INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS

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1992 Fund Assembly	**92AES20**	
1992 Fund Executive Committee	**92EC66**	●
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INCIDENTS INVOLVING THE IOPC FUNDS—1992 FUND

PRESTIGE

Note by the Secretariat

Objective of document:	To inform the 1992 Fund Executive Committee of the latest developments regarding this incident.
Summary of the incident so far:	The *Prestige* broke in two and sank some 260 kilometres west of Vigo (Spain). Approximately 63 272 tonnes of heavy fuel oil were spilled. The oil had a significant impact on fisheries, aquaculture and tourism businesses in Spain and France and extensive clean up and preventive measures were carried out in both countries. Preventive measures were also carried out in Portugal. Under Spanish law, civil claims may be submitted in criminal proceedings as the criminal court has to decide not only on criminal liability but also on civil liability derived from the criminal action. In November 2013, the Audiencia Provincial in La Coruña (Criminal Court) delivered a judgment finding that the master, the chief engineer of the *Prestige* and the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain, were not criminally liable for damages to the environment. The Criminal Court did not award any compensation to the claimants. Some 19 parties appealed against the judgment to the Supreme Court. In April 2010, France brought a legal action against the American Bureau of Shipping (ABS), the classification society that certified the *Prestige*. The defendants have opposed this action relying on the defence of sovereign immunity. In March 2014, the Court of First Instance in Bordeaux decided that ABS was entitled to sovereign immunity. France appealed against the decision. In October 2012, the 1992 Fund brought a recourse action in the Court of First Instance in Bordeaux against ABS. The proceedings have been stayed pending a final decision in legal proceedings in Spain and France.
Recent developments:	In January 2016, the Spanish Supreme Court rendered its judgment, after consideration of the appeals submitted against the judgment of the Criminal Court. In the judgment the master was found to be criminally liable for damages to the environment, with civil liability. The judgment confirms the acquittal of the chief engineer of the *Prestige* and of the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain. The judgment also found that the shipowner had subsidiary civil liability and was not entitled to limit its liability and that the London Club had civil liability up to the limit of its insurance policy of US$1 000 million.

	The 1992 Fund was found to have civil liability within the limits provided in the 1992 Fund Convention. The judgment decided to defer the quantification of damages to another Court at a later stage. The master has submitted a motion for dismissal of the Supreme Court judgment, arguing mainly that the judgment breaches his fundamental rights of defence, his right to a trial with all the guaranties, and his right to legality.
Action to be taken:	1992 Fund Executive Committee Information to be noted.

1 Summary of incident

Ship	*Prestige*
Date of incident	13.11.2002
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
Flag State of ship	Bahamas
Gross tonnage	42 820 GT
P&I insurer	London Steamship Owners' Mutual Insurance Association Ltd (London Club)
CLC Limit	€22 777 986
CLC + Fund limit	€171 520 703
STOPIA/TOPIA applicable	Not applicable
Level of payments	15 % and 30% (subject to conditions)
Compensation	Spain Two payments to the Spanish Government totalling €115 million minus €1 million, subject to a bank guarantee and an undertaking to pay all claimants in Spain. Total amount paid in Spain to date, including payments to individual claimants, is €114.6 million.
	France Level of payments at 30% subject to the French Government 'standing last in the queue'. Total paid to individual claimants in France is €5.8 million. Portugal Payment to Portuguese Government of €328 488. A further payment to the Portuguese Government would be made in the event that the 1992 Fund Executive Committee were to increase the level of payments unconditionally.
Legal proceedings against the 1992 Fund	Spain In January 2016, the Supreme Court delivered its judgment, finding that: • the master was criminally liable for damages to the environment, with civil liability. • The shipowner was found to have subsidiary civil liability and was not entitled to limit its liability. • The London Club was found to have civil liability up to the limit of its insurance policy of US$1 000 million • The 1992 Fund was found to have civil liability with the limits provided in the 1992 Fund Convention.

	France Civil actions by 120 claimants remain pending in various French courts. Portugal Legal proceedings were started but discontinued after settlement with the Portuguese Government.
Recourse actions	United States A court action was brought by the Spanish State against ABS, the classification society that certified the *Prestige*. In a final ruling, the Court of Appeals rejected the claim by Spain. France France has brought a legal action against ABS. The 1992 Fund has also brought a legal action against ABS to prevent its right to obtain reimbursement from ABS becoming time-barred.

2 Introduction

The background information to this incident is summarised above and provided in more detail at the Annex.

3 Level of payments

Detailed information about the level of payments can be found in section 4.4 of the Annex.

4 Claims for compensation

4.1 Spain

4.1.1 Detailed information regarding the claims situation in Spain can be found in section 6.1 of the Annex.

4.1.2 The claims-handling office in La Coruña received 845 claims totalling €1 037 million. These included 15 claims from the Spanish Government totalling €984.8 million.

4.1.3 The claims, excluding those of the Spanish Government, have been assessed at €3.9 million. The claims by the Spanish Government were assessed at €300.2 million. The Spanish Government has not agreed with this assessment and has decided to maintain its claim in court against the 1992 Fund and other parties.

4.1.4 Payments totalling €666 935 have been made at 30% of the assessed amount, taking into account the aid received, in respect of individual claims submitted in the claims-handling office and in Court. Payments totalling €114 million have been made to the Government (see paragraph 6.1.6 of the Annex).

4.2 France

4.2.1 Detailed information regarding the claims situation in France can be found in section 6.2 of the Annex.

4.2.2 The claims-handling office in Bordeaux received 482 claims totalling €109.7 million. This includes the claims by the French Government totalling €67.5 million.

4.2.3 The individual claims submitted to the claims-handling office were assessed at €19 million. After several reviews, the claim submitted by the French Government has been finally assessed at €42.2 million. The French Government has not agreed with this assessment and has decided to maintain its claim in court against the 1992 Fund and other parties.

4.2.4 Interim payments totalling €5.8 million have been made to individual claimants. No payments have been made to the French Government since it is standing last in the queue.

4.3 Portugal

4.3.1 The Portuguese Government submitted a claim totalling €4.3 million in respect of the costs incurred in clean up and preventive measures.

4.3.2 The claim by the Portuguese Government was finally assessed at €2.2 million. The Portuguese Government has agreed with the assessment and has withdrawn the legal action brought against the 1992 Fund before the Portuguese courts.

4.3.3 The 1992 Fund made a payment to the Portuguese Government of €328 488, corresponding to 15% of the final assessment.

5 Criminal proceedings in Spain

CIVIL CLAIMS IN THE CRIMINAL PROCEEDINGS

5.1 Under Spanish law, civil claims may be submitted in the criminal proceedings as the Criminal Court has to decide not only on criminal liability, but also on civil liability derived from the criminal action.

