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|  <p>INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS</p> | Agenda item: 3 | | IOPC/MAR11/3/4 | | |
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| | 1992 Fund Assembly | | 92AES15 | | |
| | 1992 Fund Executive Committee | | 92EC51 | ● | |
| | Supplementary Fund Assembly | | SAES4 | | |
| | 1971 Fund Administrative Council | | 71AC26 | | |
| 1992 Fund Working Group | | 92WG6/2 | | | |

INCIDENTS INVOLVING THE IOPC FUNDS – 1992 FUND

PRESTIGE

Note by the Director

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| Objective of document: | To inform the 1992 Fund Executive Committee of the latest developments regarding this incident. |
| Summary of the incident so far: | <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&I insurer, London Steamship Owners' Mutual Insurance Association Ltd (London Club), and the 1992 Fund established Claims Handling Offices in La Coruña (Spain) and Lorient (France).</p> <p>Legal proceedings have been initiated in Spain (section 6) and in France (section 7). A court action was also initiated in the United States (US) by the Spanish State against the American Bureau of Shipping (ABS), the classification society that certified the <i>Prestige</i> (section 9).</p> <p>In May 2010 the Criminal Court in Corcubión, which was investigating the cause of the incident, declared the instruction of the case as concluded. In July 2010, the Criminal Court in Corcubión decided that four persons should stand trial for criminal and civil liability as a result of the <i>Prestige</i> oil spill, namely, the Master, the Chief Officer and the Chief Engineer of the <i>Prestige</i> 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 management company, and the Spanish State were vicariously liable.</p> |
| Recent developments: | <p>The claims situation in Spain and France is summarised in sections 3, 4 and 5. The vast majority of claims in both Spain and France have been assessed.</p> <p>A new judgement has been rendered by the Court of Appeal in Rennes (section 8).</p> <p>Information is given on the pleadings submitted to the Court of Appeal in New York by the Spanish State and ABS (section 9).</p> |

The Director is studying the possibility for the 1992 Fund to bring a recourse action against ABS in France, but considers it would be prudent to wait for the judgement of the French Court of Cassation in the criminal proceedings on the *Erika* incident (section 10).

Action to be taken: 1992 Fund Executive Committee:

Information to be noted.

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 |
| Flag State of ship | Bahamas |
| Gross tonnage (GT) | 42 820 GT |
| P&I insurer | London Steamship Owners' Mutual Insurance Association Ltd (London Club) |
| CLC Limit | €22 777 986 |
| STOPIA/TOPIA applicable | No |
| CLC + FC Limit | €171 520 703 |
| Compensation | |
| Level of payments | 15%/30% subject to conditions |
| Spain | Two payments to the Spanish Government totalling €15 million minus €1 million, subject to: <ul style="list-style-type: none"> • Bank guarantee • Undertaking to pay all claimants in Spain |
| France | Level of payments at 30% subject to the French Government standing last in the queue. |
| Portugal | Payment to Portuguese Government of €328 488, corresponding to 15% of the assessment of its claim for preventive measures. 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. |
| Outstanding claims | |
| Spain | Some 122 claims are awaiting a reply from the claimant. |
| France | Some 20 claims are being re-examined following the claimants' disagreement with the assessed amount. |
| Portugal | None. |
| Legal proceedings | |
| Spain | In conjunction with an investigation into the cause of the incident, criminal proceedings have been brought against the Master, Chief Officer and Chief Engineer of the <i>Prestige</i> and a civil servant involved in the decision not to allow the ship into a place of refuge. Some 2 122 claims for compensation have been submitted into the proceedings. |
| France | Civil actions by 127 claimants remain pending in various French courts. |
| Portugal | Legal proceedings were started but discontinued after settlement with the Portuguese Government. |
| United States | A court action has been brought 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 63 000 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 Ltd (London Club).
- 2.5 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.
- 2.6 For details of the clean-up operations and the impact of the spill, reference is made to the Annual Report 2003 (pages 106-109).
- 2.7 For details of the investigations into the cause of the incident, reference is made to the Annual Report 2005 (pages 116-121).

