



INCIDENTS INVOLVING THE 1992 FUND

PRESTIGE

Note by the Director

Summary:

As there have been no significant developments in respect of most aspects of this incident since the June 2007 session, only those issues requiring the attention of the Executive Committee are set out in this document.

The shipowner's P&I insurer and the 1992 Fund have established Claims Handling Offices in La Coruña (Spain) and Lorient (France). Claims totalling €704.6 million (£477 million)^{<1>} have been received by the office in Spain and claims totalling €109.7 million (£74.7 million) have been received by the office in France. The Portuguese Government submitted claims for €4.3 million (£2.9 million) in respect of clean up and preventive measures in Portugal. The process of assessing claims both in Spain and France has been ongoing since the last session of the Committee, especially in respect of the claims for the cost of the compensation payments made by the Spanish Government in the fisheries sector.

Court actions have been initiated in Spain and in France. The 1992 Fund is following the developments of a court action initiated in the United States by the Spanish State against the Classification Society that certified the *Prestige*.

Action to be taken: Information to be noted.

1 The incident

- 1.1 On 13 November 2002 the Bahamas registered tanker *Prestige* (42 820 GT), carrying 76 972 tonnes of heavy fuel oil, began listing and leaking oil while some 30 kilometres off Cabo Finisterre (Galicia, Spain). On 19 November, whilst under tow away from the coast, the vessel broke in two and sank some 260 kilometres west of Vigo (Spain), the bow section to a depth of 3 500 metres and the stern section to a depth of 3 830 metres. The break-up and sinking released an estimated 25 000 tonnes of cargo. Over the following weeks oil continued to leak from the wreck at a declining rate. It was subsequently estimated by the Spanish Government that approximately 13 800 tonnes of cargo remained in the wreck.
- 1.2 Due to the highly persistent nature of the *Prestige's* cargo, released oil drifted for extended periods with winds and currents, travelling great distances. The west coast of Galicia (Spain) was heavily contaminated and oil eventually moved into the Bay of Biscay affecting the north coast of Spain and France.

^{<1>} In this document conversion of currencies has been made on the basis of exchange rate as at 30 August 2007 (€1 = £0.677) except in respect of payments made by the 1992 Fund where the conversion has been made at the rate on the date of payment.

- 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 the coast of Portugal.
- 1.4 The *Prestige* had insurance for oil pollution liability with the London Steamship Owners' Mutual Insurance Association (London Club).
- 1.5 Between May 2004 and September 2004 some 13 000 tonnes of cargo were removed from the forepart of the wreck. Approximately 700 tonnes were left in the aft section.
- 1.6 For details of the clean-up operations, the impact of the spill, the level of payments and the investigations into the cause of the incident reference is made to the Annual Report 2006 (pages 101-118).

2 Claims for compensation

Spain

- 2.1 As at 30 August 2007 the Claims Handling Office in La Coruña had received 840 claims totalling €704.6 million (£477 million). These include ten claims from the Spanish Government totalling €654.3 million (£443 million) submitted during the period October 2003 – August 2007 (see section 3).
- 2.2 The table below provides a breakdown of the different categories of claims received by the Claims Handling Office in La Coruña as at 30 August 2007.

Category of claim	No. of claims	Amount claimed €
Property damage	232	2 066 103
Clean-up	17	3 011 744
Mariculture	14	19 097 581
Fishing and shellfish gathering	180	3 610 886 ^{<2>}
Tourism	14	688 303
Fish processors/vendors	299	20 027 881
Miscellaneous	74	1 761 785
Spanish Government	10	654 341 636
Total	840	704 605 919

- 2.3 As at 30 August 2007, 753 (90.72%) of the claims other than those of the Spanish Government have been assessed for €3.9 million (£2.6 million). Interim payments totalling €489 042 (£329 512)^{<3>} have been made in respect of 157 of the assessed claims, mainly at 30% of the assessed amount. Of the remaining claims, one is being assessed, three though assessed are pending clarification, eight are awaiting the approval from the 1992 Fund and the London Club, 174 are awaiting a response from the claimant, 59 are awaiting further documentation, 409 (totalling €29 million (£19.6 million)) have been rejected and 19 were withdrawn by the claimants.

<2> One claim totalling €132 million (£89.4 million) from a group of 58 associations has been withdrawn following a settlement with the Spanish Government.

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

France

- 2.4 By 30 August 2007, 479 claims totalling €109.7 million^{<4>} (£74.7 million) had been received by the Claims Handling Office in France. The table below provides a breakdown of the different types of claims as at 30 August 2007.