5.2 The 1992 Fund has been a party to the proceedings from the beginning, as a party with strict civil liability under the 1992 Fund Convention.

5.3 There were 2 531 claims lodged in the legal proceedings before the Criminal Court in Corcubión. This figure includes a legal action brought by the Spanish Government, not only on its own behalf but also on behalf of regional and local authorities and a number of other claimants or groups of claimants. Included in the aforementioned figure are also 174 claims by French parties, including the French Government.

5.4 The total amount claimed in the criminal proceedings in Spain is €2 317 million, including some €1 214 million claimed for pure environmental damage, mainly by the Spanish Government, and some €2.37 million claimed for moral damage by a number of individuals. However, the Spanish Public Prosecutor is still arguing that the total damage in Spain as a result of the incident is €4 328 million and in France €108.7 million, on the basis of a theoretical study on the economic consequences of the *Prestige* incident, which includes the claim by the Spanish Government.

5.5 Some claimants have argued that, since their claims were not against the 1992 Fund but against those deemed criminally liable, the admissibility criteria applicable under the 1992 Civil Liability and Fund Conventions should not be applied in these proceedings. It has further been argued that the shipowner should not be entitled to limit his liability.

5.6 The 1992 Fund has, in its interventions, defended the application of the Conventions in the proceedings.

JUDGMENT OF THE AUDIENCIA PROVINCIAL (CRIMINAL COURT)

5.7 The Audiencia Provincial in La Coruña issued a judgment on 13 November 2013, finding that the master, the chief engineer of the *Prestige* and the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain, were not criminally liable for damages to the environment. The judgment, therefore, did not award any compensation to claimants.

CASSATION APPEAL

5.8 Some 19 parties submitted appeals to the Supreme Court, including the Spanish and French Governments, some individual claimants in Spain, and local and regional authorities in France. Of these parties, only 12 were seeking compensation, namely the Spanish and French Governments, a Spanish regional authority, a French regional authority, seven individuals and the Public Prosecutor, who is representing all victims of the spill in the proceedings.

5.9 The 1992 Fund has participated in the proceedings before the Supreme Court, as a party with strict civil liability under the 1992 Fund Convention, and has submitted pleadings defending the application of the Conventions.

5.10 The London Club did not attend the hearings. The Supreme Court ordered that the Club should be notified of the Criminal Court judgment.

JUDGMENT OF THE SUPREME COURT

5.11 In January 2016, the Spanish Supreme Court rendered its judgment after consideration of the appeals submitted against the judgment of the Criminal Court. The Supreme Court judgment sets aside the judgment of the Criminal Court. The judgment can be found via the Incidents section of the IOPC Funds' website, of which full translations in English and French are also available. A summary of the judgment is given in the paragraphs below.

5.12 Criminal liability

The master

5.12.1 The master was found guilty of a crime against the environment. The judgment confirms the acquittal of the chief engineer of the *Prestige* and of the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain.

5.12.2 The Court considered that the master, as the person responsible for the safe navigation of the ship, including the prevention of pollution, was responsible for the adequacy of the equipment of the ship, undertaking the essential repairs for safe navigation and specially responsible for controlling the weight of the cargo. The Court found that the master had breached his duty of care, with recklessness in relation to the importance of the affected natural resources, and the foreseeability of the risk. The risk was foreseeable in relation to the type and amount of oil transported. In particular, the master:

(a) Agreed to commence the voyage at a time at which it was foreseeable there would be adverse weather conditions given the area the ship had to navigate (Atlantic ocean) and the time of the year (winter).

(b) The ship's voyage to Saint Petersburg was intended to be last voyage of the *Prestige*. The ship was old and had operative deficiencies. However, the master agreed to command the ship for an additional voyage with knowledge of the condition of the ship:

- the automatic pilot was not working and therefore only manual navigation was possible;
- some of the serpentines of the heating system that are meant to heat the cargo to allow manipulation were not working. This condition prevented the internal transfer of oil; and
- the towing system was antiquated and was not operative.

(c) The master allowed the ship to be overloaded with an excess of more than 2000 tonnes of cargo, which caused the ship to exceed its permitted draft. This not only contravened safety regulations but also increased the risk of navigation. The overdraft also made more difficult the salvage operations and did not allow for the safe towing of the ship.

(d) The master placed himself in a situation in which he could not guarantee the safety of the ship against adverse events such as the structural failure that led to the failure of the engine and the fracture of the hull. Such failures are likely in a ship so old, even if a Classification Society had certified the ship as fit for navigation.

(e) The *Prestige* had failed the vetting requirements of two major oil companies.

(f) When the structural failure broke the hull, the master took on sea water ballast in order to bring the ship on an even keel and remedy the list. However, he should have known that the resulting weight would increase the stress on the ship and eventually cause her to fracture. The alternative could have been to make an internal transfer of the oil, but that was not possible due to the faulty heating system. Had it been fully operative it would have facilitated the handling of the cargo.

(g) The master's disobedience of the authorities also increased the risk of the spill.

5.12.3 The master was given a two-year prison sentence, but given the time already served, it is very unlikely he will have to serve any of it.

The chief engineer

5.12.4 With regards to the chief engineer, the Supreme Court upheld the judgment of the Criminal Court, which had not found any proof of failures by the chief engineer in his duties of control, inspection, conservation and maintenance of the ship, and had concluded that, if any negligence could be attributed to the chief engineer, it would not reach the degree of seriousness required by the offence of criminal negligence against the environment, specially taking into account that he was subordinate to the master.

The civil servant (Director General of the Merchant Marine)

5.12.5 With regard to the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain, the Supreme Court upheld the judgment of the Criminal Court, which had found that his actions, mistaken as they might be considered in view of their outcome, did not satisfy the elements of a crime against the environment and criminal damage. In the judgment, the court considered the following:

- In a situation of emergency, after expert advice, the civil servant took a decision that was debatable but partly effective, logical and prudent. His conduct could not be qualified as criminal or even merely negligent, because the decision was conscious and thoughtful in the context of the disaster that occurred but which was not caused by the Spanish Administration.

- Anyone who takes a technical decision in an emergency situation, with expert advice, cannot be considered as negligent, even when the result of the decision is not as hoped or is seen in retrospect as a miscalculation.

- The civil servant acted according to Spanish domestic law, which provides that the danger of sinking, albeit inside a port or a zone in which Spain exercises sovereign rights or jurisdiction, the evident risk to persons, property or the environment, are causes which allow preventing or avoiding the entry or stay of a ship in a port or a place where it might interfere with port activity, navigation or fishing. In addition, international conventions allow coastal States to take all necessary measures to protect the shore and related interests from pollution or threat of pollution resulting from a maritime incident.