3 Claims for compensation

3.1 Spain

- 3.1.1 As at 28 February 2011, the Claims Handling Office in La Coruña has received 845 claims totalling €1 037 million. These include 15 claims from the Spanish Government totalling €984.8 million. The table below provides a breakdown of the different categories of claims:

| Category of claim | No. of claims | Amount claimed € |
|--|---------------|----------------------|
| Property damage | 232 | 2 066 103 |
| Clean up | 17 | 3 011 744 |
| Mariculture | 14 | 20 198 328 |
| Fishing and shellfish gathering ^{<1>} | 180 | 3 610 886 |
| Tourism | 14 | 688 303 |
| Fish processors/vendors | 299 | 20 838 322 |
| Miscellaneous | 74 | 1 775 068 |
| Spanish Government | 15 | 984 827 922 |
| Total | 845 | 1 037 016 676 |

^{<1>} One claim totalling €132 million from a group of 58 associations has been withdrawn following a settlement with the Spanish Government.

3.1.2 As at 28 February 2011, 753 (90.72%) of the claims other than those of the Spanish Government have been assessed for €8 million. Interim payments totalling €546 314 ^{<2>} have been made in respect of 174 of the assessed claims, mainly at 30% of the assessed amount. Sixty-two claims are awaiting a response from the claimant and seven are in progress. Four hundred and twenty-nine claims (totalling €8 million) have been rejected and 19 have been withdrawn by the claimants. The remaining claims could not be assessed as the documentation submitted so far is insufficient to carry out an assessment.

3.2 France

3.2.1 As at 28 February 2011, 482 claims totalling €109.7 million have been received by the Claims Handling Office in Lorient. This includes the claims by the French Government totalling €7.5 million. The table below provides a breakdown of the different categories of claims:

| Category of claim | No. of claims | Amount claimed € |
|-------------------------|---------------|---------------------|
| Property damage | 9 | 87 772 |
| Clean up | 61 | 10 512 569 |
| Mariculture | 126 | 2 336 501 |
| Shellfish gathering | 3 | 116 810 |
| Fishing boats | 59 | 1 601 717 |
| Tourism | 195 | 25 166 131 |
| Fish processors/vendors | 9 | 301 446 |
| Miscellaneous | 19 | 2 029 820 |
| French Government | 1 | 67 499 154 |
| Total | 482 | 109 651 920 |

3.2.2 Of the 482 claims submitted to the Claims Handling Office, 94% had been assessed by 28 February 2011. Four hundred and fifty-five claims had been assessed for €8 million and interim payments totalling €5.6 million had been made at 30% of the assessed amounts in respect of 361 claims. The remaining claims await a response from the claimants or are being re-examined following the claimants' disagreement with the assessed amount. Fifty-eight claims totalling €3.8 million had been rejected because the claimants had not demonstrated that a loss had been suffered due to the incident. Four claims totalling some €3 000 have been withdrawn by the claimants.

3.3 Portugal

In December 2003, the Portuguese Government submitted a claim for €3.3 million in respect of the costs incurred in clean up and preventive measures. On the basis of additional documentation submitted in February 2005, the Portuguese Government increased its claim by €1 million. The claim was finally assessed at €2.2 million. The Portuguese Government accepted this assessment. In August 2006, the 1992 Fund made a payment of €328 488, corresponding to 15% of the final assessment (cf Annual Report 2006, pages 103-109). This payment does not preclude a further payment to the Portuguese Government in the event that the 1992 Fund Executive Committee were to increase the level of payments unconditionally.

4 Claims by the Spanish Government

4.1 Claims submitted

The Spanish Government has submitted a total of 15 claims for an amount of €94.8 million. The claims by the Spanish Government relate to costs incurred in respect of at sea and on shore clean-up

^{<2>} Compensation payments made by the Spanish Government to claimants have been deducted when calculating the interim payments.

operations, removal of the oil from the wreck, compensation payments made in relation to the spill on the basis of national legislation and the costs incurred therein (Royal Decrees)^{<3>}, 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 by 67 towns that had been paid by the Government, costs incurred by the regions of Galicia, Asturias, Cantabria and the Basque Country and costs incurred in respect of the treatment of the oily residues.