Category of claim	No. of claims	Amount claimed €
Property damage	9	87 772
Clean-up	59	10 466 654
Mariculture	126	2 336 501
Shellfish gathering	3	116 810
Fishing boats	59	1 601 717
Tourism	194	25 268 942
Fish processors/vendors	9	301 446
Miscellaneous	19	2 029 820
French Government	1	67 499 154
Total	479	109 708 817

- 2.5 Of the 479 claims submitted to the Claims Handling Office, 89% had been assessed by 30 August 2007. Many of the remaining claims lack sufficient supporting documentation and such documentation has been requested from the claimants. Four hundred and twenty-six claims had been assessed for €48.4 million (£32.8 million) and interim payments totalling €4.8 million (£3.3 million) had been made at 30% of the assessed amounts in respect of 306 claims. The remaining claims await a response from the claimants or are being re-examined following the claimants' disagreement with the assessed amount. Fifty-one claims totalling €3.3 million (£2.2 million) had been rejected because the claimants had not demonstrated that a loss had been suffered due to the incident.
- 2.6 In May 2004 the French Government submitted a claim for €67.5 million (£45.7 million) in relation to the costs incurred for clean up and preventive measures. The 1992 Fund and the London Club have provisionally assessed the claim at €31.2 million (£21 million). Further documentation has since been provided by the French Government. The Fund's experts are carrying out a detailed further assessment of the claim.
- 2.7 A further 59 claims, totalling €10.5 million (£7 million), had been submitted by local authorities for costs of clean-up operations. Thirty-eight of these claims had been assessed at €3.6 million (£2.4 million). Interim payments totalling €1 million (£679 700) have been made in respect of 25 claims at 30% of the assessed amounts.
- 2.8 One hundred and twenty-six claims had been submitted by oyster farmers totalling €2.3 million (£1.6 million) for losses allegedly suffered as a result of market resistance due to the pollution. The experts engaged by the London Club and the 1992 Fund had examined these claims and as at 30 August 2007, 120 of them, totalling €1.9 million (£1.2 million), had been assessed at €68 231 (£316 990). Payments totalling €27 539 (£86 688) had been made in respect of 85 of these claims at 30% of the assessed amounts.
- 2.9 As at 30 August 2007 the Claims Handling Office had received 194 tourism-related claims totalling €25.3 million (£17 million). One hundred and eighty-two of these claims had been assessed at a total of €2.6 million (£8.5 million) and interim payments totalling €3.4 million (£2.3 million) had been made at 30% of the assessed amounts in respect of 126 claims.

^{<4>} Two oyster farmers unions and an association representing victims in the mariculture sector submitted an action in court for €10 million. These three claimants have reduced their claim to €1 million.

Portugal

- 2.10 In December 2003 the Portuguese Government submitted a claim for €3.3 million (£2.2 million) in respect of the costs incurred in clean up and preventive measures. Additional documentation submitted in February 2005 included a supplementary claim for €1 million (£677 000), also in respect of clean up and preventive measures. The claims were finally assessed at €2.2 million (£1.5 million). The Portuguese Government accepted this assessment. Since the Portuguese Government had decided not to provide a bank guarantee, in August 2006 the 1992 Fund made a payment of €328 488 (£222 600), corresponding to 15% of the final assessment (cf Annual Report 2006, pages 103-106). This does not preclude the payment of further compensation to the Portuguese Government in the event that the Executive Committee were to increase the level of payments unconditionally.

3 Claims by the Spanish Government

Claims submitted

- 3.1 The Spanish Government has submitted ten claims totalling €54.3 million (£443 million). The claims by the Spanish Government relate to costs incurred in respect of at sea and on shore clean-up operations, removal of the oil from the wreck, compensation payments made in relation to the spill on the basis of national legislation (Royal Decrees)^{<5>}, tax relief for businesses affected by the spill, administration costs, costs relating to publicity campaigns and costs incurred by local authorities and paid by the Government.
- 3.2 In May 2006 the Spanish Government submitted to the 1992 Fund a claim for the cost incurred in the payment of claims based on national legislation (Royal Decrees) that were assessed by the Consorcio de Compensación de Seguros (Consorcio)^{<6>}.
- 3.3 In August 2006, the Spanish Government submitted to the Claims Handling Office a claim for the costs incurred by the 67 towns that had been paid by the Government, 51 in Galicia, 14 in Asturias and two in Cantabria, for a total of €5.8 million (£3.9 million). The 1992 Fund's experts are examining the claim. The Spanish Government has also submitted claims for the costs incurred by the regions of Galicia for €28 million (£19 million) and Asturias for €3.3 million (£2.2 million).
- 3.4 After a number of adjustments, the Spanish Government indicated in August 2007 that the total amount of its claims was €54 341 636 (£443 million). The Spanish Government has also indicated that further adjustments to claims would be made in respect of the cost for treatment and disposal of oily residues extracted during the clean up operations and the compensation payments made by the Spanish Government to individual claimants as assessed by the Consorcio.

