



## INCIDENTS INVOLVING THE 1992 FUND

### PRESTIGE

#### Note by the Director

**Objective of document:**

To inform the Executive Committee of the latest developments regarding this incident, in particular of developments in a United States court that may merit the intervention of the 1992 Fund (section 8.3).

**Summary of the incident so far:**

The Bahamas registered tanker *Prestige* broke in two and sank some 260 kilometres west of Vigo (Spain). Approximately 63 200 tonnes of heavy fuel oil were spilled. The oil had a significant impact on fisheries, aquaculture and tourism businesses in Spain and France. Extensive clean up and preventive measures were carried out in Spain and France. Preventive measures were also carried in Portugal.

The shipowner's P&I insurer and the 1992 Fund have established Claims Handling Offices in La Coruña (Spain) and Lorient (France).

Court actions have been initiated in Spain (section 5) and in France (section 6). A court action was also initiated in the United States by the Spanish State against ABS, the Classification Society that certified the *Prestige*, (section 8).

**Recent developments:**

1. The latest claims situation is as follows: claims totalling €763.9 million (£570.5 million)<sup><1></sup> have been received by the office in Spain (cf sections 4.1 and 5) and claims totalling €109.7 million (£81.9 million) have been received by the office in France (cf section 4.2). The Portuguese Government submitted claims for €4.3 million (£3.2 million) in respect of clean up and preventive measures in Portugal (section 4.3). The process of assessing claims both in Spain and France continues. The claims in Portugal were finally assessed and the Portuguese Government accepted this assessment.
2. The Civil Court in Paris rendered a judgement in October 2007 in an action lodged by the owners of a company selling boats (section 6.2).
3. The New York Court has rendered a judgement dismissing the claim by

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In this document conversion of currencies has been made on the basis of the exchange rate as at 7 February 2008 (€ = £0.7469) except in respect of payments made by the 1992 Fund where the conversion has been made at the rate on the date of payment.

the Spanish State on the grounds of lack of jurisdiction. The Spanish State has appealed against the judgement and through its United States lawyers has requested the 1992 Fund to file an *amicus curiae* brief before the New York Court of Appeal. The Director has examined the requests and his recommendation is that the Fund should not file an *amicus curiae* brief (section 8.3).

***Action to be taken:***

Decide whether the 1992 Fund should file an *amicus curiae* brief before the New York Court of Appeal.

## 1 Summary of incident

Ship	<i>Prestige</i>
Date of incident	13.11.02
Place of incident	Spain
Cause of incident	Breaking and sinking
Quantity of oil spilled	Approximately 63 200 tonnes of heavy fuel oil
Area affected	Spain, France and Portugal (preventive measures)
Flag State of ship	Bahamas
Gross tonnage (GT)	42 820 GT
P&I insurer	London Steamship Owners' Mutual Insurance Association (London Club)
CLC Limit	€2 777 986 (£17 million)
STOPIA/TOPIA applicable	No
CLC + FC Limit	€171 520 703 (£128.1 million)
<b>Compensation</b>	
Level of payments	15%/30% subject to conditions
Spain	Two payments to Spanish Government totalling €15 million (£86 million) minus €1 million (£747 000), subject to: <ul style="list-style-type: none"> <li>• Bank guarantee</li> <li>• Undertaking to pay all claimants in Spain</li> </ul>
France	Level of payments at 30% subject to the French Government standing last in the queue and also Total standing last in the queue but after the French Government.
Portugal	Payment to Portuguese Government of €328 488 (£222 600), corresponding to 15% of the assessment of its claim for preventive measures. A further payment to the Portuguese Government will be made in the event that the Executive Committee were to increase the level of payments unconditionally.
<b>Outstanding claims</b>	
Spain	210 claims being assessed, including the Spanish Government's claims
France	38 claims, being assessed, including the French Government's claim
Portugal	Only one claim was submitted and it has been settled
<b>Legal proceedings</b>	
Spain	Criminal proceedings against the master and a civil servant, including some 3 780 compensation claims.
France	Civil proceedings in various courts (228 actions).
Portugal	Legal proceedings started but, after settlement with the Portuguese Government they were discontinued.
United States	Proceedings initiated by the Spanish State against ABS, the Classification Society that certified the <i>Prestige</i> .

## 2 The incident

- 2.1 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.