- The ship was not under command because the engine had stopped and it was drifting dangerously towards the Spanish coast. The decision was then taken to tow it further from the coast given the risk of grounding on the coast which would have caused a concentrated and intense spill with highly dangerous consequences for the sea, natural resources and all the related activities.

- The possibility of towing the ship to a place of refuge in several ports had been examined but rejected, because of the high risk involved given the state of the ship, in particular its draught as a consequence of the overloading.

- Although the extent of the spill was foreseeable, the magnitude of the damage was not.

- The consequences of the decision to tow the ship out to sea were not obvious, because the excessive spread of the pollution depended on the currents, winds and waves which were not predictable. The judgment therefore did not accept the logic that the greater the distance from the shore, the greater would be the spread of the oil slick.

5.13 Civil liability

5.13.1 Under Spanish criminal law the person with criminal liability has also civil liability for any damage caused by the criminal act.

Civil liability of the master

5.13.2 In relation to the civil liability arising from the criminal act, the Court found the master liable for damages which will be quantified later in subsequent proceedings. The Court found that this civil liability should be established in accordance with civil law. Since it is civil liability arising from a spill from a ship transporting oil, the Court considered that the compensation was regulated by the 1992 Civil Liability and Fund Conventions.

5.13.3 After recognising the channelling of liability under the 1992 Civil Liability Convention (1992 CLC), the Court considered, however, that the master could not benefit from the protection under Article III(4) of the 1992 CLC because the damage was a consequence of the master's recklessness, with the knowledge that the damage could occur. This, the Court argued, justified a finding of civil liability of the master.

Liability of the shipowner

5.13.4 In the judgment, the Court held that the shipowner had subsidiary civil liability. The Court considered that the shipowner was responsible for the lack of proper maintenance of the ship and that the fault that caused the fracture of the ship was due to a structural failure known to the shipowner.

5.13.5 The judgment also stated that the same considerations which applied to the master also applied to the shipowner (see paragraph 5.12.2) The Court therefore considered that the shipowner had acted recklessly and with knowledge that damage would probably result and that therefore, applying Article V(2) of the 1992 CLC, the shipowner could not benefit from the limitation of liability established in the Convention.

Liability of the insurer

5.13.6 The judgment also found that the insurer, the London P&I Club, had direct civil liability, up to the limit of the insurance policy of US$1 000 million. The Court applied domestic law (criminal law, law of insurance and law of maritime transport) to decide that the insurer should pay compensation up to the amount in the policy of insurance.

5.13.7 The Court recognised that under the 1992 CLC the insurers' liability is limited to the amount of the established limitation fund, without envisaging any exceptions. However, the judgment took into account the following:

- By its voluntary absence from the proceedings and raising no objection to its obligation to indemnify, it was incumbent on the insurer to bear the consequences of its lack of procedural diligence.

- The civil liability of the insurer stems from a criminal action, in relation to damages occurring in an area subject to the jurisdiction of the Spanish courts. In that respect, Spanish criminal law expressly states that the liability of the insurer who has assumed a risk is up to the limit established in the insurance policy. In the *Prestige* case the P&I insurance policy for oil pollution risks has a limit of US$1 000 million.

- Spanish Maritime Transport law allows for a direct action against the insurer. According to this, the victim of pollution damage has the right to receive compensation from the insurer up to the limit in the insurance policy and any contractual provision to the contrary in the policy will be invalid. However, since the Maritime Transport Act was not in force at the time of the incident, the Law of Insurance Contract would apply, which provides for the direct action against the insurer.

- Civil liability insurance has not only the purpose of protecting the assets of the insured but also the rights of the individual victims, and the collective interests connected to the environment and natural resources.

Liability of the 1992 Fund

5.13.8 The judgment recognises that the 1992 Fund has strict liability and that this is limited according to the 1992 Fund Convention.

5.14 Damages

5.14.1 The judgment establishes that the quantification of the damages will be made at a later stage in separate legal proceedings in the Criminal Court. The quantification will be based on the evidence submitted by all the parties, including experts' reports.

5.14.2 When considering the damage caused by the incident, the judgment, whilst accepting the strict and limited liability of the 1992 Fund in accordance with the 1992 Fund Convention, suggests that compensation for damages not exactly contemplated in the Convention will not necessarily be excluded. The Court also mentions that when the quantification of the damages is carried out, the aim of which is full reparation for the damages caused, the Court will not be constrained by the criteria contained in the IOPC Funds' Claims Manual, although these criteria may be taken into consideration as guidance by the Court when deciding on the corresponding compensation.

Moral damage

5.14.3 In the judgment, the Court recognises the possibility of moral damage, which includes not only the sense of fear, anger and frustration that may have affected many of the Spanish and French citizens, but also the mark that may have been left by the notion that catastrophes of the *Prestige* kind could affect these citizens at any time. The Court decided that in those cases where moral damage had been claimed, the amount awarded could not exceed 30% of the assessed material damages.

APPEAL BY THE MASTER

5.15 The master has submitted a motion for dismissal of the Supreme Court judgment, arguing mainly that the judgment breaches his fundamental rights of defence. The master also argues that the judgment breaches his right to a trial with all the guaranties. In relation to his prison sentence, the master argues also that the judgment breaches his right to legality.

5.16 In his pleadings the master argues that the Supreme Court has breached its own doctrine and that of the Constitutional Court and the European Court of Human Rights as follows:

- By reversing a judgment acquitting the accused without giving him the opportunity of an oral hearing in which to defend himself against the accusations included in the new judgment.

- By making an assessment of facts that had been proved before the Criminal Court, under the pretence of a legal review and without reporting that the assessment carried out by the Criminal Court was arbitrary or illogical.

- By improvising new "proven facts" and making an assessment of those facts without technical support or substantial reasoning.

6 Civil proceedings in France

6.1 Actions by 120 claimants remain pending in French courts with claims amounting to a total of €79.1 million.

6.2 Some 174 French claimants, including various communes, joined the criminal proceedings in Spain. Some of these claimants have appealed against the judgment of the Audiencia Provincial (Criminal Court) (see section 5 above).

6.3 Legal action by France against ABS

In April 2010, France brought a legal action in the Court of First Instance in Bordeaux against the classification society of the *Prestige*, namely the American Bureau of Shipping (ABS). The defendants opposed this action relying on the defence of sovereign immunity. The Judge referred the case for a preliminary ruling by the Court on the question of whether ABS was entitled to sovereign immunity from legal proceedings. In a judgment rendered in March 2014 the Court decided that ABS was entitled to sovereign immunity as the Bahamas (the flag State of the *Prestige*) would be. The French Government appealed against the judgment.

6.4 Legal action by the 1992 Fund against ABS

6.4.1 Information about the recourse action brought by the 1992 Fund against ABS is provided in detail at the Annex.

6.4.2 Following the decision of the 1992 Fund Executive Committee at its October 2012 session, the 1992 Fund brought a recourse action against ABS in the Court of First Instance in Bordeaux.

