



INCIDENTS INVOLVING THE 1992 FUND

PRESTIGE

Level of payments

Note by the Director

Summary:

The total claims arising from the *Prestige* incident may be as high as €1 050 million (£711 million)^{<1>}, whereas the total amount of compensation available is €171.5 million (£116 million). In view of the uncertainty as to the amount of admissible claims, the Executive Committee decided in May 2003 that the level of payments should be limited to 15% of the loss or damage actually suffered by the respective claimants, and that level has been maintained since.

As instructed by the Executive Committee at its May 2005 session and in the light of the discussions at that session, the Director has prepared a detailed proposal for an approach that would enable the Fund to increase the level of payments. This approach also includes a provisional apportionment of the amount payable by the 1992 Fund in respect of the *Prestige* incident between the three States concerned (France, Portugal and Spain) against certain undertakings and guarantees to be provided by the Governments of these States.

Action to be taken:

Consider the Director's detailed proposal referred to above and decide the level of payments.

1 Introduction

- 1.1 This document sets out a detailed proposal by the Director on possible steps to increase the level of payments beyond the present 15%.
- 1.2 It will be recalled that the total amount available for compensation in respect of the *Prestige* incident under the 1992 Civil Liability Convention and the 1992 Fund Convention, is 135 million SDR, which corresponds to €171 520 703.

<1> In this document conversion of currencies has been made on the basis of exchange rates as at 16 September 2005 (€1 = £0.6772) except in respect of payments made by the 1992 Fund where the conversion has been made at the rate on the date of payment.

2 Previous consideration by the Executive Committee of the level of payments

Consideration up to March 2005

- 2.1 At the Executive Committee's 21st session, held in May 2003, it was decided that the 1992 Fund's payments should for the time being be limited to 15% of the loss or damage actually suffered by the respective claimants as assessed by the experts engaged by the 1992 Fund and the London Club. At its October 2003, February 2004, May 2004, October 2004 and March 2005 sessions the Committee decided that, in view of the remaining uncertainties as to the level of admissible claims, the level of payments should be maintained at 15% (documents 92FUND/EXC.22/14, paragraph 3.7.24, 92FUND/EXC.24/8, paragraph 3.4.43, 92FUND/EXC.25/6, paragraph 3.2.26, 92FUND/EXC.26/11, paragraph 3.7.30 and 92FUND/EXC.28/8, paragraph 3.4.34).

Consideration at the June 2005 session

- 2.6 The Executive Committee examined an approach outlined in document 92FUND/EXC.29/4/Add.1, prepared by the Director after discussions with the delegations of France, Spain and Portugal, which was based on an increase in the level of payments, an apportionment between the three States of the amount available for compensation and certain undertakings and guarantees to be provided by these States against overpayment.
- 2.7 In her summary of the discussion the Chairperson noted that there was broad support for the approach proposed by the Director in his search for a solution, which would enable the Fund to increase the level of payments. The Chairperson noted that delegations had emphasised that their support was without prejudice to their position as regards any detailed proposal to be developed by the Director. The Chairperson further noted that many delegations had emphasised the importance of ensuring that the principles of the Conventions were followed, particularly with regard to equal treatment of victims, and of safeguarding the Fund against overpayment.
- 2.8 The Committee decided to instruct the Director to make a detailed proposal on the basis of the approach set out in paragraph 3.2.66 of document 92FUND/EXC.29/6, after consultations with the three delegations concerned and taking into account the points raised during the discussion, covering the legal and technical aspects, to be considered by the Committee at its October 2005 session (document 92FUND/EXC.29/6, paragraph 3.2.78).

3 Meeting with the delegations of France, Portugal and Spain in July and September 2005

Subsequent to the Executive Committee's June 2005 session, the Director invited the French, Portuguese and Spanish delegations to meetings in London, which were held on 21 July and 23 September 2005 to discuss the outcome of the Committee's deliberations.