- 2.2 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.
- 2.3 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.
- 2.4 The *Prestige* had insurance for oil pollution liability with the London Steamship Owners' Mutual Insurance Association (London Club).
- 2.5 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.
- 2.6 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 2003 (pages 105-109).

### 3 Claims for compensation

#### 3.1 Spain

- 3.1.1 As at 7 February 2008 the Claims Handling Office in La Coruña had received 842 claims totalling €763.9 million (£570.5 million). These include twelve claims from the Spanish Government totalling €713.6 million (£533 million) submitted during the period October 2003 – December 2007.
- 3.1.2 The table below provides a breakdown of the different categories of claims received by the Claims Handling Office in La Coruña as at 7 February 2008.

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 <sup>&lt;2&gt;</sup>
Tourism	14	688 303
Fish processors/vendors	299	20 027 881
Miscellaneous	74	1 761 785
Spanish Government	12	713 646 135
<b>Total</b>	<b>842</b>	<b>763 910 418</b>

- 3.1.3 As at 7 February 2008, 760 (91.57%) of the claims other than those of the Spanish Government have been assessed for €3.9 million (£2.9 million). Interim payments totalling €514 002 (£370 145)<sup><3></sup> have been made in respect of 162 of the assessed claims, mainly at 30% of the assessed amount. Of the remaining claims three are pending clarification, 176 are awaiting a response from the claimant, 53 are awaiting further documentation, 413 (totalling €29 million (£21.7 million)) have been rejected and 19 were withdrawn by the claimants.

<sup><2></sup> One claim totalling €132 million (£98.6 million) from a group of 58 associations has been withdrawn following a settlement with the Spanish Government.

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

### 3.2 France

3.2.1 By 7 February 2008, 480 claims totalling €109.7 million (£81.9 million) had been received by the Claims Handling Office in France.

Category of claim	No. of claims	Amount claimed €
Property damage	9	87 772
Clean-up	60	10 479 728
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
<b>Total</b>	<b>480</b>	<b>109 721 891</b>

3.2.2 Of the 480 claims submitted to the Claims Handling Office, 92% had been assessed by 7 February 2008. Many of the remaining claims lack sufficient supporting documentation and such documentation has been requested from the claimants. Four hundred and forty two claims had been assessed for €49.6 million (£37 million) and interim payments totalling €4.9 million (£3.56 million) had been made at 30% of the assessed amounts in respect of 318 claims. The remaining claims await a response from the claimants or are being re-examined following the claimants' disagreement with the assessed amount. Fifty-four claims totalling €3.7 million (£2.8 million) had been rejected because the claimants had not demonstrated that a loss had been suffered due to the incident.

3.2.3 In May 2004 the French Government submitted a claim for €7.5 million (£50.4 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 (£23.3 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.

3.2.4 A further 60 claims, totalling €10.5 million (£7.8 million), had been submitted by local authorities for costs of clean-up operations. Forty-four of these claims had been assessed at €4.2 million (£3.1 million). Interim payments totalling €1 million (£0.75 million) have been made in respect of 28 claims at 30% of the assessed amounts.

3.2.5 One hundred and twenty-six claims had been submitted by oyster farmers totalling €2.3 million (£1.75 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 7 February 2008, 120 of them, totalling €1.9 million (£1.4 million), had been assessed at €68 231 (£350 000). Payments totalling €127 539 (£93 677) had been made in respect of 85 of these claims at 30% of the assessed amounts.

3.2.6 As at 7 February 2008 the Claims Handling Office had received 194 tourism-related claims totalling €25.3 million (£18.9 million). One hundred and eighty-three of these claims had been assessed at a total of €12.8 million (£9.6million) and interim payments totalling €3.5 million (£2.6 million) had been made at 30% of the assessed amounts in respect of 135 claims.

### 3.3 Portugal

In December 2003 the Portuguese Government submitted a claim for €3.3 million (£2.5 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 (£746 882), also in

respect of clean up and preventive measures. The claims were finally assessed at €2.2 million (£1.6 million). The Portuguese Government accepted this assessment. 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 payment does not preclude a further payment to the Portuguese Government in the event that the Executive Committee were to increase the level of payments unconditionally.

