



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUNDS

Agenda item: 3	IOPC/OCT11/3/6	
Original: ENGLISH	13 September 2011	
1992 Fund Assembly	92A16	
1992 Fund Executive Committee	92EC53	•
Supplementary Fund Assembly	SA7	
1971 Fund Administrative Council	71AC27	

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:	<p>The Bahamas-registered tanker <i>Prestige</i> 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. 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 Bordeaux (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 July 2010, the Criminal Court in Corcubión, which was investigating the cause of the incident, 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>It is expected that the criminal trial will take place in late 2012.</p> <p>The claims situation in Spain and France is summarised in sections 3, 4 and 5.</p>
Action to be taken:	<p><u>1992 Fund Executive Committee:</u></p> <p>Information to be noted.</p>

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	€1 715 207 03
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.
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 2 285 claims for compensation have been submitted into the proceedings.
France	Civil actions by 123 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. Some 63 272 tonnes of cargo were spilled. It was subsequently estimated by the Spanish Government that approximately 13 700 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 6 September 2011, the Claims Handling Office in La Coruña has received 845 claims totalling € 037 million. These include 15 claims from the Spanish Government totalling €84.8 million (cf section 4). The table below provides a breakdown of the different categories of claims:

Category of claim	Claims submitted	Amount Claimed €	Claims assessed	Amount assessed €	Claims paid	Amount Paid €
Property damage	232	2 066 103	211	318 885	22	8 034
Clean-up	17	3 011 744	11	351 037	2	1 191
Mariculture	14	20 198 328	14	518 469	2	144 263
Fishing and shellfish gathering	180	3 610 886	136	241 383	9	7 451
Tourism	14	688 303	14	17 742	4	5 323
Fish processors & vendors	299	20 836 857	294	2 111 945	115	359 108
Miscellaneous	74	1 775 068	73	231 809	21	39 606
Spanish Government	15	984 827 922	15	300 239 351	15	113 920 000
Total	845	1 037 015 211	768	304 030 621	190	114 484 976

- 3.1.2 As at 6 September 2011, 753 (90.72%) of the claims other than those of the Spanish Government have been assessed for €3.8 million. Interim payments totalling €64 976 have been made in respect of One hundred and seventy-five 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. Sixty-five claims are awaiting a response from the claimant and five are in progress. Four hundred and twenty-nine claims (totalling €38 million) have been rejected, and nineteen 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 6 September 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	Claims submitted	Amount claimed €	Claims assessed	Amount assessed €	Claims paid	Amount paid €
Property damage	9	87 772	9	17 120	7	5 136
Clean up	61	10 512 569	53	4 550 317	47	1 286 237
Mariculture	126	2 336 501	120	460 011	90	131 955
Shellfish gathering	3	116 810	3	16 613	1	4 984
Fishing boats	59	1 601 717	59	624 163	49	182 983
Tourism	195	25 166 131	185	13 081 322	154	3 880 177
Fish processors/vendors	9	301 446	8	101 355	5	29 072
Miscellaneous	19	2 029 820	17	182 074	8	39 828
French Government	1	67 499 154	1	38 481 121	0	0
Total	482	109 651 920	455	57 514 096	361	5 560 372

3.2.2 Of the 482 claims submitted to the Claims Handling Office, 94% had been assessed by 6 September 2011. Four hundred and fifty-five claims had been assessed for €57.5 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 €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 and the costs incurred therein (Royal Decrees)^{<1>}, 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, 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

^{<1>} For details regarding the scheme of compensation set up by the Spanish Government reference is made to the Annual Report 2006, pages 109-111.

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 (ie €57.6 million) and 15% of the preliminarily assessed amount of the Government's claim (ie €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^{<2>} 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 €84.8 million, have been assessed at €300.2 million. 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. For more details about the assessment reference is made to Incidents involving the IOPC Funds 2010, page 15.

5 Claims by the French Government

5.1 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 assessed the claims at €38.5 million and a letter explaining the assessment was sent to the Government.

5.2 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 was 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 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.

6.1.2 In July 2010 the Criminal Court in Corcubi3n 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.

^{<2>} The Director was authorised to pay the Spanish Government €7 365 000 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.