4.2 Payments to the Spanish Government

4.2.1 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, and the 1992 Fund made a payment of €16.1 million, corresponding to 15% of the interim assessment. The 1992 Fund 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. On that basis, and as authorised by the Assembly, the 1992 Fund made an additional payment of €41.5 million, corresponding to the difference between 15% of €383.7 million or €57.6 million and 15% of the preliminarily assessed amount of the Government's claim, €16.1 million. That payment was made against the provision by the Spanish Government of a bank guarantee covering the above mentioned difference (ie €41.5 million) 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 1992 Fund Executive Committee or the 1992 Fund Assembly.

4.2.2 In March 2006 the 1992 Fund made an additional payment of €6.4 million^{<4>} 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 1992 Fund Executive Committee at its October 2005 session (cf Annual Report 2006, pages 103-106).

4.3 Assessment of the claims

4.3.1 The claims by the Spanish Government, totalling €984.8 million, have been assessed at €300.2 million. The claimed and assessed amounts have increased since the last session of the Executive Committee in October 2010 due to the submission of an additional claim for the costs incurred in the treatment of solid oily residues. The additional claim, totalling €16 303 838, has been assessed at €12 563 623. A letter has been sent to the Spanish Government to communicate the latest assessment of their claims. It is expected that the Spanish Government will submit an additional claim for further costs relating to the treatment of solid oily residues.

4.3.2 The reason for the difference between the claimed and assessed amounts in respect of the costs incurred in clean-up operations was that, applying the Fund's criteria of technical reasonableness, there was found to be a disproportion between the response carried out by the Spanish State and the pollution and threat thereof, as regards human and material resources and also as regards the extension in time of the operations.

4.3.3 Regarding the compensation payments made in relation to the spill on the basis of national legislation and tax relief for businesses affected by the spill, some of the payments had the character of aid and were paid to the population in the affected areas without consideration of the damage or losses suffered by the recipients of the payments. The tax relief was applied in a similar fashion. Applying the Fund's criteria, an assessment has been made of the losses suffered by the fisheries sector in Spain as a result of the incident.

4.3.4 The amount claimed by the Spanish Government includes VAT and, since the Government recovers the VAT, the corresponding amounts have been deducted from the claim.

^{<3>} 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>} The Director was authorised to pay the Spanish Government €57 365 000 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.

- 4.3.5 Another reason for the difference between the claimed and assessed amount can be found in the claim for the removal of oil from the wreck for €109.2 million. At its February 2006 session, the 1992 Fund Executive Committee decided that 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, 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). Following the Executive Committee's decision, the claim was assessed at €9.5 million.

5 Claims by the French Government

- 5.1 In May 2004, the French Government submitted claims for €67.5 million in relation to the costs incurred for clean up and preventive measures. The 1992 Fund and the London Club made a provisional assessment of the claims at €31.2 million. After the analysis of further documentation submitted by the French Government, the claims have been reassessed at €38.5 million and a letter explaining the assessment has been sent to the Government.
- 5.2 The amount claimed by the French Government includes VAT and, as in the claim by the Spanish Government, this amount has been deducted from the claim.
- 5.3 Part of the difference between the claimed and assessed amounts lies in the lack of sufficient supporting documentation for some items of the claim. Therefore, it is possible that the assessed amount could increase if the French Government were to submit the required information. Other parts of the claim have been rejected for being not admissible according to the Fund's criteria.
- 5.4 A meeting took place in November 2009 between the Secretariat, its experts, and the French Government, to discuss the assessment of the Government's claim. At the meeting, the Secretariat undertook to provide further details of the assessment to the French Government. As requested, a letter has been sent to the French Government providing a detailed breakdown of the assessment of the claim.