#### **4 Claims by the Spanish Government**

##### **4.1 Claims submitted**

- 4.1.1 The Spanish Government has submitted twelve claims totalling €13.6 million (£533 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)<sup><5></sup>, 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.
- 4.1.2 In May 2006 the Spanish Government submitted to the 1992 Fund a claim for the costs incurred in the payment of claims based on national legislation (Royal Decrees) that were assessed by the Consorcio de Compensación de Seguros (Consortio)<sup><6></sup>.
- 4.1.3 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 (£4.3 million). The Spanish Government has also submitted claims for the costs incurred by the regions of Galicia for €28 million (£20.9 million), Asturias for €3.3 million (£2.5 million), Cantabria for €9.4 million (£36.9 million) and Basque Country for €5.6 million (£34.1 million).
- 4.1.4 In October and December 2007 the Spanish Government submitted claims totalling €9.3 million (£44.3 million) on subrogation for the compensation payments made by the Government to individual claimants as assessed by the Consorcio.
- 4.1.5 The 1992 Fund's experts are examining the claims referred to in paragraphs 4.1.3 and 4.1.4.
- 4.1.6 The Spanish Government has 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.

##### **4.2 Removal of oil from the wreck**

- 4.2.1 The claim for the removal of the oil from the wreck, initially for €109.2 million (£81.6 million), was reduced to €24.2 million (£18 million) to take account of funding obtained from another source (see below).
- 4.2.2 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.

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<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.

### 4.3 Payments to the Spanish Government

- 4.3.1 The first claim received from the Spanish Government in October 2003 for €383.7 million (£286.6 million) was assessed on an interim basis by the Director in December 2003 at €107 million (£79.9 million), and the 1992 Fund made a payment of €1 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 (£226.3 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, €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.
- 4.3.2 In March 2006 the 1992 Fund made an additional payment of €6 365 000<sup><7></sup> (£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).

### 4.4 Progress on the assessment

- 4.4.1 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.
- 4.4.2 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 has been analysed by the 1992 Fund's experts and a re-assessment has been issued in this connection.
- 4.4.3 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.
- 4.4.4 In November 2007 a meeting was held with representatives of the Spanish Government to discuss a provisional assessment carried out in relation to the losses suffered in the fisheries sector as a result of the incident. A number of queries were raised by the Spanish Government which the 1992 Fund's experts are considering.
- 4.4.5 Further discussions between representatives of the Spanish Government and the 1992 Fund are ongoing.

## 5 Court actions in Spain

- 5.1 Some 3 780 claims have been lodged in the legal proceedings before the Criminal Court in Corcubión (Spain). Six hundred and seventeen of these claims involve persons who have submitted claims directly to the London Club and 1992 Fund through the Claims Handling Office in

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<sup><7></sup> The Director was authorised to pay the Spanish Government €7 365 000 (£42 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.

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. The Claims Handling Office has dealt with 102 of the claims submitted in court, out of which two have been settled and paid for an amount of €2 140 (£1 598).

- 5.2 Some 1 850 of these claims have been paid by the Spanish Government under the Royal Decrees<sup><8></sup> 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.
- 5.3 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 1 308 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.

## **6 Court actions in France**

- 6.1 The French Government and 227 other claimants have taken legal action against the ship-owner, the London Club and the 1992 Fund in 16 courts in France requesting compensation totalling some €22 million (£91.1 million), including €67.7 million (£50.6 million) claimed by the Government.

### **6.2 Judgement by the Civil Court in Paris**

*Claim by the owners of a company in liquidation*

- 6.2.1 The owners of a company selling boats, which had been liquidated in 2004, submitted a claim for €403.205 (£301 146) for the loss of the capital they had invested in the company. The 1992 Fund had assessed the loss of income suffered by the claimant in 2003 as a result of the reduction in boat sales in the amount of €21 452 (£16 022). However the Fund rejected the claim for loss of the capital invested in the company since it considered that the owners had not established a link of causation between the liquidation of the company and the contamination caused by the incident. The owners of the company brought proceedings before the Civil Court in Paris.
- 6.2.2 In a judgement rendered in October 2007 the Court stated that the Fund's criteria for admissibility of claims followed good sense and observed that prior to the incident the financial status of the company was not strong enough to survive in a competitive market. The Court held that the claimants had not provided evidence of the alleged loss nor of a link of causation between the alleged loss and the contamination and for these reasons rejected the claim. The claimants have not appealed against the judgement.