4 Director's detailed proposal

- 4.1 On the basis of the discussions held with the delegations of France, Portugal and Spain and as instructed by the Executive Committee, the Director submits for the Committee's consideration the detailed proposal set out below which addresses the following five issues:
- Estimate of the likely final amount of the admissible claims in respect of the damage in each of the three States concerned.
 - A revision of the level of payments on the basis of that estimate.
 - A provisional apportionment between the three States of the maximum amount payable by the 1992 Fund on the basis of the total amount of the admissible claims as established by the assessments carried out to date.

- The provision of undertakings and guarantees by the Governments of France, Portugal and Spain.
- A final apportionment between the three States of the maximum amount payable by the 1992 Fund on the basis of the final settlement of all claims arising from the incident, whether as a result of agreements with the claimants or as a result of final judgements by competent court.

General approach

- 4.2 The Director's proposal contains two main elements; the revision of the level of payments and the apportionment of the maximum amount payable by the 1992 Fund.
- 4.3 With regard to the level of payments, the Director proposes that this should be decided on the basis of an estimate of the final amount of the admissible claims against the 1992 Fund (cf. paragraphs 4.21 to 4.26).
- 4.4 Under the Director's proposal the apportionment of the maximum amount payable by the 1992 Fund would be carried out in two phases. The first phase would be a provisional apportionment between the three States, established on the basis of assessments of the claims submitted to date (c.f. paragraphs 4.5 to 4.17). The second phase would be a final apportionment, the purpose of which is to make the necessary adjustments to the provisional apportionment so that the correct proportion is received in respect of each of the three States. The final apportionment would be established on the basis of the final settlement of all claims arising from the incident, whether as a result of agreements with the claimants or as a result of final judgements by competent court (c.f. paragraph 4.42 and 4.43).

Assessment of the total amount of the admissible claims in respect of the damage in each of the three States concerned.

- 4.5 The Spanish Government represents the great majority of claimants in respect of damage in Spain, since it has undertaken to compensate all victims in Spain.
- 4.6 The Spanish Government has submitted five claims totalling some €67 million (£452 million) and other claimants have submitted claims totalling some €167 million (£113 million), bringing the total amount claimed in respect of damage in Spain to approximately €34 million (£565 million). Additionally, there are some 2 020 claims presented in the proceedings before the Criminal Court in Corcubión (Spain) which have not been presented to the 1992 Fund, although it is expected that most of these will be withdrawn as a result of the compensation paid to the claimants by the Spanish Government. In fact, on 23 September 2005 claims by 13 700 victims, representing 75% of those in the fisheries sector affected by the incident, were withdrawn. The Spanish Government has mentioned that it will submit further claims not exceeding €150 million (£102 million) for the cost of treatment of the oily residues and for the costs incurred by the local and regional authorities as a result of the incident (including payments to fishermen). The Spanish Government has indicated that the claims in respect of payments to the regional and local authorities include some items which will not be admissible under the 1992 Fund Convention and that part of the new claims will relate to clean-up costs included in the claims already presented by the Government.
- 4.7 The Spanish Government claims submitted so far are primarily for the costs of shoreline clean up, operations at sea combating the pollution and aid to fishermen, shellfish harvesters and related sectors affected by the incident and the cost of removal of oil from the wreck. In total, nineteen Ministries have been involved in the aftermath of the incident, although the majority of the claim by the Government relates to work carried out by the Ministries of Environment, Public Works, Defence, Agriculture and Fisheries and Finance which represent 74% of the total amount claimed.
- 4.8 The claim for the costs incurred by the Ministries of Environment and Defence (35% of the total of the Spanish Government's claim) relates primarily to the shoreline clean up carried out on the northern and western coastlines of Spain from the border with Portugal in the west to the border

with France in the east. The first assessment of the claim by these two Ministries, carried out in 2003, was on the basis of the observations made during the clean up by the experts engaged by the Club and Fund. Due to the geographical extent of the impact, these observations were neither continuous nor all encompassing. Subsequent to this first assessment the Spanish Government has submitted additional claims for shoreline clean up costs and extensive supporting documentation. The analysis of this documentation is well advanced, but the volume of data involved is such that the analysis has not yet reached the point at which a final assessment of this significant part of the total claim can be made. For these reasons the present provisional assessment has been carried out on a similar basis to the assessment in 2003.