6 Legal proceedings in Spain

6.1 Criminal investigation

- 6.1.1 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. The Court was investigating the role of the Master, Chief Officer and Chief Engineer of the *Prestige* and of a civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain.
- 6.1.2 In May 2010, the Criminal Court in Corcubión declared the instruction of the case concluded. In July 2010 the Court 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 management company and the Spanish State were vicariously liable. In the decision, the Court requested the parties with civil liability to provide security to cover their liabilities up to their respective legal limits.
- 6.1.3 The 1992 Fund has requested the Court to reconsider the above decision on the grounds of public policy, since a request to the 1992 Fund to deposit a guarantee in Court was in contravention with the spirit of the 1992 Fund Convention and the treaty obligations incurred by Spain. In its pleadings the 1992 Fund argues that the Fund's mission is to compensate the persons that suffer pollution damage in accordance with the 1992 Fund Convention, that the Fund has already paid a great part of the claims arising for the *Prestige* incident and that there were still outstanding claims in France and Portugal

that the Fund will have to compensate. The 1992 Fund has also argued that a request for the Fund to provide a security would impede the Fund to compensate the victims that are not party to the criminal proceedings and therefore it would prevent the Fund from complying with its mission.

6.1.4 The proceedings will be transferred to another court, the Audiencia Provincial in La Coruña. It is expected that the hearing on the criminal and civil merits of the case will commence in 2012.

6.2 Civil claims

6.2.1 As at 28 February 2011, some 2 122 claims were lodged in the legal proceedings before the Criminal Court in Corcubión (Spain). Some of the claimants in the proceedings had also submitted a claim in the Claims Handling Office in La Coruña. Included in the aforementioned figure are also 31 claims by French parties.

6.2.2 As at 28 February 2011 the experts engaged by the 1992 Fund had examined the vast majority of those claims and excluding the claims by the Spanish Government and the French claimants, 1 883 of the claims had been assessed for €108 043. Interim payments totalling €29 797 had been made at 30% of the assessed amount, taking into account the aid received, if applicable. Claimants in 403 of the court actions had received payments as a result of a settlement agreement with the Spanish Government and the assessment of these claims is included in the subrogated claim submitted by the Spanish Government (cf section 4). The remaining claims, but two, have been assessed at nil, since no documentation at all was made available.

6.2.3 The Spanish Government has taken legal action, 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.

6.2.4 In January 2010, the experts appointed by the Criminal Court in Corcubión submitted their assessment report of the civil claims lodged in the criminal proceedings. The experts engaged by the 1992 Fund have examined the report. They have concluded that, in general, the Court experts have noticed the lack of supporting documentation submitted in most claims. In their assessments the Court experts have 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 is higher than the Court's 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.

6.2.5 The 1992 Fund's experts are finalising the assessment of the civil claims submitted to the Criminal Court, in order to try to reach out-of-court settlements with claimants when possible and also in order to be ready to submit defence pleadings when the hearing commences.

7 Legal proceedings in France

7.1 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 €11 million, including €7.7 million claimed by the Government.

7.2 One hundred and five of these claimants have withdrawn their actions. Therefore, actions by 127 claimants remain pending in court for compensation claims amounting to a total of €85.5 million.

7.3 The courts have granted a stay of proceedings in 19 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.

7.4 Some 31 French claimants, including various communes, have joined the legal proceedings in Corcubión, Spain.

7.5 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*. There have been no developments in respect of this action.

8 Judgements by courts in France

Court of appeal in Rennes

- 8.1 Two owners of fishing vessels brought an action claiming €419 333 for loss of income allegedly incurred through a reduction in the anchovy population as a result of the *Prestige* incident and €1 000 for the replacement of a fishing net damaged by oil. The 1992 Fund had assessed the damage to the net at € 000 and rejected the claim for loss of income since no sufficient link of causation was established between the contamination and the alleged loss. In a judgement rendered in May 2009 the Court agreed with the 1992 Fund's assessment of the claim for loss of income and rejected the claim. As to the claim for the fishing net, the Court assessed the damage at € 000 to be paid at the current level (30%) of the payments applied by the Fund. One of the claimants appealed against the judgement.
- 8.2 In a judgement rendered in January 2011, the Court of Appeal in Rennes upheld the rejection of the claim for loss of income. Regarding the claim for the replacement of the fishing net, the Court of Appeal overturned the judgement and agreed with the 1992 Fund's assessment at €3 000 to be paid at the current level (30%) of the payments applied by the Fund.
- 8.3 At the date of publication of this document the claimant had not lodged an appeal before the Court of Cassation.

