



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUNDS

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1992 Fund Assembly	92A14	
1992 Fund Executive Committee	92EC46	•
Supplementary Fund Assembly	SA5	
1971 Fund Administrative Council	71AC24	

INCIDENTS INVOLVING THE IOPC FUNDS – 1992 FUND

PRESTIGE

Note by the Director

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 Club) and the 1992 Fund have established Claims Handling Offices in La Coruña (Spain) and Lorient (France).</p> <p>Court actions have been initiated in Spain (section 5) and in France (section 6). A court action was also initiated in the United States by the Spanish State against American Bureau of Shipping (ABS), the classification society that certified the <i>Prestige</i> (section 9).</p>
Recent developments:	<p>The latest claims situation is as follows: claims totalling €1 020.7 million have been received by the office in Spain (cf. sections 3.1 and 4) and claims totalling €109.7 million have been received by the office in France (cf. section 3.2). The process of assessing claims both in Spain and France continues.</p> <p>The experts engaged by the London Club and the 1992 Fund have finalised a provisional assessment of the claims by the Spanish and French Governments.</p> <p>The claims of the Spanish Government, totalling €68.5 million have been provisionally assessed at €266.5 million. A letter explaining the assessment has been sent to the Spanish Government (section 4.3).</p> <p>The claims submitted by the French Government, totalling €67.5 million, have been provisionally assessed at €38.5 million. A letter has been sent to the French Government explaining the assessment (paragraphs 3.2.3-3.2.5).</p> <p>There have been further developments in the proceedings taking place in the United States, referred to above, between the Spanish State and ABS (section 9).</p>

Action to be taken:	<u>1992 Fund Executive Committee:</u>
	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	€2 777 986
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 (£91.7 million) minus €1 million (£800 000), 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 (£222 600), 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 187 claims are awaiting a reply from the claimant.
France	28 claims are being assessed.
Portugal	None.
Legal proceedings	
Spain	Criminal proceedings against the Master, Chief Officer, Chief Engineer and a civil servant, including some 4 010 compensation claims. In a decision the civil servant has been exonerated by the Court.
France	Civil proceedings in various French courts (232 actions).
Portugal	Legal proceedings were started but discontinued after settlement with the Portuguese Government.
United States	Proceedings initiated by the Spanish State against ABS, the classification society that certified the <i>Prestige</i> .

2 The incident

- 2.1 On 13 November 2002 the Bahamas registered tanker *Prestige* (42 820 GT), carrying 76 972 tonnes of heavy fuel oil, began listing and leaking oil while some 30 kilometres off Cabo Finisterre (Galicia, Spain). On 19 November, whilst under tow away from the coast, the vessel broke in two and sank some 260 kilometres west of Vigo (Spain), the bow section to a depth of 3 500 metres and the stern section to a depth of 3 830 metres. The break-up and sinking released an estimated 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 105-109).
- 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 2 September 2009 the Claims Handling Office in La Coruña had received 844 claims totalling €1 020.7 million. These include 14 claims from the Spanish Government totalling €968.5 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	20 833 237
Miscellaneous	74	1 775 068
Spanish Government	14	968 524 084
Total	844	1 020 707 753

^{<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 2 September 2009, 794 (95.66%) of the claims other than those of the Spanish Government had been assessed for €3.9 million (£3.5 million). Interim payments totalling €527 327 (£461 991)^{<2>} had been made in respect of 173 of the assessed claims, mainly at 30% of the assessed amount. Of the remaining claims 3 are pending clarification, 166 are awaiting a response from the claimant, 21 are awaiting further documentation, 412 (totalling €29.8 million) have been rejected and 19 have been withdrawn by the claimants.

3.2 France

3.2.1 As at 2 September 2009, 482 claims totalling €109.7 million had been received by the Claims Handling Office in Lorient. This includes the claims by the French Government totalling €67.5 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 2 September 2009. Four hundred and fifty four claims had been assessed for €50 million and interim payments totalling €5.3 million had been made at 30% of the assessed amounts in respect of 346 claims. The remaining claims await a response from the claimants or are being re-examined following the claimants' disagreement with the assessed amount. Fifty-six claims totalling €3.8 million had been rejected because the claimants had not demonstrated that a loss had been suffered due to the incident.

3.2.3 In May 2004 the French Government submitted 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. A letter has been sent to the Government explaining the assessment.

3.2.4 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 (cf paragraph 4.3.4).

3.2.5 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.

3.2.6 A further 61 claims, totalling €10.5 million, have been submitted by local authorities for costs of clean-up operations. Fifty-four of these claims have been assessed at €4.6 million. Interim payments totalling €1.2 million (£1.1 million) have been made in respect of 41 claims at 30% of the assessed amounts.