- 6.1.3 The 1992 Fund 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 argued that the Fund's mission was to compensate the persons that suffer pollution damage in accordance with the 1992 Fund Convention, that the Fund had 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 would have to compensate. The 1992 Fund had also argued that a request for the Fund to provide security would impede the Fund in compensating the victims that were not party to the criminal proceedings and therefore it would prevent the Fund from complying with its mission.
- 6.1.4 The Court of Appeal delivered a resolution in which it acknowledged the difficulties of combining the domestic procedural law with the provisions of the Convention and, while confirming the decision of the Court of Corcubi3n, stated that the amount already paid by the 1992 Fund would be excluded from the proceedings and that the Fund had the possibility to put security in place for the rest of its limits, if such security were to be finally requested to the Fund.
- 6.1.5 The proceedings will be transferred to another court, the Audiencia Provincial in La Coru3a, who will conduct the criminal trial. It is expected that the hearing on the criminal and civil merits of the case will commence in late 2012.
- 6.2 Civil claims
- 6.2.1 As at 6 September 2011, some 2 285 claims were lodged in the legal proceedings before the Criminal Court in Corcubi3n. 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 122 claims by French parties. Some of the claimants in the proceedings had also submitted a claim in the Claims Handling Office in La Coru3a.
- 6.2.2 The experts engaged by the 1992 Fund have assessed claims submitted by individual claimants in Spain for a total of €144 334. Interim payments totalling €254 968 had been made at 30% of the assessed amount, taking into account the aid received, if applicable. Claimants in 407 of the court actions had received payments as a result of a settlement agreement with the Spanish Government. The assessment of these claims is included in the subrogated claim submitted by the Spanish Government (cf section 4). The claims submitted by French claimants are being assessed.
- 6.2.3 The Criminal Court in Courcubi3n appointed court experts to examine the civil claims lodged in the criminal proceedings. In January 2010, the experts appointed by the Court submitted their assessment report. 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 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.
- 6.2.4 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 €111 million, including €67.7 million claimed by the Government.
- 7.2 One hundred and nine of these claimants have withdrawn their actions. Therefore, actions by 123 claimants remain pending in court for compensation claims amounting to a total of €83.6 million.

- 7.3 The courts have granted a stay of proceedings in 20 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.
- 7.4 Some 122 French claimants, including various communes, have joined the legal proceedings in Corcubi3n, Spain.

8 Judgements by courts in France

Court of first instance in Bordeaux

- 8.1 The owners of a campsite in the affected area submitted a claim totalling €14 966 for loss of income and costs incurred in measures to prevent economic losses, namely marketing activities. The 1992 Fund had initially assessed the claim at €95 831 and had paid to the claimant €178 749, ie 30% of the assessed amount. Following additional information the claim was reassessed at €738 716. The claimant did not agree with the assessment and brought an action against the shipowner, its insurer and the 1992 Fund in the Court of First instance in Bordeaux.
- 8.2 In a judgement delivered in May 2011 the Court partially agreed with the Fund's assessment of the claim but considered that the total losses suffered by the claimant totalled €82 268. In its judgement the Court recognised that the Fund should pay 30% of that amount, after deducting the amounts already paid.
- 8.3 As the judgement did not involve a question of principle the 1992 Fund did not appeal, and paid the claimant the sum of €85 931 plus legal costs.

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 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 Corcubi3n, financial records and e-mail communications, reference is made to the Annual Report 2007, pages 101-104 and the Annual Report 2008, pages 103-107.
- 9.4 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 104-105.

First judgement by the District Court

- 9.5 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 a summary judgement, dismissing the Spanish State's claim.

Court of Appeal

- 9.6 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).
- 9.7 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.
- 9.8 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.
- 9.9 The case was sent to the District Court Judge for further consideration.

Second judgement by the District Court

- 9.10 The District Court issued its second judgement in August 2010, granting ABS' Motion for Summary Judgement and again dismissing Spain's claims against ABS.
- 9.11 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 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.
- 9.12 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*.
- 9.13 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.
- 9.14 The Spanish State has appealed against the judgement. For details about the pleadings submitted by both parties in the appeal, and the *amicus curiae* brief submitted by two environmental organisations in support the Spanish Government claim, reference is made to document IOPC/MAR11/3/4.
- 9.15 No date has as yet been set for the oral hearing before the Court of Appeal.
- 9.16 No developments have taken place in these proceedings since this incident was considered by the 1992 Fund Executive Committee at its March 2011 meeting.

10 Legal action by the French Government against ABS in France

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.

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

- 11.1 At the June 2010 and March 2011 sessions of the 1992 Fund Executive Committee the Director provided a preliminary analysis of the implications of a possible recourse action of the 1992 Fund against ABS in France (cf documents IOPC/JUN10/3/2/1 and IOPC/MAR11/3/4).

- 11.2 The Executive Committee noted that in the *Erika* incident the Criminal Court of Appeal in Paris had decided that Registro Italiano Navale (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 and that, regarding civil liabilities, these three condemned parties were jointly and severally liable for the damage caused by the incident (cf document IOPC/JUN10/3/1, section 4).
- 11.3 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 late 2011 or early 2012.
- 11.4 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 (cf document IOPC/MAR11/3/4).
- 11.5 Under French Law a ten-year time bar period would be applicable for a recourse action, which means that the 1992 Fund would have until 13 November 2012 to bring an action against ABS in France.
- 11.6 Since the Court of Cassation is expected to deliver its judgement in late 2011 or early 2012, the Director considers that it would be best to wait for that judgement before deciding whether to bring an action against ABS.
- 11.7 There have been no developments since March 2011 that could influence the considerations on the possibility of a recourse action against ABS. The Director will review the issue once the French Court of Cassation has delivered its judgement in the context of the *Erika* incident.

12 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.
-