9 Court action in the United States

Background information

- 9.1 The Spanish State has taken legal action against ABS before the District Court of First Instance in New York, requesting compensation for all damage caused by the incident, estimated to exceed US\$1 billion. The Spanish State has maintained, *inter alia*, that ABS had been negligent and reckless 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.
- 9.2 ABS denied the allegation made by the Spanish State and in its turn took action against the State, arguing that, if the State had suffered damage, this was caused in whole or in part by its own negligence. ABS made a counterclaim and requested that the State be ordered to indemnify ABS for any amount that ABS may be obliged to pay pursuant to any judgement against it in relation to the *Prestige* incident.
- 9.3 For details about the defence of sovereign immunity, discovery of the criminal file in Corcubión, financial records and e-mail communications, reference is made to the Annual Report 2007, pages 101 to 104 and the Annual Report 2008, pages 103 to 107.
- 9.4 ABS's defence that it acted as 'the pilot or any other person, (...), who performs services for the ship'
- 9.5 For details about ABS's request for a summary judgement and the opposition by the Spanish State, reference is made to the Annual Report 2008, pages 104 and 105.

First judgement by the District Court

- 9.6 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 Civil Liability Convention (1992 CLC) and that therefore it was exempt from liability. 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.

Court of Appeal

- 9.7 The Court of Appeal 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 Foreign Sovereign Immunities Act (FSIA).
- 9.8 With respect to Spain's claim, the Court of Appeal held that the 1992 CLC cannot divest a US federal court of subject matter jurisdiction. However, in sending the case to the District Court, the Court of Appeal stated that the District Court may still exercise its discretion to decline jurisdiction based on *forum non conveniens* or principles of international comity.
- 9.9 The Court of Appeal reinstated the original counterclaims by ABS that had been dismissed under the FSIA, holding that ABS's counterclaims did arise out of issues of duty and causation which were 'similar, if not identical' to the issues raised by Spain's claim.
- 9.10 The case was sent to the District Court Judge for further consideration.

Second judgement by the District Court

- 9.11 The District Court issued its second judgement in August 2010, granting ABS' Motion for Summary Judgement and again dismissing Spain's claims against ABS.
- 9.12 The Court decided that US Law governed in this case, primarily based on Spain's allegations that the critical wrongful act occurred in ABS' headquarters in the US and based on the fact that ABS headquarters did set central standards for the certification of vessels and that at least one of the operative certificates in place at the time of the *Prestige* incident was issued from those headquarters.
- 9.13 The Court noted that Spain did not cite, nor could the Court locate in its own research, any US legal precedent where a classification society had been held liable to a third party for damages caused by the failure of a vessel and that Spain had submitted no evidence that it had specifically relied upon the class certificate issued to the *Prestige*.
- 9.14 The Court finally 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 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.
- 9.15 The Spanish State has appealed against the judgement. In its pleadings, Spain argued that:
- the Spanish State had produced sufficient evidence so based on the facts a Judge could find that ABS acted recklessly in its inspection and classification of the *Prestige*.
 - the District Court erred in holding that a classification society should not be held liable for its own recklessness, as opposed to ordinary negligence.
 - reckless behaviour amounts to an intentional disregard for others, is simple to avoid and that a classification society should not be afforded the same protection for reckless behaviour that it receives for negligent acts.
- 9.16 In its defence pleadings ABS argues that:
- ABS, in performing specified duties to a shipowner, does not have an unlimited duty to all third parties with respect to its recklessness and that a shipowner's duty to provide a seaworthy vessel was non-delegable and should not be transferred to a classification society.