## **7 Court actions in Portugal**

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 (£3.2 million). Following the settlement of the claim referred to in paragraph 3.3.1, the Portuguese State withdrew its action in December 2006.

## **8 Court actions in United States**

### **8.1 Claim and Counterclaim**

- 8.1.1 The Spanish State has taken legal action against American Bureau of Shipping (ABS) before the Federal Court of first instance in New York requesting compensation for all damage caused by the

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<sup><8></sup> Some 397 claims under the Royal Decrees have been rejected by the Spanish Government.

incident, estimated initially to exceed US\$700 million (£360.5 million)<sup><10></sup> and estimated later to exceed US\$1 000 million (£515 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.

- 8.1.2 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.
- 8.1.3 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.
- 8.1.4 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.

## 8.2 Detailed information regarding the court action

Subsequently, a number of events took place during the proceedings regarding the discovery of the criminal file in Corcubión, financial records and e-mail communications. Details about these events can be found in document 92FUND/EXC.38/7, paragraphs 7.6 to 7.16. Two further recent events in this court case are set out in paragraph 8.3.

## 8.3 ABS acting as 'the pilot or any other person, (...), who performs services for the ship'

- 8.3.1 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 or an 'other person who...performs services for the ship' and that, therefore, in accordance with Article III.4(a) and (b) 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 under Article IX.1 of the 1992 Civil Liability Convention all actions for compensation, such as that pursued by the Spanish State in the New York Court, could only be brought in the courts of a Contracting State. Since the United States was not a Contracting State to the 1992 Civil Liability Convention and the pollution damage had occurred in Spain, ABS argued that the United States Courts were not competent to hear the case.
- 8.3.2 The Spanish State opposed the request by ABS, arguing that classification societies could not be considered either agents or servants of the shipowner or a person who performs services for the ship, within the meaning of Article III.4(a) and (b) of the 1992 Civil Liability Convention respectively. Spain denied that ABS fitted within Article III.4(b) as 'the pilot or any other person who, without being a member of the crew, performs services for the ship', arguing that 'any other person' referred to any other person similar to a pilot or a member of the crew in their relationship with the owner, and who performs services of the kind performed by a pilot or a member of the crew of the ship, and that 'any other person' as used in Article III.4(b) referred to persons involved in the navigation or

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<sup><10></sup> The conversion of the US\$ has been made on the basis of the exchange rate as at 7 February 2008 (US\$1 = £0.5150).

operation of the vessel on the incident voyage in question. In support of its argument, the Spanish State relied upon the *ejusdem generis* rule of construction, which provides that when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.

- 8.3.3 In support of its motion, Spain submitted declarations from legal experts that had attended the 1969 and 1984 diplomatic conferences. Both experts' declarations take the position that classification societies were not intended to be covered by Article III.4(b).
- 8.3.4 The Spanish State further argued that since the United States was not a signatory to the 1992 Civil Liability Convention, the jurisdictional provisions of Article IX.1 of the Convention were not binding on its courts.
- 8.3.5 In January 2008 the New York Court accepted ABS's argument that ABS fell into the category of 'other persons' performing services for the ship under Article III.4(b) of the 1992 CLC. The Court argued that the text of the treaty had to be interpreted in accordance with the ordinary meaning given to the terms of the treaty in their context and in light of its object and purpose. It further argued that the *ejusdem generis* rule of construction did not apply because it was only to be used where there was uncertainty as to the meaning of a particular clause in a statute. The court found no uncertainty or ambiguity in the wording of Article III.4(b) and, therefore, held it did not need to refer to *ejusdem generis*, negotiation history or other extrinsic sources.
- 8.3.6 The Court further argued that under Article IX.1 of the 1992 CLC Spain could only make claims against ABS in its own courts and it therefore granted ABS's motion for summary judgement, dismissing the Spanish State's claim.
- 8.3.7 In its decision, the Court also denied all pending motions as now being non actionable, except for the pending motions over sanctions for Spain's failure to comply with certain discovery requests relating to e-mails (cf section 9.4).
- 8.3.8 The Spanish State has appealed against the Court's decision.