- 4.9 The claims for the costs incurred by the Ministry of Public Works (16% of the total of the Spanish Government's claim) relates mainly to operations at sea combating pollution. Important factors in the assessment of this claim are the date at which it would be considered reasonable that the operations to combat oil at sea should have been discontinued and the reasonability of the purchase and deployment of booms by the authorities.
- 4.10 The claims for the costs incurred by the Ministries of Agriculture and Fisheries and Finance (23% of the total of the Spanish Government's claim) concern primarily aid to fishermen, shellfish harvesters and those involved in related sectors, who were affected by the incident. The first assessment, carried out in 2003, was on the basis of the information available from published statistical sources relating to 2001. Since then, the Spanish Government has submitted extensive documentation of the payments made to victims in those sectors and of the catches of those concerned during 2002 to 2004 (some 470 000 records in total). This data is being analysed by the experts engaged by the Club and Fund. The present provisional assessment has been carried out on a similar basis to the assessment in 2003 although using also statistical data for the period 2002-2004.
- 4.11 The claims by the other fourteen Ministries (10% of the total of the Spanish Government's claim) relate, amongst others, to various administrative tasks, the costs of studies in relation to the pollution and marketing campaigns. These claims are being assessed.
- 4.12 The assessment of the claim for the cost of removal of the oil from the wreck (16% of the total of the Spanish Government's claim) will be carried out if the Executive Committee were to decide that the claim is admissible in principle.
- 4.13 The experts engaged by the Club and Fund have been analysing the documentation submitted by the Spanish Government for the last three years. The majority of the claims have been submitted and have been assessed albeit in some important instances provisionally. The experts have provisionally assessed the claims submitted to date in respect of damage in Spain at some €241 million (£163 million). This amount does not include the claim for the cost of the removal of the oil from the wreck.
- 4.14 In the case of France, the total amount claimed in respect of damage in France is approximately €7 million (£66 million). The largest claim is that of the French Government for €67.5 million (£46 million) which relates to clean-up costs incurred by the Government. The other claims, for a total of €30 million (£20 million), relate to clean-up costs incurred by local authorities and losses in the fisheries and tourism sectors. The Government's claim has been provisionally assessed at €31.2 million (£21 million). The total assessed amount to date of the damage in France is some €38 million (£26 million).
- 4.15 In the case of Portugal, the Government is the only claimant. The claims, in the amount of €4.3 million (£3.0 million), relating to the cost of preventive measures, have been provisionally assessed at €1 530 000 million (£1.0 million).
- 4.16 The amounts claimed and the provisional assessments as at 1 September 2005 (rounded figures) are summarised in the following table:

State	Amounts claimed	Assessed amounts
Spain	€834 000 000	€241 000 000
France	€97 000 000	€38 000 000
Portugal	€4 300 000	€1 530 000
Total	€935 300 000	€280 530 000

- 4.17 It is expected that the assessed amounts will increase as the examination of the claims progresses and the additional information provided is analysed.

Provisional apportionment between the three States of the maximum amount payable by the 1992 Fund

- 4.18 The Director proposes that a provisional apportionment should be made between the three States concerned of the maximum amount payable by the 1992 Fund in respect of this incident, namely 135 million SDR minus the limitation amount of €22.8 million (£15.8 million) applicable to the *Prestige*, ie approximately €148.7 million (£101 million).
- 4.19 The total amount of admissible claims for damage in Spain will be much higher than the amounts of admissible claims for damage in France and Portugal. For this reason any change in the total amount of admissible claims in respect of each of the three States as a result of the continued assessment or court decisions would have only a minor effect on the final apportionment between the three States.
- 4.20 The Director proposes therefore that the provisional apportionment between the three States should be made on the basis of the total amount of admissible claims in respect of each State as assessed as at 1 September 2005. On that basis, the provisional apportionment between the three States would be as follows:

State	Assessed amounts	Provisional apportionment
Spain	€241 000 000	85.90%
France	€38 000 000	13.55%
Portugal	€1 530 000	0.55%
Total	€280 530 000	100.00%

Level of payments

- 4.21 The level of the 1992 Fund's payments has in the past generally been determined on the basis of the total amount of claims already presented and possible future claims against the Fund, and not on the basis of the Fund's assessment of the admissible amounts. On the basis of the figures presented by the Governments of the three States affected by the incident, the total of claims presented and possible future claims might be as high as some €1 050 million (£711 million). On this basis it is likely that the level of payments would have to be maintained at 15% for several years, unless a new approach were to be taken.
- 4.22 An alternative way of determining the Fund's level of payments would be to base it on an estimate of the final amount of the admissible claims against the Fund, established either as a result of agreements with the claimants or by final judgements of a competent court, which is unlikely to be exceeded.
- 4.23 The experts engaged by the London Club and the 1992 Fund, having reviewed and analysed thousands of pages of supporting documentation and compared the documentation presented with their own observations during the time of the clean up operations, have developed a very good understanding of the claims. Although they have not yet been able to make a final assessment of all of them, they have nevertheless been able to form a view of, ie to estimate, the likely final

amount of the admissible claims. On the basis of the opinion of the experts on the likely final amount of the admissible claims the Director has made the following analysis.

In the case of Spain:

- The final assessment of the costs of the clean up operations carried out by the Spanish Government is unlikely to exceed €235 million (£159 million).
- The final assessment of the losses incurred in the fisheries sector is unlikely to exceed €60 million (£54 million).
- Pending the Executive Committee's decision on the claim for the costs of removal of the oil from the wreck, it has been assumed that this claim for €109 million (£74 million) would be considered admissible in full.
- The non-fishery claims for economic loss are for relatively small amounts and the final assessment is unlikely to exceed €10 million (£7 million).
- As stated above, the Spanish Government will submit further claims not exceeding €150 million (£102 million). A part of these claims will relate to payments made by the regional authorities to fishermen, but the assessment of losses in the fisheries sector in Spain is already covered by the amount of €60 million set out above. Another part of the claims will relate to clean-up operations carried out by regional or local authorities. As set out in paragraph 4.6, the Spanish Government has indicated that there will be a partial duplication in this regard between this part of the claims and the claims in respect of clean-up operations already presented by the Spanish Government and that the claims in respect of payments to the regional and local authorities will include some items which will not be admissible under the 1992 Fund Convention. It is unlikely therefore that these additional claims will increase the total amount of admissible claims by more than €85 million (£51 million).

In the case of France:

- It is unlikely that the final assessment of the costs of the clean up operations carried out by the French Government will exceed €55 million (£37 million).
- The final assessment of the admissible losses incurred by non central government claimants is unlikely to exceed €15 million (£10 million).

In the case of Portugal:

- It is unlikely that the final assessment of the costs of the preventive measures carried out by the Portuguese Government will exceed €3 million (£2 million).

4.24 On the above basis, the Director considers that it is unlikely that the final amounts of the admissible claims would exceed the following amounts:

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

- 4.25 In the light of the estimates of the final amount of the admissible claims set out above the Director considers that the level of payments could be increased to 30% as follows:

Amount available for compensation under the 1992 Civil Liability and Fund Conventions	Estimated final amount of admissible claims	Proposed level of payments
€71.5 million	€73 million	30% ^{<2>}

Undertakings by the States

- 4.26 The Director accepts that, when all claims have been presented and assessed, the percentages proposed in paragraph 4.20 above for the purpose of provisional apportionment will have to be adjusted for the purpose of the final apportionment between the three States concerned and that the final level of payments will have to be adjusted in relation to the one proposed in paragraph 4.25. It is, therefore, in the Director's view, necessary that the 1992 Fund should be provided with appropriate undertakings and guarantees from the three States concerned to ensure that the 1992 Fund is protected against an overpayment situation and that the principle of equal treatment of victims is respected. The Director proposes therefore that the three Governments give undertakings and guarantees as follows.