- ABS did not behave in a reckless manner, its rules were as stringent as those of any other classification society at the time of the *Prestige* incident and Spain is attempting to elevate allegations of negligence to recklessness.
- public policy considerations go against unlimited liability on the part of classification societies to all parties, as such liability would amount to an insurer-like liability, and would result in shipowners being held less accountable for the seaworthiness of their vessels.
- Spanish Law, and therefore the CLC, should apply to this case and under the CLC Article III.4(b), ABS has no liability. ABS points out that, except in the U.S, the CLC is the law of every other jurisdiction associated with the case, including China and the United Arab Emirates (UAE). Alternatively, ABS argues for the application of the Law of the Bahamas, under which they maintain that they are immune from liability. ABS also maintains that if the non-CLC domestic law or the Bahamas, China or the UAE is applied, they have no liability under those laws.

9.17 In its reply to the defence, of ABS Spain argues that:

- both the District Court and ABS have mis-stated the law on liability for reckless behaviour. Spain argues that reckless behaviour gives rise to liability to all those who could be foreseeably impacted by that behaviour.
- the shipowner is not a party to this case and that a finding of liability on the part of ABS in no way weakens the shipowner's non-delegable duty to provide a seaworthy vessel.
- ABS' alleged adherence to industry customs and standards does not insulate them from liability.
- US Law is the correct law to govern the case, and even if foreign law applied, a classification society is not entitled to immunity under the CLC and, even if it were, such immunity would be defeated by the reckless behaviour of ABS in this case.

9.18 Two environmental organisations have filed a joint *amicus curiae* brief in favour of the Spanish State's position, arguing that:

- major oil spills have long-term negative effects on the environment.
- not only shipowners and marine insurers, but the maritime world in general, *inter alia*, shippers, charterers, flag states and coastal states, rely upon the representations made by classification societies.
- economic pressures have caused classification societies to be more flexible and, as a result, they cannot be insulated from their own reckless behaviour.

9.19 No date has as yet been set for the oral hearing before the Court of Appeal.

10 Possible recourse action of the 1992 Fund against ABS in France

10.1 At the 48th session of the Executive Committee held in June 2010 the Director provided a preliminary analysis of the implications of a possible recourse action of the 1992 Fund against ABS in France (cf document IOPC/JUN10/3/2/1).

Considerations on the Erika incident

10.2 In the *Erika* incident the Criminal Court of Appeal in Paris decided that RINA (the classification society that certified the *Erika*), together with the representative of the shipowner (Tevere Shipping) and the president of the management company (Panship Management and Services Srl), were criminally liable for the offence of causing pollution. Regarding civil liabilities, the judgement held

these three condemned parties jointly and severally liable for the damage caused by the incident (cf document IOPC/JUN10/3/1, section 4).

- 10.3 RINA had argued that it could benefit from the channelling provisions under Article III.4(b) of the CLC but the Criminal Court of Appeal in Paris held that RINA could not benefit from the channelling provisions in the CLC.
- 10.4 The Criminal Court of Appeal accepted that RINA was entitled to immunity from jurisdiction since, as a classification society, it provided a public service on behalf of the Maltese State, but the Court held that RINA had waived its immunity for not having pleaded the immunity at the commencement of the proceedings.
- 10.5 The judgement by the Criminal Court of Appeal in Paris is subject to appeal. It is expected that the Court of Cassation will deliver its judgement in November 2011.

Director's considerations

- 10.6 The Director has 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. If, in the *Erika* incident, the Court of Cassation were to uphold the Criminal Court of Appeal's judgement, RINA would be held liable for the pollution arising from the *Erika* incident. This could be a precedent that would be followed by a French court in an action against ABS in the *Prestige* incident.
- 10.7 The question of sovereign immunity would be another uncertainty. In the *Erika* incident the Court recognised RINA's right to foreign state immunity of jurisdiction, but the Court removed that immunity due to RINA's behaviour in not invoking that right at the outset of the proceedings (cf paragraph 10.4). It is uncertain whether a court, in the context of the *Prestige* incident, would hold that ABS has the right to immunity of jurisdiction.
- 10.8 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.
- 10.9 Since the Court of Cassation is expected to deliver its judgement in November 2011, the Director considers that it would be best to wait for that judgement before deciding whether to bring an action against ABS.

11 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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