6.4.3 ABS submitted points of defence alleging that it was entitled to sovereign immunity as the Bahamas (the flag State of the *Prestige*) would be.

6.4.4 The proceedings in the Bordeaux Court have been stayed.

7 Director's considerations

7.1 The Spanish Supreme Court finds the master criminally liable for the spill. However, it is very unlikely that he will have to serve a prison sentence.

7.2 The finding by the Supreme Court that the master was criminally liable allowed the court not only to establish his civil liability but also that such liability resulted from recklessness and therefore that he could not benefit from the protection afforded by Article III(4) of the 1992 CLC.

7.3 In the Director's view, it is unfortunate that the Supreme Court has taken the decision to reverse the judgment by the Criminal Court which had concluded, after having examined all the evidence available and considered the views provided by the experts during the hearing, that the master was not criminally liable for damage to the environment.

7.4 The Court also finds, applying Article V(2) of the 1992 CLC, that the shipowner had acted recklessly and with knowledge that the damage would probably result and does therefore not have the right to limit his liability.

7.5 In its judgment, the Court finds that the London Club has civil liability up to the maximum amount in its insurance policy. This decision is in breach of the Article V(11) of the 1992 CLC, which provides that even if the owner had lost the right to limit its liability, the insurer can always limit its liability under the Convention. The judgment reaches this decision by applying domestic law (criminal law, law of insurance and law of maritime transport) instead of the Convention.

7.6 In the Director's view this decision is a clear breach of the Convention. Under the Convention the insurer may avail itself of the right to limitation of liability, even if the owner is not entitled to do so.

Ignoring this provision, the Spanish Supreme Court held the insurer liable up to the amount of the ship's insurance for oil pollution US$1 000 million which is a clear contravention of the Convention.

7.7 The judgment also contradicts the Conventions by recognising damages which are not admissible such as moral damage, although it is not clear whether those damages will be enforced against the 1992 Fund. The judgment states that the liability of the 1992 Fund will be limited according to the 1992 Fund Convention.

7.8 The judgment, although providing general criteria for the assessment of damages, does not quantify the losses. The quantification will be made within the proceedings for the execution of the judgment. The 1992 Fund will have to defend such proceedings and argue for the application of the Conventions for each of the claims in the execution of the judgment.

7.9 The compensation amount available for the *Prestige* incident under the Conventions is €171.5 million. Some €121 million in compensation has already been paid to victims of this spill.

7.10 After allowing for the above mentioned payment, a further €27.7 million of compensation is left from the 1992 Fund. The 1992 Fund has already levied all the contributions payable in relation to this incident and has established a Major Claims Fund to pay all the compensation due in respect of this incident.

7.11 Finally, €22.8 million was available from the amount deposited in the Criminal Court in Corcubión by the London Club. However, according to the judgment of the Supreme Court, the shipowner does not have the right to limit its liability and the London Club's liability is not subject to the limit established in the Convention but to its policy of insurance of US$1 000 million.

7.12 Once the quantification of the damages is made by the court, it remains to be seen how the judgment will be enforced against the shipowner and the London Club.

7.13 The Director, with the help of the 1992 Fund's Spanish and French lawyers, will continue to monitor developments in this case and will report to a future session of the 1992 Fund Executive Committee.

8 Action to be taken

1992 Fund Executive Committee

The 1992 Fund Executive Committee is invited to take note of the information contained in this document.

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ANNEX

BACKGROUND INFORMATION—PRESTIGE

1 Incident

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 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 63 272 tonnes of cargo. Over the following weeks oil continued to leak from the wreck at a declining rate. It was subsequently estimated that approximately 13 700 tonnes of cargo remained in the wreck.

2 Impact

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 was heavily contaminated and oil eventually moved into the Bay of Biscay, affecting the north coast of Spain and France. Traces of oil were detected in the United Kingdom (the Channel Islands, the Isle of Wight and Kent).

3 Response operations

3.1 Major clean-up operations were carried out at sea and on shore in Spain. Significant clean-up operations were also undertaken in France. Clean-up operations at sea were undertaken off Portugal.

3.2 Between May and September 2004, some 13 000 tonnes of cargo were removed from the fore part of the wreck. Approximately 700 tonnes were left in the aft section.

3.3 In anticipation of a large number of claims, and after consultation with the Spanish and French authorities, the London Club (the shipowner's insurer) and the 1992 Fund established claims-handling offices in La Coruña (Spain) and Bordeaux (France). In September 2006 the 1992 Fund decided to close the claims-handling office in Bordeaux. Given the volume of work arising from the legal proceedings in Spain, as at October 2015, the claims-handling office in La Coruña remained open.

4 Applicability of the Conventions

4.1 At the time of the incident France, Portugal and Spain were Parties to the 1992 Civil Liability Convention (1992 CLC) and the 1992 Fund Convention. The *Prestige* was insured for oil pollution liability with the London Steamship Owners' Mutual Insurance Association Ltd (London Club).

4.2 The limitation amount applicable to the *Prestige* under the 1992 CLC is approximately 18.9 million SDR or €22 777 986. In May 2003, the shipowner deposited this amount with the Criminal Court in Corcubión (Spain) for the purpose of constituting the limitation fund required under the 1992 CLC.

4.3 The maximum amount of compensation under the 1992 CLC and the 1992 Fund Convention is 135 million SDR which corresponds to €171 520 703[<1>].

4.4 Level of payments

4.4.1 Unlike the policy adopted by the insurers in previous IOPC Funds' cases, the London Club decided not to make individual compensation payments up to the shipowner's limitation amount. This position was taken following legal advice that if the Club were to make payments to claimants in line with past practice, it was likely that these payments would not be taken into account by the Spanish courts when the shipowner set up the limitation fund, with the result that the Club could end up paying twice the limitation amount.

[<1>] The rate of exchange on 7 February 2003 was 1 Euro = 0.78707700 SDR.

4.4.2 In May 2003, the 1992 Fund Executive Committee decided that the 1992 Fund's payments should for the time being be limited to 15% of the loss or damage actually suffered by the respective claimants as assessed by the experts engaged by the Fund and the London Club. The decision was taken in the light of the figures provided by the delegations of the three affected States and an assessment by the 1992 Fund's experts, which indicated that the total amount of the damage could be as high as €1 000 million. The Executive Committee further decided that the 1992 Fund should, in view of the particular circumstances of the *Prestige* case, make payments to claimants, although the London Club would not pay compensation directly to them.

4.4.3 In October 2005, the Executive Committee considered a proposal by the Director for an increase in the level of payments. This proposal was based on a provisional apportionment between the three States concerned of the maximum amount payable by the 1992 Fund on the basis of the total amount of the admissible claims as established by the assessment which had been carried out at that time. The proposed increase was also subject to the provision of certain undertakings and guarantees by the States of France, Portugal and Spain.