Removal of oil from the wreck

- 3.5 The claim for the removal of the oil from the wreck, initially for €109.2 million (£73.9 million), was reduced to €24.2 million (£16.4 million) to take account of funding obtained from another source (see paragraph 3.12).
- 3.6 At its February 2006 session the Executive Committee decided that some of the costs incurred in 2003 in respect of sealing the oil leaking from the wreck and various surveys and studies were admissible in principle, but that the claim for costs incurred in 2004 relating to the removal of oil from the wreck was inadmissible (cf Annual Report 2006, pages 111-114). In accordance with the Executive Committee's decision, an assessment is being carried out of the admissible costs of activities that had a bearing on the assessment of the pollution risk posed by the oil in the wreck, incurred by the Spanish Government in 2003 prior to the removal of the oil from the wreck.

<5> For details regarding the scheme of compensation set up by the Spanish Government reference is made to the Annual Report 2006, pages 109-111.

<6> 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.

Payments to the Spanish Government

- 3.7 The first claim received from the Spanish Government in October 2003 for €383.7 million (£259.8 million) was assessed on an interim basis by the Director in December 2003 at €107 million (£72.4 million), and the 1992 Fund made a payment of €6 050 000 (£11.1 million), corresponding to 15% of the interim assessment. The Director also made a general assessment of the total of the admissible damage in Spain, and concluded that the admissible damage would be at least €303 million (£205 million). On that basis, and as authorised by the Assembly, the Director made an additional payment of €41 505 000 (£28.5 million), corresponding to the difference between 15% of €383.7 million or €7 555 000 and 15% of the preliminarily assessed amount of the Government's claim, €6 050 000. That payment was made against the provision by the Spanish Government of a bank guarantee covering the above-mentioned difference (ie €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.
- 3.8 In March 2006 the 1992 Fund made an additional payment of €56 365 000^{<7>} (£38.5 million) to the Spanish Government, in accordance with the distribution of the amount payable by the 1992 Fund in respect of the *Prestige* incident, as authorised by the Executive Committee at its October 2005 session (cf annual Report 2006, pages 103-106).

Progress on the assessment

- 3.9 Many meetings have been held between representatives of the Spanish Government and of the 1992 Fund and a considerable amount of further information has been provided in support of the Government's claims. Co-operation with representatives of the Spanish Government is continuing and progress is being made on the assessment of all the claims submitted by the Government.
- 3.10 In May 2007 a meeting was held with representatives of the Spanish Government to discuss a provisional assessment carried out in relation to the at sea and on shore clean-up operations by the Ministries of Defence, of the Environment and of Public Works (Fomento). As a result of the queries raised in this provisional assessment the Spanish Government has submitted further information, which is being analysed by the 1992 Fund's experts.
- 3.11 The 1992 Fund's experts are finalising a provisional assessment of the Spanish Government's claim for the compensation payments made by the Government in the fisheries sector as a result of the fishing bans in relation to the *Prestige* incident.
- 3.12 In June 2007 the 1992 Fund received further information from the Spanish Government regarding the amount of European funding it had received following the incident. The Fund is examining the information provided and its bearing on the assessment of the claims by the Spanish Government.
- 3.13 Further discussions between representatives of the Spanish Government and the 1992 Fund are ongoing.

4 Court actions in Spain

- 4.1 Some 3 570 claims have been lodged in the legal proceedings before the Criminal Court in Corcubión (Spain). Five hundred and ninety-seven of these claims involve persons who have submitted claims directly to the London Club and 1992 Fund through the Claims Handling Office in La Coruña. Details of the claims made in some of these court actions have been provided to the Court and are being examined by the experts engaged by the London Club and the 1992 Fund.

<7> The Director was authorised to pay the Spanish Government €57 365 000 (£39 million) but, as requested by the Spanish Government, the 1992 Fund retained €1 million in order to make payments at the level of 30% of the assessed amounts in respect of the individual claims that had been submitted to the Claims Handling Office in Spain.

Some 1 900 of these claims have been paid by the Spanish Government under the Royal Decrees^{<8>} or by the 1992 Fund through the Claims Handling Office in La Coruña. A number of claimants who have been paid by the Spanish Government under the Royal Decrees have withdrawn their claims from the court proceedings. It is expected that more claimants will withdraw their court actions for the same reason.