*Request for the filing of an amicus curiae brief in support of the Spanish State appeal*

- 8.3.9 The legal firm in the United States acting for the Spanish State in this case has approached the 1992 Fund's lawyer in the United States to request from the Fund the filing of an *amicus curiae* brief in support of the Spanish State appeal. The purpose of an *amicus curiae* brief is not merely to support one party's legal position, but to bring to the court's attention information on a point of law or some other aspect of the case, including the possible impact of the decision, that will assist the court in deciding the matter before it. Approval of the Court of Appeal is granted if the party wishing to file the *amicus curiae* brief explains why it has a reasonable interest in the outcome of the case.
- 8.3.10 The Executive Committee may wish to consider whether the Court's decision is contrary to the meaning and intent of the 1992 Civil Liability Convention, specifically, to the correct interpretation of Article III.4(b). In its brief to the Court Spain has argued that the object and purpose of the 1992 CLC is to provide compensation, and that to broaden the intended classes of protected parties under Article III.4 would prevent plaintiffs from seeking compensation from every possible tortfeasor. The Spanish State has also argued that a broad enforcement of Article IX.1 could prevent a shipowner, pursuing recourse under Article III.5, from pursuing a tortfeasor where that party was not subject to jurisdiction in the Contracting State.

*Director's considerations*

- 8.3.11 The Director has considered the request without, having studied the issues in depth as yet, since the request for an *amicus curiae* brief had only been received shortly before the issuing of this document.
- 8.3.12 As regards the substantive question, the Director is of the opinion that the decision taken by the Court that ABS, as a classification society, falls under the provision of Article III.4(b), of the 1992 Civil Liability Convention, could well be criticised.
- 8.3.13 Looking in particular at the structure of Article III.4(b) it would seem that the provision is meant to incorporate persons who, while not (formally) being crew members, perform services directly to the ship in the context of its normal, day to day, operations. The fact that the pilot is explicitly mentioned, as well as the proviso 'without being a member of the crew', seem to signify that a close link of the person's services with the core operations of the ship was intended to be required in order to be covered by the provision. It appears questionable whether a classification society, which carries out a technical survey of the ship at certain, usually quite long, intervals, should be considered such a person by simply relying on the very general part of the language of the provision ('... any other person who ... performs services to the ship').
- 8.3.14 In this context it is also worth noting that, in a similar situation, the Criminal Court in Paris in the *Erika* trial recently came to the opposite conclusion, ie that RINA, the classification society involved in that case could not be considered to fall under Article III.4(b) of the 1992 Civil Liability Convention (document 92FUND/EXC.40/4, section 6).
- 8.3.15 However, apart from the substantive question as to whether these decisions are right or wrong, there are other considerations to be taken into account.
- 8.3.16 Firstly, it is questionable whether it would be appropriate for the Fund as an intergovernmental organisation to get involved in legal proceedings in a non-Member State which essentially address issues outside the scope of the Convention, or to express an opinion on the correct interpretation of any legal term by the courts of a non-Member State. This would perhaps be even more so where a Member State of the Organisation is one of the parties in the proceedings. Would the Fund, for instance, also be expected to file, in a similar case, an *amicus curiae* brief speaking against the interpretation supported by one of its Member States?
- 8.3.17 Furthermore, it is questionable whether it would be appropriate for the Fund to get involved in legal proceedings not directly related to the fulfilment of its core functions under the Conventions, in particular the payment of compensation to victims of oil pollution incidents in Member States. This was also an important consideration when the decision was taken not to intervene in the criminal proceedings which recently took place in France as a result of the *Erika* incident.
- 8.3.18 Another consideration could be, that the decision was taken in a lower court in a State which is not a Member State of the 1992 Fund, which would probably make the decision of relative value as a precedent for future cases to be judged in a Member State on the basis of the Conventions.
- 8.3.19 Finally, and perhaps most importantly, a decision to file an *amicus curiae* brief would to some extent mean a diversion from the decision made by the Executive Committee at its 26th session, not to take recourse action against ABS in the United States, a non-Member State of the 1992 Fund, and to defer any decision on recourse action in Spain until further details surrounding the cause of the *Prestige* incident came to light (document 92FUND/EXC.26/11, paragraph 3.7.71).
- 8.3.20 On the basis of these considerations, the Director would, on balance, not recommend to file an *amicus curiae* brief.

9 **Action to be taken by the Executive Committee**

The Committee is invited:

- (a) to take note of the information contained in this document;
  - (b) to decide whether to file an *amicus curiae* brief in support of the Spanish State's appeal; and
  - (c) to give the Director such instructions in respect of matters dealt with in this document as it may deem appropriate.
-