Spain

- 4.27 The Spanish Government would undertake to compensate all claimants who have suffered pollution damage in Spain for amounts no less than those that would be arrived at by applying the level of payments established by the Executive Committee, if the Government has not already done so.
- 4.28 The Spanish Government would undertake to repay to the Fund any amount due by it to the Fund if the Executive Committee were to decide to reduce the proportion payable by the Fund for damage in Spain.
- 4.29 The Spanish Government would provide the 1992 Fund with a bank guarantee to cover the difference between the amount paid by the Fund and 15% of the assessed amount.

Portugal

- 4.30 The Portuguese Government would undertake to repay to the 1992 Fund any amount due by it to the Fund if the Executive Committee were to decide to reduce the proportion payable by the Fund for damage in Portugal.
- 4.31 The Portuguese Government would undertake to indemnify the 1992 Fund for any amounts which it has paid to other claimants for pollution damage in Portugal in accordance with an enforceable court decision.
- 4.32 The Portuguese Government would provide the 1992 Fund with a bank guarantee to cover the difference between the amount paid by the Fund and 15% of the assessed amount.

France

- 4.33 The French Government would undertake to accept a reduction in the compensation to which it would be entitled, up to the amount of its admissible claim, to protect the 1992 Fund against overpayment to claimants having suffered damage in France, if the Executive Committee were to decide to reduce the level of payments.

^{<2>} €71.5 million / €73 million = 29.9%

Bank guarantees

- 4.34 The bank guarantees to be provided by the Spanish and Portuguese Governments should be given not by the State, but by a financial institution which would have the financial standing laid down in the 1992 Fund's Internal Investment Guidelines.
- 4.35 The Director considers that under the terms of the guarantees, the bank should, up to the amount of the guarantee, pay to the Fund the amount or amounts requested by the Director without him having to show the Fund's right to repayment. This would correspond to the terms of the bank guarantee provided in December 2003 in connection with the payment by the Fund of €41 505 000 to the Spanish Government.

Amount payable by the 1992 Fund on the basis of the provisional apportionment between the three States.

- 4.36 The Director considers that in order to minimise the risk of the 1992 Fund having to call upon the Portuguese or Spanish Governments to return a part of the payment made on the basis of a provisional apportionment, the 1992 Fund should at this stage base the provisional apportionment on 90% of the amount available for compensation from the Fund, ie €133.8 million (£91 million). The balance, €14.9 million (£10 million), would be distributed between the three States once the final apportionment has been established.
- 4.37 The Director proposes therefore that the apportionment should be made between the three States as follows:

State	Assessed amounts	Apportionment (%)	Apportionment (amounts) (rounded figures)	Bank guarantees ^{<3>}
Spain	€241 000 000	85.90%	€115 000 000	€78 850 000
Portugal	€1 530 000	0.55%	€740 000	€510 500
France	€38 000 000	13.55%	€18 100 000	-
Total	€280 530 000	100.00%	€133 840 000	-

Spain

- 4.38 The 1992 Fund would pay to the Spanish Government an amount corresponding to the proportion established by the Executive Committee for provisional distribution for damage in Spain of 90% of the maximum amount payable by the Fund in respect of the incident, €115 million (£78.5 million), less the amounts already paid to the Spanish Government, €57 555 000 (£39.9 million), and the amounts already paid by the Fund to other claimants in Spain, €80 000 (£55 000). The amount payable to the Spanish Government would then be €57 365 000 (£39.1 million).
- 4.39 Any amount paid by the 1992 Fund after the provisional distribution directly to claimants for damage in Spain would be taken into account in the final distribution.