- 4.2 The Spanish Government has taken legal action in the Criminal Court in Corcubi3n on its own behalf and on behalf of regional and local authorities as well as on behalf of 971 other claimants or groups of claimants. A number of other claimants have also taken legal actions and the Court is assessing whether these claimants are eligible to join the proceedings.

5 Court actions in France

- 5.1 The French Government and 227 other claimants have taken legal action against the shipowner, the London Club and the 1992 Fund in 16 courts in France requesting compensation totalling some €31 million (£88.7 million), including €67.7 million (£45.8 million) claimed by the Government. A number of claimants have received compensation from the Fund and have undertaken to withdraw their court actions, but as at 30 September 2007 only five actions had been officially withdrawn, bringing the number of actions to 223 and the total claimed amount to €27.5 million (£86.3 million).

- 5.2 In March 2003 two oyster farmers unions and an association brought an action, which is also included in the actions referred to in paragraph 5.1, against the shipowner, the London Club, the owner of the cargo/charterer of the vessel, the Spanish State, the American Bureau of Shipping (ABS), the classification society of the *Prestige*, and Bureau Veritas^{<9>}. In June 2006 the Fund was joined in the proceedings as a defendant.

6 Court actions in Portugal

- 6.1 The Portuguese Government took legal action in the Maritime Court in Lisbon against the shipowner, the London Club and the 1992 Fund claiming compensation for €4.3 million (£2.9 million). Following the settlement of the claim referred to in paragraph 2.10, the Portuguese State withdrew its action in December 2006.

7 Court actions in United States

Claim and counterclaim

- 7.1 The Spanish State has taken legal action against ABS before the Federal Court of first instance in New York requesting compensation for all damage caused by the incident, estimated initially to exceed US\$700 million (£348 million)^{<10>} and estimated later to exceed US\$1 000 million (£497 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.
- 7.2 ABS denied the allegation made by the Spanish State and in its turn took action against the State, arguing that if the State had suffered damage this was caused in whole or in part by its own negligence. ABS made a counterclaim and requested that the State should be ordered to indemnify ABS for any amount that ABS may be obliged to pay pursuant to any judgement against it in relation to the *Prestige* incident. The New York Court dismissed the counterclaim by ABS on the ground that the Spanish State was entitled to sovereign immunity. ABS sought reconsideration by the Court or permission to appeal.

^{<8>} Some 397 claims under the Royal Decrees have been rejected by the Spanish Government.

^{<9>} The classification society that had issued the ISM certification for the *Prestige*.

^{<10>} The conversion of the US\$ has been made on the basis of the exchange rate as at 30 August 2007 (US\$1 = £0.497).

- 7.3 In July 2006 the New York Court confirmed its decision on the Spanish State entitlement to sovereign immunity, but granted ABS permission to resubmit its counterclaim on different grounds.
- 7.4 In July 2006 ABS resubmitted its counterclaim, designed to fall within the sovereign immunity exception in that it does not seek relief exceeding in amount or different in kind from that sought by Spain. ABS sought indemnity from the Spanish State in the event that any third party obtained a judgement against ABS as a result of the incident. In September 2006 the Spanish State requested that the ABS counterclaim be dismissed on the grounds that the Court lacked subject matter jurisdiction. The New York Court has not yet taken any decision on this request.

ABS acting as an agent or servant of the shipowner

- 7.5 In August 2005 ABS submitted a request to the New York Court for a summary judgement dismissing the Spanish State's action. ABS argued that it was an agent or servant of the shipowner and that therefore in accordance with Article III.4(a) of the 1992 Civil Liability Convention no claim for compensation for pollution damage could be made against it unless the damage resulted from ABS's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. ABS also maintained that since the United States was not a Contracting State to the 1992 Civil Liability Convention and the pollution damage had occurred in Spain, the United States Courts were not competent to hear the case. The Court has not yet taken a decision on the request.

