



## INCIDENTS INVOLVING THE 1992 FUND

### PRESTIGE

#### Note by the Director

<b>Objective of document:</b>	To inform the Executive Committee of the latest developments regarding this incident.
<b>Summary of the incident so far:</b>	<p>The Bahamas registered tanker <i>Prestige</i> 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. Some preventive measures were also carried out in Portugal.</p> <p>The shipowner's P&amp;I insurer and the 1992 Fund have established Claims Handling Offices in La Coruña (Spain) and Lorient (France).</p> <p>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 <i>Prestige</i>, (section 9).</p>
<b>Recent developments:</b>	<ol style="list-style-type: none"><li>1. The latest claims situation is as follows: claims totalling €1 018.8 million (£807.8 million)<sup>&lt;1&gt;</sup> have been received by the office in Spain (cf sections 3.1 and 4) and claims totalling €109.7 million (£87 million) have been received by the office in France (cf section 3.2). The Portuguese Government submitted claims for €4.3 million (£3.2 million) in respect of clean up and preventive measures in Portugal (section 3.3). 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.</li><li>2. Two recent judgements by a French court, in which the Court agreed with the Fund's arguments, are reported in section 7.</li></ol>
<b>Action to be taken:</b>	Information to be noted.

<sup><1></sup> Conversion of currencies has been made on the basis of the exchange rate as at 12 May 2008 (€1 = £0.7929) except in respect of payments made by the 1992 Fund where the conversion has been made at the rate of exchange on the date of payment.

## 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 (£18 million)
STOPIA/TOPIA applicable	No
CLC + FC Limit	€1 715 207 703 (£136 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.
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	The 14 claims by the Spanish Government are being assessed. Some 200 other claims are awaiting a reply by the claimant.
France	36 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 (234 actions).
Portugal	Legal proceedings were started, but discontinued after settlement with the Portuguese Government.
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 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 9 May 2008 the Claims Handling Office in La Coruña had received 844 claims totalling €1 018.8 million (£807.8 million). These include 14 claims from the Spanish Government totalling €68.5 million (£767.9 million).

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 9 May 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	14	968 524 084
<b>Total</b>	<b>844</b>	<b>1 018 788 367</b>

3.1.3 As at 9 May 2008, 760 (91.57%) of the claims other than those of the Spanish Government have been assessed for €3.9 million (£3 million). Interim payments totalling €518 485 (£411 000)<sup><3></sup> have been made in respect of 168 of the assessed claims, mainly at 30% of the assessed amount. Of the remaining claims three are pending clarification, 174 are awaiting a response from the claimant, 53 are awaiting further documentation, 413 (totalling €9.2 million (£23 million)) have been rejected and 19 were withdrawn by the claimants.

<sup><2></sup> One claim totalling €132 million (£104.7 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 9 May 2008, 481 claims totalling €109.7 million (£87 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	195	25 268 942
Fish processors/vendors	9	301 446
Miscellaneous	19	2 029 820
French Government	1	67 499 154
<b>Total</b>	<b>481</b>	<b>109 721 891</b>

- 3.2.2 Of the 481 claims submitted to the Claims Handling Office, 92% had been assessed by 9 May 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 €49.8 million (£39.5 million) and interim payments totalling €5 million (£4 million) had been made at 30% of the assessed amounts in respect of 321 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 (£3 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 €67.5 million (£53.5 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 (£24.7 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 (£8.3 million), have been submitted by local authorities for costs of clean-up operations. Forty-six of these claims have been assessed at €4.3 million (£3.4 million). Interim payments totalling €1 million (£800 000) have been made in respect of 29 claims at 30% of the assessed amounts.
- 3.2.5 One hundred and twenty-six claims have been submitted by oyster farmers totalling €2.3 million (£1.85 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 have examined these claims and as at 9 May 2008, 120 of them, totalling €2.3 million (£1.82 million), had been assessed at €468 231 (£371 000). Payments totalling €127 539 (£100 000) have been made in respect of 85 of these claims at 30% of the assessed amounts.
- 3.2.6 As at 9 May 2008 the Claims Handling Office had received 195 tourism-related claims totalling €25.3 million (£20 million). One hundred and eighty-five of these claims had been assessed at a total of €12.9 million (£10.2 million) and interim payments totalling €3.5 million (£2.8 million) had been made at 30% of the assessed amounts in respect of 137 claims.

3.3 Portugal

In December 2003 the Portuguese Government submitted a claim for €3.3 million (£2.6 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 (£792 900), 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**

4.1.1 Between October 2003 and March 2008 the Spanish Government submitted a total of fourteen claims for an amount of €68.56 million (£768 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), tax relief for businesses affected by the spill, administration costs, costs relating to publicity campaigns, costs incurred by local authorities and paid by the Government, costs incurred in the payment of claims based on national legislation (Royal Decrees)<sup><4></sup>, costs incurred by 67 towns that had been paid by the Government, costs incurred by the regions of Galicia, Asturias, Cantabria, Basque Country and costs incurred in respect of the treatment of the oily residues.

4.1.2 The 1992 Fund's experts are examining the claims by the Spanish Government.

##### **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 (£86.6 million), was reduced to €24.2 million (£19.2 million) to take account of funding obtained from another source (see paragraph 4.4.3).

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.

##### **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 (£304.2 million) was assessed on an interim basis by the Director in December 2003 at €107 million (£84.8 million), and the 1992 Fund made a payment of €16 050 000 (£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 (£240.2 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.