4.4.4 On the basis of the figures presented by the Governments of the three States affected by the incident, which indicated that the total amount of the claims could be as high as €1 050 million, it was considered likely that the level of payments would have to be maintained at 15% for several years unless a new approach could be taken. The Director therefore proposed that, instead of the usual practice of determining the level of payments on the basis of the total amount of claims already presented and possible future claims, it should be determined on an estimate of the final amount of admissible claims against the 1992 Fund, established either as a result of agreements with claimants or by final judgments of competent courts.

4.4.5 On the basis of an analysis of the opinions of the joint experts engaged by the London Club and the 1992 Fund, the Director considered that it was unlikely that the final admissible claims would exceed the following amounts:

State	**Estimated final admissible claims (€) (rounded figures)**
Spain	500 million
France	70 million
Portugal	3 million
Total	**573 million**

4.4.6 The Director therefore considered that the level of payments could be increased to 30%[<2>] if the 1992 Fund was provided with appropriate undertakings and guarantees from the three States concerned to ensure that it was protected against an overpayment situation and that the principle of equal treatment of victims was respected. The Executive Committee agreed with the Director's proposal.

4.4.7 In December 2005, the Portuguese Government informed the 1992 Fund that it would not provide a bank guarantee and as a consequence would only request payment of 15% of the assessed amount of its claim.

4.4.8 In January 2006, the French Government gave the required undertaking to 'stand last in the queue' in respect of its own claim, until all other claimants in France had been compensated.

4.4.9 In March 2006, the Spanish Government gave the required bank guarantee and undertaking to compensate all claimants in Spain and, as a consequence, a payment of €56 365 000 was made in March 2006. 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. These payments would be made on behalf of the Spanish Government in compliance with its undertaking, and any amount left after paying all the

[<2>] €171.5 million/€573 million = 29.9%.

claimants in the claims-handling office would be returned to the Spanish Government. If the amount of €1 million were to be insufficient to pay all the claimants who submitted claims to the claims-handling office, the Spanish Government undertook to make payments to these claimants up to 30% of the amount assessed by the London Club and the 1992 Fund.

4.4.10 Since the conditions set by the Executive Committee had been met, the Director increased the level of payments to 30% of the established claims for damage in Spain and in France with effect from 5 April 2006.

5 Investigations into the cause of the incident[3]

5.1 An investigation into the cause of the incident was carried out by the Bahamas Maritime Authority (the authority of the Flag State). The report of the investigation was published in November 2004.

5.2 The Spanish Ministry of Public Works (Ministerio de Fomento) also carried out an investigation into the cause of the incident through the Permanent Commission on the Investigation of Maritime Casualties, which is tasked with determining the technical causes of maritime accidents.

5.3 The French Ministry of Transport and the Sea (Secrétariat d'État aux Transports et à La Mer) carried out a preliminary investigation into the cause of the incident through the General Inspectorate of Maritime Affairs, Investigations Bureau, accidents/sea (Inspection générale des services des affaires maritimes, Bureau enquêtes, accidents/mer (BEAmer)).

5.4 Shortly after the incident, the Criminal Court in Corcubión (Spain) started an investigation into the cause of the incident to determine whether any criminal liability could arise from the events (see section on criminal proceedings below).

5.5 A criminal investigation into the cause of the incident had been commenced by an examining magistrate in Brest (France). Subsequently the magistrate reached an agreement with the Criminal Court in Corcubión by which the criminal file was transferred from Brest to Corcubión.

6 Claims for compensation

6.1 Spain

General overview

6.1.1 The claims-handling office in La Coruña received 845 claims totalling €1 037 million. These included 15 claims from the Spanish Government totalling €984.8 million. The claims, excluding those of the Spanish Government, have been assessed for €3.9 million. Interim payments totalling €565 310 have been made in respect of 176 of the assessed claims, mainly at 30% of the assessed amount. Compensation payments made by the Spanish Government to claimants have been deducted when calculating the interim payments. Some claims were either rejected or could not be assessed due to lack of documentation and no response to the repeated requests by the 1992 Fund.

6.1.2 The experts engaged by the 1992 Fund have also assessed the court claims (see section on criminal proceedings below) submitted by individual claimants in Spain. Interim payments totalling €101 625 have been made at 30% of the assessed amount, taking into account the aid received, in respect of those court claims that had not been submitted to the claims-handling office.

[3] A summary of the findings of the investigations into the cause of the incident carried out by the Bahamas Maritime Authority, the Spanish Ministry of Works and the French Ministry of Transport and the Sea can be found in the IOPC Funds Annual Report 2005 pages 116–119.

Claims submitted by the Spanish Government

6.1.3 The Spanish Government submitted a total of 15 claims for an amount of €984.8 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)[4], tax relief for businesses affected by the spill, administration costs, costs relating to publicity campaigns, costs incurred by local authorities and paid by the State, costs incurred by 67 towns that had been paid by the State, costs incurred by the regions of Galicia, Asturias, Cantabria and Basque Country and costs incurred in respect of the treatment of the oily residues.

Removal of oil from the wreck

6.1.4 The claim for the removal of the oil from the wreck, initially for €109.2 million, was reduced to €24.2 million to take account of funding obtained from another source.

6.1.5 At its February 2006 session, the Executive Committee decided that some of the costs incurred in 2003 prior to the removal of the oil from the wreck, including sealing the oil leaking from the wreck and various surveys and studies that had a bearing on the assessment of the pollution risk posed, were admissible in principle, but that the claim for costs incurred in 2004 relating to the removal of oil from the wreck was inadmissible. Following the Executive Committee's decision, the claim was assessed at €9.5 million[5].

Payments to the Spanish Government

6.1.6 The first claim received from the Spanish Government in October 2003 for €383.7 million was assessed on an interim basis in December 2003 at €107 million. The 1992 Fund made a payment of €16 050 000, corresponding to 15% of the interim assessment. The 1992 Fund also made a general assessment of the total admissible damage in Spain and concluded that the admissible damage would be at least €303 million. On that basis, and as authorised by the 1992 Fund Assembly, the Director made an additional payment of €41 505 000, corresponding to the difference between 15% of €383.7 million (i.e. €57 555 000) and 15% of the preliminarily assessed amount of the State's claim (i.e. €16 050 000). That payment was made against the provision by the Spanish Government of a bank guarantee covering the above-mentioned difference (i.e. €41 505 000) from the Instituto de Crédito 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. In March 2006, the 1992 Fund made an additional payment of €56 365 000 to the Spanish Government.