<3> The amounts of the bank guarantees correspond to the differences between the apportioned amounts and 15% of the assessed amounts, ie Spain €115 000 000 - €36 150 000 (€241 million at 15%) = €78 850 000; Portugal €740 000 - €229 500 (€1 530 000 at 15%) = €510 500.

Portugal

- 4.40 The 1992 Fund would pay to the Portuguese Government an amount corresponding to the proportion established by the Executive Committee for provisional distribution for damage in Portugal of 90% of the maximum amount payable by the Fund in respect of this incident, ie €740 000 (£505 000).

France

- 4.41 The 1992 Fund would pay to each claimant who has suffered pollution damage in France, except the French Government, an amount arrived at by applying the level of payments established by the Executive Committee to the loss or damage as assessed by the 1992 Fund or as decided by a final judgement rendered by a competent court.

Final apportionment between the three States of the maximum amount payable by the 1992 Fund

- 4.42 Once all claims arising from the incident have been settled, whether as a result of agreements with the claimants or as a result of final judgements by a competent court, the Director would inform the Executive Committee of the total amount of admissible claims in respect of the three States concerned. The Committee would then decide, taking into account the distribution of the shipowner's limitation fund deposited with the Criminal Court in Corcubi3n (Spain) as decided by the courts, on any reapportionment between the three States concerned of the total amount payable by the 1992 Fund.
- 4.43 The Committee would then make the necessary adjustments so that the correct proportion of the total amount of compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention is received in respect of each of the three States, using the retained amount or the balance thereof as set out in paragraph 4.36. The 1992 Fund would have the possibility to request repayments from the Spanish and Portuguese Governments and to invoke the bank guarantees provided by these Governments, if required.

5 Analysis by the Director

General considerations

- 5.1 As set out above a level of payments of 15% is manifestly unsatisfactory for claimants. The Director's proposal would, if accepted, make it possible to increase the level of payments and speed up payments to claimants.
- 5.2 As stated above, unless steps were taken to avoid this, there is a considerable risk that the payment level of 15% will have to be maintained for several years. It is for this reason that the Director believes that the proposed innovative approach should be adopted since it respects the provisions of the Conventions, including the principle of equal treatment of claimants.
- 5.3 The total amount of admissible claims for pollution damage arising from the *Prestige* incident will exceed by far the amount available for compensation. The 1992 Fund will therefore pay the total amount available for compensation, although the final apportionment between the three States can only be determined once all claims arising from the incident have been settled, whether as a result of agreements with the claimants or as a result of final judgements of a competent court. Under the Director's proposal the major part of the amount available for compensation would be payable to victims before the end of 2005.

Concerns expressed by delegations in June 2005

- 5.4 As mentioned above, at the Executive Committee's June 2005 session some delegations expressed concerns regarding the precedent that the adoption of the approach proposed by the Director would set for future incidents. A number of delegations urged caution since it was

important to ensure that the principles of the 1992 Fund Convention were respected and that any solution should be transparent and ensure that:

- The payment of compensation was made on the basis of assessment of individual claims in accordance with the criteria for admissibility established by the governing bodies.
- The principle of equal treatment between victims was upheld.
- The 1992 Fund was protected against overpayment.
- There was a real benefit to claimants.

5.5 The Director would like to make the following observations as regards these concerns.

The payment of compensation should be made on the basis of assessment of individual claims in accordance with the criteria for admissibility established by the governing bodies.

5.6 The 1971 Fund and the 1992 Fund have in many previous incidents made payments on the basis of provisional assessments. Those payments have always been set at a level which ensured that the payments did not exceed the amounts which would finally be payable in respect of the claim or claims in question. Final payments have always been made on the basis of assessments of individual claims or groups of claims.