Discovery of the criminal file in Corcubión

- 7.6 As part of the discovery procedure in the New York litigation, ABS requested production by the Spanish State of all documents and material forming part of the file of the Criminal Court in Corcubión investigating the *Prestige* incident, as well as all the documents and material reviewed by the Spanish Permanent Commission for the Investigation of Maritime Accidents. The Spanish State responded, asserting that the requested documents and material were protected from disclosure by privilege under Spanish procedural law. In August 2005, after having taken into account the various interests involved, the judge supervising discovery denied the Spanish State's assertion of privilege and ordered the production of the documents. The Spanish State appealed against this decision.
- 7.7 In September 2005, the Spanish State submitted a petition to the Criminal Court in Corcubión maintaining that these documents and material were privileged under Spanish procedural law and could not be provided to ABS. The Criminal Court decided that these documents and material were privileged to the parties who had joined in the criminal proceedings and should therefore not be made available to ABS.
- 7.8 In August 2006 the New York Court rejected the appeal by the Spanish State. The Court considered that both parties to the proceedings should have access to the same material and that failure by the Spanish State to make the documents and material requested available to ABS would place ABS in a situation of unfair disadvantage in that it would affect ABS's right of defence. In a decision which is not subject to appeal, the Court ordered the Spanish State to produce the documents and material by 30 August 2006.
- 7.9 The Spanish State reviewed its position and in August 2006 submitted a request to the Court in Corcubión to be authorised to disclose to ABS the documents and material referred to above. The Spanish State argued that the decisions by the New York Court and the Corcubión Court placed the Spanish State in a difficult position in that a New York Court had ordered the State to do something, namely to disclose all documents in the Corcubión Court file, and the Court in Corcubión had ordered the State to do the contrary, namely not to disclose those documents. The Spanish State mentioned that a confidentiality agreement had been concluded between the State and ABS in respect of any documents and material disclosed. The Spanish State further argued that if the documents and materials requested were not made available, it would damage the Spanish State's position before the New York Court. In September 2006, the Court in Corcubión authorised the disclosure to the New York Court of all the documentation relevant to the *Prestige* case. In

January 2007 a lawyer acting on behalf of ABS visited the Court in Corcubión and examined the documents in the Court file.

Discovery of financial records

- 7.10 In June 2006 the Spanish State submitted a request to the New York Court that the Court should order ABS to produce financial records. The Spanish State argued that the financial records would demonstrate that ABS had diverted revenue and resources, and that, as a result, ABS had not adequately addressed surveyor training and staffing deficiencies. ABS maintained that the financial records were not relevant at the liability stage of the litigation.
- 7.11 The New York Court denied the Spanish State's request holding that the financial records were not relevant to the issue of whether or not there were deficiencies in ABS's performance in respect of the *Prestige*. The Spanish State has not appealed against this decision.

Discovery of e-mail communications

- 7.12 In November 2006 the judge supervising discovery ruled on a motion by ABS to compel the Spanish State to produce all e-mail communications from the casualty period of 12 - 20 November 2002. The judge found that the State had failed either to preserve e-mail communications or to conduct a diligent search when ABS first sought production of those communications. Finding that a search for the e-mail communications at this late date may be futile, the judge invited ABS to make a request for the relief, remedy or sanction it deemed appropriate. A request by the Spanish State that the judge should reconsider his decision was denied. The State has appealed.
- 7.13 In view of the judge's invitation, ABS filed a motion seeking sanctions for the Spanish State's failure to produce the e-mail communications. ABS requested dismissal of the action or dismissal of certain parts of the action, or a ruling that at trial an adverse inference should be drawn against the State for its failure to produce the e-mails. ABS requested, in any event, recovery of its costs and fees associated with the dispute over the production of the e-mails.
- 7.14 In June 2007 the New York Court issued an order partly granting and partly denying ABS's motion. The Court has awarded ABS its legal fees incurred in seeking to compel the production of the e-mails by the Spanish State and has ordered ABS to submit an account of the time spent and costs incurred in making its motion. However, the Court did not dismiss the action by the Spanish State, nor any part thereof, as requested by ABS, finding that although the State had a duty to preserve the evidence and had breached that duty, there was no evidence that the State's actions were wilful, intentional, taken in bad faith or the result of gross negligence. In similar terms, the judge did not accept ABS' position that negative inferences should be drawn from the failure of the Spanish State to produce the e-mails, finding that ABS had not proved that the missing e-mails were relevant to its case. The Court has ordered the Spanish State to continue its search for the relevant e-mail records and, if found, to produce them to ABS on an ongoing basis. The Spanish State has not appealed against the New York Court's decision.
- 7.15 ABS has filed a motion asking the judge to partially reconsider his decision. The Spanish State has filed pleadings opposing that motion for reconsideration.
- 7.16 In July 2007 ABS filed a motion seeking an award of legal fees and costs incurred in making its motion to compel discovery, in the amount of \$1.2 million (£600 000). The Spanish State has opposed that motion. There has been no decision from the court as yet.

8 Action to be taken by the Executive Committee

The Executive Committee is invited:

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