Assessment of the claims by the Spanish Government

6.1.7 The claims by the Spanish Government, totalling €984.8 million, were assessed at €300.2 million.

6.1.8 The reasons for the difference between the claimed and assessed amounts in respect of the claims by the Spanish Government are principally as follows:

- Costs incurred in clean-up operations: applying the Fund's criteria of technical reasonableness, there was found to be a disproportion between the response carried out by the Spanish Government and the pollution and threat thereof, both with regard to the human and material resources employed and to the length of the operations;
- Subrogated claim for the compensation payments made in the fisheries sector in relation to the spill on the basis of national legislation, including tax relief for businesses affected by the spill: some of these payments and tax relief had the character of aid and were paid to the population in

[4] For details regarding the scheme of compensation set up by the Spanish Government reference is made to the IOPC Funds Annual Report 2006, pages 109–111.

[5] For details regarding the assessment of the claim in respect of the cost incurred in the removal of oil from the wreck see IOPC Funds Annual Report 2006, pages 111–114.

the affected areas without consideration of the damage or losses suffered by the recipients of the payments. The Fund's assessment of these claims was based on an estimation of the losses actually suffered by the fisheries sector;

- Value added tax (VAT): the amount claimed by the Spanish Government included VAT. Since the Government recovers the VAT, the corresponding amounts have been deducted; and
- Removal of oil from the wreck: as noted above, the assessed amount was limited to some of the costs incurred in 2003, prior to the removal of the oil from the wreck, in respect of sealing the oil leaking from the wreck and various surveys and studies that had a bearing on the assessment of the pollution risk posed.

6.2 France

General overview

6.2.1 The claims-handling office in Lorient received 482 claims totalling €109.7 million. This includes the claims by the French Government totalling €67.5 million. The claims submitted to the claims-handling office were assessed at €61.2 million and interim payments totalling €5.8 million had been made at 30% of the assessed amounts. Some claims were either rejected or could not be assessed due to lack of documentation and no response to the repeated requests by the 1992 Fund.

Claim submitted by the French Government

6.2.2 The French Government submitted claims for €67.5 million in relation to the costs incurred for clean up and preventive measures. Several meetings have taken place, between the Secretariat, its experts, and the French Government to discuss the assessment of the Government's claims. The Fund, with the help of its experts, has reassessed the claim at €42.2 million. One of the reasons was that VAT had been deducted when calculating the assessment. The French Government did not agree with that assessment and decided to maintain its claim in court against the 1992 Fund and other parties.

6.2.3 At the October 2013 sessions of the governing bodies, the Director submitted a document on the inclusion of VAT in claims for compensation and the French Government submitted a document containing a legal opinion on the issue. It was agreed that the recoverability of VAT by central governments claiming from the IOPC Funds should be studied further and discussions took place at the October 2014 and 2015 sessions[<6>].

6.2.4 At the October 2015 session the governing bodies decided that:

- the IOPC Funds may pay compensation for VAT if a State's national law or legislation allowed for the inclusion of VAT in the State's claim for compensation and to use a modified Foster Test where no such legislation existed or where further clarity was required; and

- the governing bodies also instructed the Director to propose criteria based on the principles of the law of damages (as contained in document IOPC/OCT15/4/4) to be applied in cases where the national law was not clear, and to present a new text for the Claims Manual for consideration at the April 2016 session of the governing bodies.

6.2.5 Since it is unclear whether the French Government is, under French law, entitled to recover VAT, the matter will be decided by the French courts.

6.2.6 No payments have been made to the French Government since the French Government is standing last in the queue.

[<6>] The Record of Decisions to the relevant meetings which detail the discussions on VAT are available via the IOPC Funds' document services website (documents IOPC/OCT13/11/1, IOPC/OCT14/11/1 and IOPC/OCT15/11/1).

6.3 Portugal

The Portuguese Government submitted a claim totalling €4.3 million in respect of the costs incurred in clean up and preventive measures. The claim was finally assessed at €2.2 million and the 1992 Fund made a payment of €328 488, corresponding to 15% of the final assessment.

7 Criminal proceedings

7.1 In July 2010, upon conclusion of an investigation into the cause of the incident, the Criminal Court in Corcubión decided that four persons should stand trial for criminal and civil liability as a result of the *Prestige* oil spill, namely, the master, the chief officer and the chief engineer of the *Prestige* and the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain. In the decision, the Court stated that the London Club and the 1992 Fund were directly liable for the damages arising from the incident and that their liability was joint and several. The Court also decided that the shipowner, the ship's management company and the Spanish Government were vicariously liable.

7.2 The proceedings were transferred to another court, the Audiencia Provincial in La Coruña, to conduct the criminal trial. The hearing started on 16 October 2012 and continued until July 2013. Since the chief officer of the *Prestige* could not be located the proceedings continued only against the master, the chief engineer of the *Prestige* and the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain.

7.3 Civil claims in the criminal proceedings

7.3.1 Under Spanish law, civil claims may be submitted in the criminal proceedings as the criminal court will decide not only on criminal liability but also on civil liability derived from the criminal action. The criminal court is acting as a limitation court awarding compensation for losses suffered as a result of the spill.

7.3.2 In May 2003, the shipowner deposited with the Criminal Court in Corcubión the estimated limitation amount applicable to the *Prestige* under the 1992 CLC of approximately 18.9 million SDR or €22 777 986, for the purpose of constituting the limitation fund required under the 1992 CLC.

7.3.3 The 1992 Fund has been a party to the proceedings from the beginning, as a party with strict civil liability under the 1992 Fund Convention.

7.3.4 Some 2 531 claims were lodged in the legal proceedings before the Criminal Court in Corcubión. The Criminal Court in Corcubión appointed court experts to examine the claims. In January 2010, the experts appointed by the Court submitted their assessment report. The experts engaged by the 1992 Fund examined the report and concluded that, in general, the court experts had noticed the lack of supporting documentation submitted in most claims. In their assessments the court experts had not, in most cases, examined the link of causation between the damage and the pollution. In some cases, the amount assessed by the 1992 Fund was higher than the court experts' assessment due to the fact that the 1992 Fund's experts had more information available to them, allowing a more detailed assessment of the claims.

7.3.5 The total amount claimed in the criminal proceedings in Spain is €2 317 million including some €1 214 million claimed for pure environmental damage, mainly by the Spanish Government, and some €2.37 million claimed for moral damage by a number of individuals. In their interventions, some claimants have argued that, since their claims were not against the 1992 Fund but against whoever resulted in being criminally liable, the admissibility criteria applicable under the Civil Liability and Fund Conventions should not be applied in these proceedings. It has further been argued that the shipowner should not be entitled to limit his liability.

7.3.6 The 1992 Fund has, in its interventions, defended the application of the Conventions in the proceedings.

7.4 Judgment of the Audiencia Provincial (Criminal Court)

7.4.1 The Audiencia Provincial (Criminal Court) in La Coruña issued its judgment on 13 November 2013. In its judgment, the Court found the master, the chief engineer of the *Prestige* and the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain, not criminally liable for damages to the environment. The master was convicted of disobeying the Spanish authorities during the crisis and was sentenced to nine months in prison. He will however not need to serve any additional time in prison since he had already served a period under detention.