5.7 Under the Director's proposal, payments to claimants for damage in France would be made, at the level decided by the Executive Committee, on the basis of assessments of individual claims. In the case of Spain and Portugal, provisional assessments have been made of the Portuguese and Spanish Governments' claims. The payments made under the proposed provisional apportionment to the Portuguese and Spanish Governments would be much lower than the amounts already assessed of the claims submitted by them.

5.8 Under the proposal, the final apportionment of the amount available for compensation under the 1992 Fund Convention should be made on the basis of final assessments of all claims or final judgements by competent courts.

Equal treatment of claimants.

5.9 In October 2003 the 1992 Fund Assembly discussed the principle of equal treatment of claimants. In response to a question, the Director stated that according to his reading of Article 4.5 of the 1992 Fund Convention, the requirement for equal treatment only referred to the final result of claims settlements as opposed to the settlement process. He also expressed the view that Article 18.7 gave the Assembly wide ranging powers regarding the terms and conditions according to which provisional payments in respect of claims could be made with a view to ensuring that victims of pollution damage were compensated as promptly as possible, provided that Article 4.5 was not violated. He added, however, that the notion of equal treatment could be given a wider meaning to the effect that not only should the final result give equal treatment but also the claimant's rights during the assessment period.

5.10 In the Director's view, in the *Prestige* case, there are two groups of claimants, namely the three Governments concerned (France, Spain and Portugal), on the one hand, and other claimants (private individuals, businesses, local or regional authorities), on the other.

5.11 The principle of equal treatment laid down in the Conventions applies to all claimants. However, claimants are entitled to renounce their rights in this respect for the benefit of other claimants.

5.12 The Director considers that, in conformity with the views set out in paragraph 5.9, the Executive Committee could exercise the authority delegated to it by the Assembly regarding the terms and conditions according to which provisional payments in respect of claims can be made with a view to ensuring that the victims of the pollution damage are compensated as promptly as possible. In

his view, the provisions of Article 4.5 would not be violated, since the final compensation would be paid to all victims of pollution damage on the basis of an assessment of every claim (or group of claims) on the basis of the criteria adopted by the 1992 Fund's governing bodies.

- 5.13 Once all claims arising from the incident have been settled, whether as a result of agreements with the claimants or as a result of final judgements by a competent court, the necessary adjustments would be made so that the correct proportion of the total amount of compensation available is received by the claimants in each of the three States. Thus, although equal treatment would not necessarily apply during the course of the assessment period, it would be ensured by the final apportionment.

The 1992 Fund should be protected against overpayment.

- 5.14 In the Director's view, the undertakings to be made by the three Governments and the bank guarantees to be provided by the Portuguese and Spanish Governments should provide sufficient protection to the 1992 Fund against overpayment.

- 5.15 As stated in paragraph 4.36, the Director considers, however, that it would be preferable not to have to request repayments from States and to call upon the bank guarantees provided. It is for this reason that his proposal includes the retention of 10% of the amount payable by the Fund, i.e. €14.9 million (£10.2 million), to be used in the final apportionment for adjustment of the payments made in respect of the three States concerned.

There should be a real benefit to claimants.

- 5.16 The Director's proposal would allow an increase in the level of payments to claimants. In the Director's view, for any claimant it must be an advantage to receive a higher amount of compensation earlier rather than later. This also applies to Governments, i.e. in the *Prestige* case, the Governments of Portugal and Spain, and to individual claimants in France.

Position of the three Governments concerned

- 5.17 The Director has discussed this proposal with representatives of the French, Portuguese and Spanish Governments who have indicated their agreement, subject to the Executive Committee adopting both the proposed increase in the level of payments and the proposed apportionment of the maximum amount payable by the 1992 Fund.

Conclusion

- 5.18 The Director is of the view that the detailed proposal set out in section 4 is in conformity with the 1992 Civil Liability and Fund Conventions and meets the concerns expressed by a number of delegations at the Committee's June 2005 session.

6 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 proposals on the apportionment and on the level of payments; and
 - (c) to give the Director such instructions in respect of matters dealt with in this document as it may deem appropriate.
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