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

- 3.2.7 One hundred and twenty-six claims have been submitted by oyster farmers totalling €2.3 million for losses allegedly suffered as a result of market resistance due to the pollution. The experts engaged by the London Club and the 1992 Fund have examined these claims and 120 of them, totalling €2.4 million, have been assessed at €468 231. Payments totalling €131 955 have been made in respect of 90 of these claims at 30% of the assessed amounts.
- 3.2.8 The Claims Handling Office has received 195 tourism-related claims totalling €25.2 million. One hundred and eighty-five of these claims have been assessed at a total of €3.2 million and interim payments totalling €3.7 million have been made at 30% of the assessed amounts in respect of 149 claims.
- 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 €28 488 (£222 600), 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 General claims

- 4.1.1 The Spanish Government submitted a total of 14 claims for an amount of €68.5 million. The claims by the Spanish Government relate to costs incurred in respect of at-sea and onshore clean-up 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 €83.7 million was assessed on an interim basis in December 2003 at €107 million, and the 1992 Fund made a payment of €16.1 million (£11.1 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 (£265.5 million). On that basis, and as authorised by the Assembly, the 1992 Fund made an additional payment of €41.5 million (£28.5 million), corresponding to the difference between 15% of €83.7 million or €7.6 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 Executive Committee or the Assembly.

^{<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.

4.2.2 In March 2006 the 1992 Fund made an additional payment of €6.4 million^{<4>} (£38.5 million) to the Spanish Government, in accordance with the distribution of the amount payable by the 1992 Fund in respect of the *Prestige* incident, as authorised by the Executive Committee at its October 2005 session (cf Annual Report 2006, pages 103-106).

4.3 Assessment

4.3.1 The experts engaged by the London Club and the 1992 Fund have finalised the assessment of the claim by the Spanish Government. The claim, totalling €68.5 million, has been provisionally assessed at €66.5 million and a letter explaining the assessment has been sent to the Government.

4.3.2 Regarding the costs incurred in clean-up operations, the reason for the difference lies in the disproportion, applying the Fund's criteria of technical reasonableness, 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, that claim has been assessed on the basis of an estimation of the damages 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 payments through the levies, the corresponding amounts have been deducted from the claim.

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 has been assessed at €9.5 million.

4.3.6 There is insufficient supporting documentation in respect of costs incurred by an autonomous region and in respect of some compensation payments made in relation to the spill on the basis of national legislation. In this regard, the experts are still examining further documentation recently submitted in support of those compensation payments (some 120 000 pages) and that, together with the possible receipt of further documentation in support of the costs incurred by one of the regions, might increase the assessed amount in the future.

5 Legal proceedings in Spain

5.1 Investigations into the cause of the incident

5.1.1 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. 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.

^{<4>} The Director was authorised to pay the Spanish Government €57 365 000 (£45.7 million) but, as requested by the Spanish Government, the 1992 Fund retained €1 million in order to make payments at the level of 30% of the assessed amounts in respect of the individual claims that had been submitted to the Claims Handling Office in Spain.

- 5.1.2 In March 2009 the Criminal Court in Corcubi3n issued a decision declaring the instruction of the case as concluded. In the decision the Court exonerated from liability the civil servant who had been involved in the decision not to allow the ship into a place of refuge in Spain and decided to continue the proceedings against the Master, Chief Officer and Chief Engineer of the *Prestige*.
- 5.1.3 Some of the parties to the criminal proceedings have appealed against this decision, pleading that the Appeal court declares the nullity of the Corcubi3n Court's decision in respect of the non-liability of the civil servant mentioned above. The French government has also appealed, pleading that some employees of ABS should be incriminated and that proceedings should be initiated against them as well.
- 5.2 **Claims in court**
- 5.2.1 Some 4 010 claims have been lodged in the legal proceedings before the Criminal Court in Corcubi3n (Spain). Six hundred and twelve of these claims involve persons who have submitted claims directly to the 1992 Fund through the Claims Handling Office in La Coru3a. Details of the claims made in some of these court actions have been provided by the Court and are being examined by the experts engaged by the 1992 Fund. The Claims Handling Office has examined documentation relating to 382 of the claims submitted in court, out of which three have been settled and paid for a total amount of €24 267.
- 5.2.2 One thousand nine hundred and ninety four of these claims have been paid by the Spanish Government under the Royal Decrees^{<5>} or by the 1992 Fund through the Claims Handling Office in La Coru3a. A number of claimants who have been paid by the Spanish Government under the Royal Decrees have withdrawn their claims from the court proceedings. It is expected that more claimants will withdraw their court actions for the same reason.
- 5.2.3 The Spanish Government has itself taken legal action in the Criminal Court in Corcubi3n as well as on behalf of regional and local authorities and 1 867 other claimants or groups of claimants. A number of other claimants have also taken legal action and the Court is considering whether these claimants are eligible to join the proceedings.

6 Legal proceedings in France

- 6.1.1 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 €11 million, including €7.7 million claimed by the Government.
- 6.1.2 Thirty-nine of these claimants have withdrawn their actions, therefore the actions by 193 claimants remain pending in court for compensation claims amounting to a total of €2.6 million.
- 6.1.3 The courts have granted a stay of proceedings in 28 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 Corcubi3n is known. One judgment was rendered in late May 2009 by the Civil Court in Saint Nazaire (see overleaf).
- 6.1.4 Some one hundred and forty French claimants, including various communes, have joined the legal proceedings in Corcubi3n, Spain.