7.4.2 As regards the damages arising out of the incident, the Criminal Court can only declare civil liability when there has been a criminal offence. The judgment found that the only criminal offence was the disobedience of the master. However, since this was not the cause of the damage, the Court could not judge on any civil liability arising from the damage.

7.4.3 On the subject of the limitation fund established by the London Club, totalling some €22 million, the Court decided that the fund was at the Club's disposal to decide on its distribution, subject to any appeal by the affected parties.

7.4.4 Some 19 parties appealed against the judgment of the Criminal Court in La Coruña to the Supreme Court.

7.4.5 The Supreme Court, in view of the fact that the London P&I Club did not participate in the hearing and was mentioned in several of the appeals submitted, ordered that the Club should be notified of the Criminal Court judgment.

7.4.6 Some of the parties, appealing solely on the decision on criminal liability, argued that, contrary to the decision of the Audiencia Provincial (Criminal Court), the criminal offence of disobedience by the master should carry civil liability.

7.4.7 The 1992 Fund has submitted pleadings in reply to the appealing parties' arguments against the civil liability decision. In its pleadings, the 1992 Fund defends the application of the Conventions and reiterates the assessments that the Fund had carried out of the damages claimed by the different parties.

7.4.8 A hearing to consider the appeals took place in late September 2015 and the Supreme Court is expected to deliver its judgment later in 2015, the outcome of which will be reported to a future session of the 1992 Fund Executive Committee.

8 Civil proceedings

8.1 France

8.1.1 Two hundred and thirty-two claimants, including the French Government, brought legal actions against the shipowner, the London Club and the 1992 Fund in 16 courts in France, requesting compensation totalling some €111 million, including €67.7 million claimed by the Government.

8.1.2 One hundred and twelve of these claimants have withdrawn their actions. Therefore, actions by 120 claimants remain pending in court amounting to a total of €79.1 million.

8.1.3 The courts have granted a stay of proceedings in 17 legal actions, either in order to give the parties time to discuss their claims out of court, or until the outcome of the criminal proceedings in Corcubión is known.

8.1.4 Some 174 French claimants, including the French Government and various communes, have joined the legal proceedings in Corcubión, Spain.

8.2 United States

8.2.1 Spain took legal action against the classification society of the *Prestige*, namely the American Bureau of Shipping (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 and estimated later to exceed US$1 000 million. Spain has maintained 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.

8.2.2 ABS denied the allegation made by Spain and in its turn took action against Spain, arguing that if Spain had suffered damage this was caused in whole or in part by its own negligence. ABS made a counterclaim and requested that Spain should be ordered to indemnify ABS for any amount that ABS may be obliged to pay pursuant to any judgment against it in relation to the *Prestige* incident.

8.2.3 ABS's counterclaim was dismissed based on the Foreign Sovereign Immunities Act (FSIA). The District Court held that ABS's counterclaim did not arise from the same transaction as Spain's claim and, therefore, did not fall under the FSIA exception permitting counterclaims against a foreign sovereign entity if they arose out of the same transaction as the sovereign entity's original claim.

First judgment by the District Court in New York

8.2.4 In January 2008 the District 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 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 judgment, dismissing Spain's claim.

8.2.5 Spain appealed the judgment. ABS also filed an appeal against the Court's decision to dismiss its counterclaims for lack of jurisdiction.

Decision by the Court of Appeals for the Second Circuit

8.2.6 The Court of Appeals rendered its decision in June 2009, reversing both the dismissal of Spain's case and the dismissal of ABS's counterclaims, which the District Court had held did not fall under an exception to the FSIA.

8.2.7 With respect to Spain's claim, the Court of Appeals held that the 1992 CLC could not divest a US federal court of subject matter jurisdiction. However, in sending the case to the District Court, the Court of Appeals stated that the District Court might still exercise its discretion to decline jurisdiction based on *forum non conveniens* or principles of international comity.

8.2.8 The case was sent to the District Court for further consideration.

Second judgment by the District Court in New York

8.2.9 The District Court issued its second judgment in August 2010, granting ABS's motion for summary judgment and again dismissing Spain's claims against ABS.

8.2.10 The Court stated that it was unwilling to accept Spain's proposed rule that 'a classification society owes a duty to refrain from reckless behaviour to all coastal States that could foreseeably be harmed by failures of classified ships', finding that that would amount to an 'unwarranted expansion of the existing scope of tort liability'. The Court also held that such an expansion would be inconsistent with a shipowner's non-delegable duty to provide a seaworthy vessel.

8.2.11 Spain appealed against the judgment of the District Court.

Judgment by the Court of Appeals for the Second Circuit

8.2.12 The Court of Appeals for the Second Circuit delivered its judgment in August 2012, dismissing the claim by Spain. In its judgment the Court held that Spain had not produced sufficient evidence to establish that ABS had acted in a reckless manner. In the absence of such evidence of reckless behaviour, the Court avoided ruling on whether ABS owed a duty to coastal States to avoid reckless behaviour.

8.2.13 In reaching its decision, the Court of Appeals took note of the following facts:

- In addition to its functions as a not-for-profit classification society, ABS had a for-profit subsidiary that conducted computer analysis of vessels (the SafeHull program) to assess and predict possible areas of future structural failure. The owners of two sister ships[<7>] of the *Prestige* had SafeHull analyses done on those vessels, but the owners of the *Prestige* did not. The results of the computer analyses of the sister ships were not shared with the *Prestige*'s owners nor with the ABS surveyors inspecting the *Prestige*;
- following the *Erika* incident, ABS proposed that it and other classification societies enact classification rules changes, which would have included the use of the SafeHull computer analysis. The proposals were never implemented. ABS also stated at the time that it was engaged in a review of all vessels it classed which were over 20 years old. However, the evidence showed that no meaningful review was ever conducted;
- in December 2000 the *Castor*, a small tanker classed by ABS, suffered serious structural damage. As a result, in October 2001 ABS stated that certain changes in the classification rules were required, particularly with respect to ballast tanks on older tankers. However, no rule changes had been implemented by the time of the *Prestige*'s final annual survey in May 2002; and
- the *Prestige*'s final Special Survey took place in China in April/May 2001 and its final annual survey was conducted in the United Arab Emirates in May 2002. In both cases the vessel remained in class. Spain contended, and ABS disputed, that in August 2002 the master of the *Prestige* had sent a fax to ABS giving notice of serious structural and mechanical problems. However, Spain was never able to prove that ABS received that fax.

