers the last Annual Machinery Inspection, it is stated that the loading and offloading connections at the bow and stern were inspected and found in satisfactory condition. However, the ship did not have loading connections at either the bow or the stern.
 - In the report of that same inspection, concerning the hull, and in the report of the last Intermediate Inspection dated 2 June 1999, it is stated in both cases that the freeing ports along with their bars, covers and hinges were inspected and found in a satisfactory condition. However, the *Prestige*

had neither bulwarks nor freeing ports, not even in the area of the accommodation; only stanchions and handrails. If the inspector had actually boarded, that would have been the first thing that he would have observed.

- For Special Periodic Survey no. 5 (twenty-five years of service) to be carried out at Guangzhou (China), the shipowners of the *Prestige* sent the study entitled '*Re-evaluation of the scantlings of the shell stiffeners and the longitudinal bulkhead*' to the ABS office in Piraeus (Greece). The purpose of this work was to justify an eventual loss of thickness of the webs of the hull longitudinals and of the longitudinal bulkheads in the ballast tanks; and in short, a saving in the amount of steel to be replaced. That study was approved by ABS.
- This 're-evaluation' was not as effective as was hoped because much greater corrosion was found during repairs, requiring complete renewal of several longitudinals using specifically fabricated L-sections.
- Furthermore, the local inspector accepted that in the repair stiffeners were used with very inferior scantlings to those approved. The longitudinals replaced ended up with deficiencies of up to 49.4% relative to the ABS requirements. That means that some of these stiffeners deformed plastically, simply when the tanks were filled with water. This occurred without being detected by the local Supervisor, by the Survey Manager of the Division and by the report examiners in the Classification Section of ABS.
- Finally, it should be taken into account that 50% of the material renewed in Guangzhou had been replaced five years earlier in Constanza. This gives an idea of the enormous problem of corrosion that those tanks had.

Nothing is mentioned about all this in the ABS, IACS or BMA reports.

- After the major repairs carried out during Special Periodic Survey no. 5, a hydrostatic test would have been carried out, covering the aspects of resistance and watertightness, in tanks 1B and 3C, in which the repairs effected were minimal, instead of making them in tanks 3B and 3E in which more than 90 per cent of the repairs were carried out.

Nothing is mentioned about all this in the ABS, IACS or BMA reports.

- The ABS and the Bahamas Maritime Authority reports reject material fatigue, as a possible cause of the damage, in spite of ABS having found that the *Prestige* did not comply with its requirements for fatigue and the existence of highly corroded areas.
- In accordance with the International Convention for the Safety of Life at Sea (SOLAS), the *Prestige* should have had two emergency towing systems: one at the bow and the other at the stern. In the report of the Obligatory Annual Inspection for compliance with SOLAS, carried out in Dubai in 2002, it is stated that the emergency towing system at the stern was ready for use. However, it was not used by the Captain after the incident, a fact that was decisive when decisions were later taken because of the enormous loss of time that it implied.

2. According to BMA's own report, it did not carry out its annual inspection in 2001.
3. A new study has been carried out of the sea conditions which the *Prestige* encountered during its crossing from the North Sea until the MAYDAY. The conditions recorded on 13 November 2002 cannot be described as extreme or unusual for the area and that time of the year. There is no evidence of abnormal waves. Approximately 45 000 ships pass annually through the Finisterre Traffic Separation Scheme. None of those that did this on 13 November 2002 reported extreme conditions.
4. The thermographic images taken by one of the rescue helicopters have been studied. The results of the study, the existing photographs and videos as well as other accounts make it impossible to maintain, as BMA claims, that the initial spill occurred exclusively through the Butterworth covers. It is highly probable, as the ship's Captain believed on 13 November 2002, that the dividing bulkhead

between no. 3 centre tank and no. 3 ballast tank failed. No. 2 centre tank and no. 4 starboard tank were probably seriously damaged. This would explain the enormous amount of fuel that had already spilled into the sea on the morning of 14 November, as the study mentioned in this paragraph concludes.

5. The analysis of the available evidence, including documentation recovered on board, allows the *Prestige* to be described as “substandard”.
 - The inexplicable reductions in speed recorded on the plotters of the CZCS at Finisterre before the MAYDAY and contrary to what is required by good seamanship when there is rough sea abeam can be understood only if the ship had machinery problems. Such a precarious state of navigation could mean that the ship had suffered a considerable shift in equilibrium, thus creating a particularly unfavourable situation regarding the action of the sea on the starboard side, an action to which it remained exposed during its crossing via the North Sea.
 - The BMA indicates that the ship underwent a vetting inspection on 13 March 2002 while it was loading and had full ballast tanks. As a result, no relevant structural inspection was carried out. The documentation from the inspection limits itself to summarising the ABS report concerning the result of its Special Survey no. 5. Furthermore, the inspection report points out that any eventual chartering of the ship could take place only after a new more detailed inspection.
 - As the report of the Spanish Accident Investigation Commission's indicates, the last Paris Memorandum inspection of the ship was dated 1 September 1999.

In summary and final conclusion, in the opinion of the Spanish Maritime Administration, it can be stated that the chain of errors, omissions and negligence in the inspections of the *Prestige* were factors determining the critical condition in which it found itself and consequently the final outcome. To ignore deliberately this circumstance, as the BMA seems to do, creates the impression that the Captain or the Salvage Team had complete freedom at that time to choose between various options as to the action to be taken while the Spanish coast was seriously threatened and the Spanish authorities were taking measures to protect it without having accurate information available about the ship's real condition.