

 <p>INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS</p>	<b>Agenda item: 3</b>		IOPC/JUN10/3/2/1	
	Original: ENGLISH		23 June 2010	
	1992 Fund Executive Committee		<b>92EC48</b>	•
	1992 Fund Working Group		<b>92WG6/1</b>	

## INCIDENTS INVOLVING THE IOPC FUNDS – 1992 FUND

### PRESTIGE

#### Note by the Director

<b>Objective of document:</b>	To inform the 1992 Fund Executive Committee of the latest developments regarding this incident.
<b>Recent developments:</b>	<p>In April 2010, the French State brought a legal action in the Court of First Instance in Bordeaux against three companies in the group of the American Bureau of Shipping (ABS) to recover costs incurred by the French State in the clean-up operations, totalling €67.5 million. The French State has based its action on negligence by ABS in its classification activity (section 3).</p> <p>The Director, in consultation with the Fund's lawyers in Spain and France, has carried out an analysis of a possible legal action by the Fund against ABS in Spain and France.</p>
<b>Action to be taken:</b>	<p><u>1992 Fund Executive Committee:</u></p> <p>Information to be noted.</p>

#### 1 Introduction

The 1992 Fund's Secretariat has learned that in April 2010, the French State brought a legal action in the Court of First Instance in Bordeaux against three companies in the group of the American Bureau of Shipping (ABS), the classification society that certified the *Prestige*. The Director has considered whether this and other developments would give rise to reconsidering the position of the 1992 Fund regarding recourse action in connection with this incident.

#### 2 Considerations by the 1992 Fund Executive Committee in October 2004

2.1 At its October 2004 session, the 1992 Fund Executive Committee considered whether the 1992 Fund should take recourse action against ABS, since the Spanish State had brought proceedings against ABS before the US courts (cf documents 92FUND/EXC.26/8/Add.1 and 92FUND/EXC.26/11).

2.2 The Committee noted that in the Director's view there were two main options for the 1992 Fund in respect of choice of jurisdiction, namely the United States, where the defendant was incorporated, and Spain where the major part of the pollution damage had occurred.

#### 2.3 Legal action against ABS in the United States

2.3.1 For details regarding the possibility of an action in the United States reference is made to document 92FUND/EXC.26/8/Add.1, section 2.1.

## 2.4 Legal action against ABS in Spain

At its October 2004 session, the 1992 Fund Executive Committee considered the legal advice from the 1992 Fund's Spanish lawyer on the implications of a possible legal action against ABS in Spain. The relevant parts of this advice are reproduced in paragraphs 2.4.1 to 2.4.5 below (cf document 92FUND/EXC.26/8/Add. 1, section 2.2).

### *Spanish jurisprudence*

- 2.4.1 The 1992 Fund's Spanish lawyer has not been able to identify any court case where a classification society has been held liable outside contractual relations. However, of interest is a judgement rendered in 2003 by the Spanish Supreme Court in which a classification society and a shipyard were held liable to a shipowner for damage caused as a result of, *inter alia*, a seriously defective steel structure in the inspected vessel<sup><1></sup>. The society had, in the Supreme Court's view, failed to fulfil its obligation to exercise special care in the inspection to ensure that the ship not only conformed to the specifications in the drawings but also to the technical specifications in the society's own rules. Under the contract between the shipowner and the classification society, the society was exonerated from any liability for mistakes or negligence by its staff or experts. Recognising the principle of 'freedom of contract' within the limits of the law, moral and public order, the Supreme Court found nevertheless that in the light of the serious failure to fulfil its obligations, the classification society should pay compensation for the damage caused. It should be noted that this judgement dealt with a contractual situation.