^{<5>} Some 397 claims under the Royal Decrees have been rejected by the Spanish Government.

7 Judgements by courts in France

7.1 Civil court in Saint Nazaire

7.1.1 Two owners of five fishing vessels brought an action before the Court of First Instance of Saint Nazaire claiming €419 333 for loss of income allegedly incurred through a reduction in the anchovy population as a result of the *Prestige* incident and €81 000 for the replacement of a fishing net damaged by oil. The 1992 Fund had assessed the damage to the net at €3 000 and rejected the claim for loss of income since no sufficient link of causation was established between the alleged loss and the contamination.

7.1.2 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 €6 000 to be paid at the current level (30%) of the payments applied by the Fund.

7.1.3 As at 8 September 2009 the claimants had not appealed against the judgement.

8 Court actions in Portugal

The Portuguese Government took legal action in the Maritime Court in Lisbon against the shipowner, the London Club and the 1992 Fund claiming compensation for €4.3 million. Following the settlement of the claim referred to in paragraph 3.3, the Portuguese Government withdrew its action in December 2006.

9 Court actions in the United States

9.1 Background information

9.1.1 The Spanish State has taken legal action against American Bureau of Shipping (ABS) before the Federal Court of First Instance in New York requesting compensation for all damage caused by the incident, estimated initially to exceed US\$700 million and estimated later to exceed US\$1 billion. The Spanish State has maintained, *inter alia*, that ABS had been negligent in the inspection of the *Prestige* and had failed to detect corrosion, permanent deformation, defective materials and fatigue in the vessel and had been negligent in granting classification.

9.1.2 ABS denied the allegation made by the Spanish State and in its turn took action against the State, arguing that if the State had suffered damage this was caused in whole or in part by its own negligence. ABS made a counterclaim and requested that the State 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.

9.1.3 For details about the defence of sovereign immunity, the discovery of the criminal file in Corcubión, of financial records and of e-mail communications, reference is made to Annual Report 2007, pages 101 to 104 and Annual Report 2008, pages 103 to 107.

9.2 ABS's defence that it acted as 'the pilot or any other person, (...), who performs services for the ship'

9.2.1 For details about ABS's request for a summary judgement and the opposition by the Spanish State, reference is made to Annual Report 2008, pages 104 and 105.

9.2.2 In January 2008 the New York Court accepted ABS's argument that ABS fell into the category of 'any other person who performs services for the ship' under Article III.4(b) of the 1992 Civil Liability Convention (CLC). The Court argued that the text of the treaty had to be interpreted in accordance with the ordinary meaning given to the terms of the treaty in their context and in light of its object and purpose. It further argued that the *ejusdem generis* rule of construction did not apply because it was only to be used where there was uncertainty as to the meaning of a particular clause in a statute. The Court found no uncertainty or ambiguity in the wording of Article III.4(b) and, therefore, held it did

not need to refer to *ejusdem generis*, negotiation history or other extrinsic sources. The Court further ruled that, under Article IX.1 of the 1992 CLC, Spain could only make claims against ABS in its own courts and it therefore granted ABS's motion for summary judgement, dismissing the Spanish State's claim.

- 9.2.3 In its decision, the New York Court also denied all pending motions as now being non actionable, except for the pending motions over sanctions for Spain's failure to comply with the discovery requests relating to e-mails (cf paragraph 9.1.3).
- 9.2.4 The Spanish State appealed against the New York Court's decision. ABS has also filed an appeal against the Court's decision to dismiss its counterclaims for lack of jurisdiction. The Spanish State also filed a motion with the Court of Appeal seeking to dismiss ABS's appeal.
- 9.2.5 For details about the appeal by the Spanish State, its request that the Fund present an *amicus curiae* brief and ABS's counter appeal, reference is made to Annual Report 2008, pages 104 to 105.
- 9.2.6 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).
- 9.2.7 With respect to Spain's claim, the Court of Appeal held that the 1992 CLC cannot divest a U.S. 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. The Court of Appeal decision made the point that ABS' willingness to fully submit to jurisdiction in Spain was a relevant factor in any decision to decline jurisdiction. The Court of Appeal also points out that the District Court should consider the equities in declining jurisdiction at this advanced stage in the litigation process. If the District Court decided to retain jurisdiction, then the Court of Appeal has instructed it to conduct a conflict of laws analysis to determine which law should govern this case.
- 9.2.8 ABS' original counterclaim was dismissed based on the U.S. FSIA. The District Court held that ABS' 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 if they arose out of the same transaction as the sovereign's original claim. 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, the Court of Appeals reinstated the original counterclaims by ABS.
- 9.2.9 The case has now been sent to the District Court Judge for further consideration.

10 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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