8.2.14 On the issue of applicable law, the Court examined the traditional choice of law factors applied in maritime law and concluded that the place of the alleged negligence/recklessness by ABS (the US headquarters of ABS) was the most significant factor and that this justified the District Court's application of US maritime law.

8.2.15 The Court of Appeals did not address the legal issue of whether ABS owed a duty to coastal States to avoid reckless behaviour. Instead, the Court held that Spain had not proved that ABS had acted in a reckless manner. This approach by the Court of Appeals has left the possibility for that legal issue to be decided in another case.

8.2.16 Had the Court of Appeals affirmed the District Court's ruling that there was no duty, not even for reckless behaviour, that might have barred the possibility of a future recovery by a third party in a case with strong evidence of reckless behaviour by a classification society. The policy adopted by the District Court that ABS did not owe a duty to Spain to avoid recklessness, is a ruling for this case only and is only persuasive, but not binding, as a precedent.

8.2.17 Spain has not appealed against the judgment and therefore the judgment is final.

8.3 Legal action by France against ABS in France

In April 2010, France brought a legal action in the Court of First Instance in Bordeaux against three companies in the group of ABS. The defendants opposed this action relying on the defence of sovereign immunity. The Judge referred the case for a preliminary ruling by the Court on the question of whether ABS was entitled to sovereign immunity from legal proceedings. In a judgment rendered

[<7>] Sister ships are those built to the same design, although there may be small differences.

in March 2014 the Court decided that ABS was entitled to sovereign immunity as the Bahamas (the flag State of the *Prestige*) would be. The French Government has appealed against the judgment.

9 Recourse actions

9.1 United States

In October 2004 the Executive Committee decided that the 1992 Fund should not take recourse action against ABS in the United States. The Director was instructed to follow the ongoing litigation in the United States, monitor the ongoing investigations into the cause of the incident and take any steps necessary to protect the 1992 Fund's interests in any relevant jurisdiction. The Executive Committee stated that this decision was without prejudice to the Fund's position in respect of legal actions against other parties.

9.2 Spain

As regards a possible recourse action in Spain, the Director was advised by the 1992 Fund's Spanish lawyer that an action against ABS in Spain would face procedural difficulties. Criminal proceedings have been brought in Spain against four parties, namely the master, the chief officer and the chief engineer of the *Prestige* and the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain. ABS was not a defendant in the proceedings. Under Spanish law, when a criminal action has been brought, any action for compensation based on the same or substantially the same facts as those forming the basis of the criminal action, whether against the defendants in the criminal proceedings or against other parties, cannot be pursued until the final judgment has been rendered in the criminal case. On the basis of the Fund's Spanish lawyer's advice, the Director did not recommend bringing an action against ABS in Spain.

9.3 France

9.3.1 At its October 2012 session the Executive Committee took note of the judgment rendered by the Court of Cassation in France in the context of the *Erika* incident. It was noted that in its judgment the Court of Cassation had stated that, in relation to the classification society, Registro Italiano Navale (RINA), the Court of Appeal had been wrong in deciding that a classification society could not benefit from the channelling provisions contained in Article III(4) of the 1992 CLC. It was noted, however, that the Court of Cassation had decided that the damage had resulted from RINA's recklessness and that therefore RINA could not rely on the protection awarded by the 1992 CLC.

9.3.2 It was also noted that the Court of Cassation had not addressed the question of whether the classification society would have been entitled to invoke sovereign immunity since RINA was deemed to have renounced such immunity by having taken part in the preliminary criminal proceedings.

9.3.3 The Director noted that he had previously been advised by the Fund's French lawyer that in a possible action against ABS in France in the context of the *Prestige* incident, the Court would most likely apply French law. It was noted that the Court of Cassation judgment in the *Erika* incident, which held RINA liable for the pollution arising from the *Erika* incident, could constitute a precedent that would be followed by a French court in an action against ABS in the *Prestige* incident.

9.3.4 Following the decision of the 1992 Fund Executive Committee at their October 2012 session, the 1992 Fund brought a recourse action against ABS in the Court of First Instance in Bordeaux as an interim measure to avoid the action becoming time-barred under French law.

9.3.5 ABS submitted points of defence alleging that it was entitled to sovereign immunity as the Bahamas (the flag State of the *Prestige*) would be.

9.3.6 As at October 2015, the proceedings in the Bordeaux Court had been stayed pending a final decision in the criminal proceedings in Spain and in the action brought by France against ABS.

10 Considerations

10.1 It was clear from the outset that the damages arising from the *Prestige* spill would exceed the amount of compensation available under the Conventions. The compensation amount available for the *Prestige* incident is €171.5 million. However, after depositing the estimated limitation amount of €22.8 million applicable to the *Prestige* under the 1992 CLC with the Criminal Court in Corcubión, the shipowner decided not to make interim payments to individual claimants. The 1992 Fund therefore had to commence making payments with the available funds under the Conventions, i.e. €148.7 million. Some €121 million in compensation has already been paid to victims of this spill.

10.2 Following the above mentioned payments, a further €50.5 million is left under the 1992 Civil Liability and Fund Conventions—€22.8 million from the shipowner's limitation fund and €27.7 million from the 1992 Fund. The distribution of the limitation fund is a matter for the courts to decide. It is most likely that it will take a number of years before this money is distributed. The 1992 Fund has already levied all the contributions payable in relation to this incident and has established a Major Claims Fund to pay all the compensation due for this incident.

10.3 In 2006, the 1992 Fund Executive Committee decided to set the level of payments at 15%, however it allowed the level of payments to be raised to 30% subject to conditions. The Spanish Government provided a bank guarantee and an undertaking to pay all victims in Spain which allowed the 1992 Fund Executive Committee to increase the level of payments to 30%. The French Government provided an undertaking of 'standing last in the queue', which allowed the 1992 Fund Executive Committee to increase the level of payments for victims in France to 30%. The Portuguese Government, the only claimant in Portugal, decided not to provide a bank guarantee and therefore the level of payments in Portugal is 15%.

10.4 The Audiencia Provincial (Criminal Court) judgment of November 2013, decided that no criminal offence had been committed, the Court could not declare civil liability and award compensation to the victims. The judgment has not awarded compensation, and therefore, it has still not been possible to determine the total amount due to the victims under the 1992 Conventions in the three affected States. The judgment was not final.

10.5 As far as the claims against the 1992 Fund are concerned, claimants can now either settle their claims with the 1992 Fund or continue to seek compensation through the courts. If the Supreme Court upholds the judgment, the claimants who have not agreed a settlement will have to commence fresh civil proceedings against the shipowner, the London Club and the 1992 Fund under the Conventions or against any other party they consider to be liable.

10.6 It is expected that the Supreme Court will reach its judgment in 2015. The Director, with the help of the 1992 Fund Spanish lawyers, will continue to monitor developments and will report to a future session of the 1992 Fund Executive Committee.