### *Procedural aspects and time bar*

- 2.4.2 It appears that the 1992 Fund's action would have to be based on ABS having been negligent in its inspections of the *Prestige*. These inspections were not carried out in Spain. However, the effects of the allegedly negligent inspections, ie the breaking up of the vessel and the ensuing oil pollution, occurred in Spain. The Director has been advised by the Fund's Spanish lawyer that the Spanish Courts are likely to accept jurisdiction over a recovery action by the 1992 Fund against ABS, since the pollution damage occurred in Spain, and it would not be an unreasonable burden for ABS, which has several offices in Spain operated by a company established in Spain (ABS Europe Ltd.), to defend itself in such a case in Spain.
- 2.4.3 An action against ABS would, however, face procedural difficulties. Shortly after the incident, the Criminal Court in Corcubi3n (Spain) started an investigation into the cause of the incident to determine whether any criminal liability could arise from the events (cf section 6 of document IOPC/JUN10/3/2). When a criminal action has been brought, under Spanish law, 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 judgement has been rendered in the criminal case. The Fund's Spanish lawyer has advised that it is likely that the courts would consider that the Fund's action was based on substantially the same facts as the criminal action and that therefore, such an action would be suspended pending the termination of the criminal proceedings, which would probably take many years.
- 2.4.4 The time bar issue is also complicated in respect of Spain. The 1992 Fund's Spanish lawyer has advised that criminal proceedings will interrupt the time bar in respect of actions for compensation based on the same or substantially the same facts, whether or not the parties in the two actions are the same. They have further advised that, in the light of Spanish jurisprudence, it is, in their view, likely that the criminal action in the Court in Corcubi3n has the effect of interrupting the time bar period within which the Fund should take recourse action against ABS, in which case an action against ABS by the 1992 Fund should be brought within one year of the final judgement in the criminal proceedings in the Spanish Courts in relation to the *Prestige* incident.

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<1> Supreme Court judgement 278/2003 of 20 March 2003;RG 2003/2794.

2.4.5 If the Fund were to obtain a final judgement in Spain in its favour against ABS, it is probable that ABS has no significant assets in Spain and it could be difficult to enforce the Spanish judgement against ABS in the United States.

## 2.5 Decision by the 1992 Fund Executive Committee in October 2004

2.5.1 At its October 2004 session, the Executive Committee noted that the question of safety of navigation had become a major issue and that it was possible that the courts, in particular European courts, would be more inclined to impose liability also in extra-contractual situations on those who by negligence had caused or contributed to pollution incidents. It was further noted that the evidence that emerged during any legal proceedings might show that ABS had been negligent in its inspections of the *Prestige*.

2.5.2 All delegations reaffirmed their support for the Fund's policy of pursuing recourse actions against third parties whenever it was appropriate to do so. However, a number of delegations expressed the view that it was premature to take a decision at that stage on whether or not to pursue a recourse action against ABS given the lack of evidence.

2.5.3 The Executive Committee decided that the 1992 Fund should not take recourse action against ABS in the United States. It further decided to defer any decision on recourse action against ABS in Spain until further details surrounding the cause of the *Prestige* incident came to light. The Director was instructed to follow the ongoing litigation in the United States, follow 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 (cf document 92FUND/EXC.26/11, paragraph 3.7.71).

## 3 Developments since October 2004

### 3.1 Developments relevant to possible legal action in France

3.1.1 In April 2010, the French State brought a legal action in the Court of First Instance in Bordeaux against three companies in the ABS Group to recover costs incurred by the French State in the clean-up operations, totalling €67.5 million. The French State has based its action on negligence by ABS in its classification activity as follows:

- ABS's mission is to verify the conformity of ships to the safety regulations. However, the *Prestige* incident can be considered as the consequence of an important structural failure, which was not detected by ABS, and it should be noted that:
  - ABS carried out a special inspection of the *Prestige* in Guangzhou in May 2001, and as a result of the inspection certain repairs were made. When the repairs were finalised a test was carried out by ABS to confirm that the repairs had brought the *Prestige* into a satisfactory state in accordance with the applicable safety regulations; and
  - the *Prestige* underwent an annual inspection in Dubai in May 2002. All the repairs were carried out to the satisfaction of ABS and the appropriate certifications were issued.
- These inspections should have detected the faults in the vessel which led to its sinking in November 2002.

3.1.2 The French State also supports its arguments with the conclusions of the report by one expert appointed by the Criminal Court in Corcubi3n (Spain) in the context of its investigation into the cause of the *Prestige* incident. That court expert concluded that the principal cause of the initial damage of the oil spill and of the sinking of the *Prestige* were defects due to the negligence of ABS, who had issued certificates without having established that the *Prestige* complied with the required safety standards (cf paragraph 3.2.1).