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<sup><4></sup> For details regarding the scheme of compensation set up by the Spanish Government reference is made to the Annual Report 2006, pages 109-111.

4.3.2 In March 2006 the 1992 Fund made an additional payment of €56 365 000<sup><5></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 Legal proceedings in Spain

5.1 Some 3 780 claims have been lodged in the legal proceedings before the Criminal Court in Corcubi3n (Spain). Six hundred and eighteen of these claims involve persons who have submitted claims directly to the 1992 Fund through the Claims Handling Office in La Coru3na. Details of the claims made in some of these court actions have been provided by the Court and are being examined by the experts engaged by the 1992 Fund. The Claims Handling Office has dealt with 102 of the claims submitted in court.

5.2 One thousand nine hundred and sixty six of these claims have been paid by the Spanish Government under the Royal Decrees<sup><6></sup> or by the 1992 Fund through the Claims Handling Office in La Coru3na. 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 1 619 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.

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<5> The Director was authorised to pay the Spanish Government €57 365 000 (£45.5 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.

<6> Some 397 claims under the Royal Decrees have been rejected by the Spanish Government.

## **6 Legal proceedings in France**

- 6.1 The French Government and 233 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 (£103.9 million), including €67.7 million (£57.5 million) claimed by the Government.
- 6.2 The courts have granted the stay of proceedings in 29 legal actions in order to give the parties time to discuss the claims out of court.
- 6.3 One hundred and ninety seven French claimants, including various communes, have joined the legal proceedings in Corcubión, Spain.

## **7 Court Judgements in France**

### **7.1 Judgement by the Court of first instance in Mont-de-Marsan**

- 7.1.1 A company making reservations in bed and breakfasts brought an action in the Court of first instance of Mont-de-Marsan claiming €25 501 (£20 220) for loss of income incurred as a result of the *Prestige* incident. The company had been created in March 2003 but had closed down in the same year. The 1992 Fund had assessed the losses by the claimant on the basis of the results recorded by other companies in the same area having a similar activity in the amount of €451 (£360). The claimant who had based the claim on a business plan did not agree with the Fund's assessment.

- 7.1.2 In a judgement rendered in March 2008, the Court agreed with the 1992 Fund's assessment of the claim.

- 7.1.3 At the date when this document was issued the claimant had not appealed against the judgement.

### **7.2 Civil Court of Rochefort-sur-Mer**

- 7.2.1 Two oyster farmers associations and an association for the defence of the professionals of the sea brought a legal action in the Civil Court of Rochefort-sur-Mer against the 1992 Fund, the shipowner, its insurer, the Spanish State and ABS claiming €100 million (£79.3 million), reduced later to €10 million (£7.9 million). The claim was for economic losses and damage to their profession's image. The 1992 Fund rejected the claim as being not admissible under the 1992 Civil Liability and Fund Conventions. The Fund also argued in Court that the claims were time-barred since the claimants had failed to bring a legal action against the 1992 Fund within three years of the date when the damage occurred, nor had they notified the 1992 Fund of an action against the shipowner, within this period.

- 7.2.2 In a judgement rendered in May 2008 the Court agreed with the 1992 Fund's arguments and rejected the claim.

## **8 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 (£3.4 million). Following the settlement of the claim referred to in paragraph 3.3, the Portuguese State withdrew its action in December 2006.

## **9 Court actions in the United States**

### **9.1 Background information**

For details about the claim submitted by the Spanish State against American Bureau of Shipping (ABS), ABS's counterclaim, the defence of sovereign immunity, the discovery of the criminal file in

Corcubión, of financial records and of e-mail communications reference is made to document 92FUND/EXC.38/7, section 7.

- 9.2 ABS's defence that it acted as 'the pilot or any other person, (...), who performs services for the ship'
- 9.2.1 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 fell under the category of 'the pilot or any other person who, without being a member of the crew, performs services for the ship' and that, therefore, in accordance with Article III.4(a) and (b) of the 1992 Civil Liability Convention (1992 CLC) no claim for compensation for pollution damage could be made against it, unless the damage resulted from its 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 CLC 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 CLC and the pollution damage had occurred in Spain, ABS argued that the United States Courts were not competent to hear the case.
- 9.2.2 The Spanish State opposed the request by ABS, arguing that a classification society could not be considered either an agent or servant 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. As regards Article III.4(b), Spain argued that 'any other person' only referred to a person similar to a pilot or a member of the crew in their relationship with the owner, who performs services of the kind performed by a pilot or a member of the crew of the ship and who is involved in the navigation or 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 shall be interpreted to include only persons or things of the same type as those listed.
- 9.2.3 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).
- 9.2.4 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.
- 9.2.5 In January 2008 the New York Court accepted ABS's argument that ABS fell into the category of 'any other person who performs 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. The Court further ruled 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.
- 9.2.6 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.
- 9.2.7 The Spanish State has appealed against the Court's decision. ABS has also filed an appeal against the court's decision to dismiss its counterclaims for lack of jurisdiction. The Spanish State has also filed a motion with the Court of Appeal seeking to dismiss ABS's appeal.



*Request for the 1992 Fund to file an amicus curiae brief in support of the appeal*

9.2.8 At its 40th session, held in March 2008, the 1992 Fund Executive Committee considered a request by the Spanish State for the 1992 Fund to file an *amicus curiae* brief<sup><7></sup> in support of the Spanish State's appeal. The Executive Committee decided not to file such an *amicus curiae* brief (document 92FUND/EXC.40/11, paragraphs 3.3.10-3.317).

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

The 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.

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<sup><7></sup> 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.