- 3.1.3 In its pleadings the French State concludes that for the above reasons it would appear that ABS was negligent in its inspections of the *Prestige*, that ABS's negligence had caused the incident leading to the pollution suffered in France and that therefore, ABS should compensate the French State for the losses it has suffered.
- 3.1.4 There is recent jurisprudence in France declaring a classification society liable outside contractual relations. In the *Erika* incident, the Criminal Court of Appeal in Paris confirmed the judgement of the Criminal Court of First Instance that the classification society that certified the *Erika*, Registro Italiano Navale (RINA), amongst other parties, was liable for the damage arising from the *Erika* incident since the incident had been partly caused by RINA's negligence in its inspections for the purposes of class certification (cf document IOPC/JUN10/3/1, section 4).
- 3.1.5 The Court of Appeal's decision is, however, subject to appeal to the Court of Cassation in Paris and therefore the issue of the liability of classification societies under French law will not be completely clear until after that Court has issued its decision, which is expected within a year or two.
- 3.2 Developments relevant to legal action in Spain
- 3.2.1 In the context of the criminal proceedings the Criminal Court in Corcubi3n engaged two experts to investigate the causes and possible liabilities of the different parties involved in the incident. The experts delivered their reports in 2008. Both court experts' reports concluded that the main cause of the incident was the precarious structural condition and the lack of maintenance of the *Prestige*. In particular, one of the reports concluded that the principal cause of the initial damage of the oil spill and of the sinking of the *Prestige* was the poor structural condition of the ballast tanks and defects in the devices for emergency towing. That court expert concluded that these defects were due to the negligence of ABS, who had issued certificates confirming the class of the *Prestige* and had allowed the delivery of the flag State (Bahamas) certificates, without having established that the *Prestige* complied with the required safety standards.
- 3.2.2 In 2009, the French Government requested that some employees of ABS should be incriminated in the legal proceedings in the Criminal Court in Corcubi3n. However, the Court denied this request, primarily for the reason that bringing new parties into the proceedings at such a late stage would delay the resolution of the proceedings.

#### **4 Director's considerations**

- 4.1 As instructed by the Executive Committee at its October 2004 session (cf paragraph 2.5), the Director has been following the ongoing litigation in the United States and the progress is regularly reported to the Executive Committee (cf document IOPC/JUN10/3/2, section 9).
- 4.2 The 1992 Fund, through its Spanish lawyer, has also been following the developments in the criminal proceedings in Spain, which are ongoing. It is expected that a trial will be conducted in late 2010 or early 2011.
- 4.3 As regards a possible recourse action in Spain, the Director considers, after consultation with the 1992 Fund's Spanish lawyer, that the advice regarding such action received in 2004 (cf section 2.4), is still valid. On that basis, and in view of the fact that the 1992 Fund will in any event have a year after the conclusion of the criminal proceedings in Spain to start such recourse action, the Director does not, for the time being, recommend to bring an action against ABS in Spain.

- 4.4 As regards a possible recourse action in France, the Director considers, after consultation with the 1992 Fund's French lawyer, that there appear to be a number of relevant developments that require further study with a view to determining the prospects and legal implications of a possible recourse action by the 1992 Fund against ABS in France. These are, in particular:
- the publication of two experts' reports submitted in the criminal proceedings in Spain (cf paragraph 3.2.1), which concluded that the defects of the *Prestige* were due to the negligence of ABS;
  - the request by the French Government in 2009, that some employees of ABS be incriminated in the legal proceedings in the Criminal Court in Corcubi3n, and the fact that this request was, however, denied;
  - recent jurisprudence in France attaching civil liability to a classification society for the damage caused by the pollution resulting from the *Erika* incident; and
  - a recent legal action brought by the French State against ABS in France.
- 4.5 With respect to the time bar issue in relation to a possible legal action in France, it is important to keep in mind that the *Prestige* incident occurred on 13 November 2002, ie almost eight years ago. The 1992 Fund's French lawyer has advised that, under French law, a ten-year time bar period would be applicable for a recourse action, which means that the Fund would have until 13 November 2012 to bring an action against ABS in France.
- 4.6 In view of the above considerations, the Director intends to further examine, in consultation with the 1992 Fund's French lawyer, legal implications and the prospect for success of a recourse action by the 1992 Fund against ABS in France, with a view to making a recommendation to the Executive Committee at a future session.

## 5 Action to be taken

### 1992 Fund Executive Committee

The 1992 Fund Executive Committee is invited:

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