



LEVY OF CONTRIBUTIONS

Note by the Director

Summary: Considerable funds may be required during 2003 and early 2004 for the payment of claims and claims related expenses in respect of the *Prestige* incident, which occurred after the 2002 contributions had been decided by the Assembly in October 2002. Possible sources of funding are examined.

Action to be taken: Decide on the levy of contributions in respect of the *Prestige* incident.

1 Levy of contributions at the Assembly's October 2002 session

The assessment of 2002 contributions was considered by the 1992 Fund Assembly at its 7th session, held in October 2002. The Assembly decided to levy contributions for £3 million to the General Fund and for £28 million to the *Erika* Major Claims Fund for payment by 1 March 2003 (document 92FUND/A.7/29, paragraphs 25 and 27.2).

2 The *Prestige* incident

- 2.1 The *Prestige* incident occurred off Spain on 13 November 2003 (ie after the 7th session of the Assembly).
- 2.2 The total amount of the admissible claims arising out of the *Prestige* incident will greatly exceed the limit of liability applicable to the *Prestige* under the 1992 Civil Liability Convention, approximately 18.9 million Special Drawing Rights (SDR) (approximately £16.4 million). It is also expected that the total amount of the admissible claims will exceed the 1992 Fund's limit of 135 million SDR corresponding to €171 520 703.
- 2.3 At its 20th session, held in February 2003, the Executive Committee invited the Director to convene an extraordinary session of the Assembly during the week of 6 May 2003 to consider whether contributions should be levied for payment during the second half of 2003 to enable the 1992 Fund to make prompt payments of compensation (document 92FUND/EXC.20/7, paragraph 3.4.41).

3 Level of payments

- 3.1 The Executive Committee considered the level of payments in respect of the *Prestige* incident at its 20th session, held in February 2003 (document 92FUND/EXC.20/7, paragraphs 3.4.42 - 3.4.62).
- 3.2 Unlike in previous cases the insurer of the *Prestige*, the London Steam-Ship Owners' Mutual Insurance Association Ltd (London Club), has not agreed to make payments up to the shipowner's limitation amount. At the Committee's February 2003 session the representative of the London Club drew the Committee's attention to the advice it had received from its legal advisers in Spain, which indicated that if the Club were to make payments to claimants in line with past practice it was highly likely that these payments would not be taken into account by the Spanish courts when the shipowner set up the limitation fund, with the result that the Club could end up paying twice the limitation amount. The London Club representative stated that despite lengthy discussions between the Club's legal advisers and lawyers representing the Spanish State, the Club was not convinced that a double payment situation could be avoided, which left the Club no alternative but to deposit the limitation fund with a competent court in Spain or France, recognising that this could result in the money becoming unavailable for the payment of claims for several years.
- 3.3 A number of delegations accepted that the 1992 Fund could not dictate to the London Club that it should make compensation payments without the Club receiving a guarantee that it would not be required to pay double the limitation amount. In those delegations' view it would therefore be necessary for the Fund to make payments from the outset since the concerns of the victims of pollution damage were paramount. It was noted that if the 1992 Fund were to depart from its previous policy of not paying claims before the insurer had paid up to the limitation amount, the Fund could only pay up to 135 million SDR minus the shipowner's limitation amount under the 1992 Civil Liability Convention.
- 3.4 The Executive Committee considered that it was not possible at that stage to make any meaningful assessment of the magnitude of the total amount of the established claims arising from the *Prestige* incident. The Committee decided that in view of this uncertainty the Director's authority to make payments should, for the time being, be limited to provisional payments under Internal Regulation 7.9.
- 3.5 The Executive Committee noted that it was expected that the claims situation would become clearer by the end of April 2003, prior to its next session. It was further noted that the intentions of the affected States with regard to their own claims and subrogated claims would be known at that time, thus enabling the Committee to make a decision on the appropriate level of payments by the 1992 Fund.

4 Funds required for the *Prestige* incident

4.1 Overall situation

- 4.1.1 It is not possible at this stage to make an accurate assessment of the payments which the 1992 Fund will be called upon to make during the coming eleven months, ie before 1 March 2004 when the 2003 contributions to be decided by the Assembly at its October 2003 session will be due. The Director believes, however, that the 1992 Fund may be called upon to make significant compensation payments during that period especially since the shipowner's insurer is unlikely to make any such payments. The 1992 Fund will also incur considerable expenses.
- 4.1.2 The claims situation may have become clearer by the Executive Committee's May 2003 session. The Committee may then decide on the level of the 1992 Fund's payments, and that decision would be of major importance for the amount of the compensation payments to be made during the period up to 1 March 2004. In the meantime, however, the Director estimates that expenditure

(both compensation payments and costs) of some £35 million may have to be paid before 1 March 2004.

- 4.1.3 The Director may in an addendum to this document modify this estimate and consequently the proposal set out below if the information available by the time of the Assembly's extraordinary session should warrant it.

4.2 General Fund

Financial Regulation 7.1(c)(i) provides that the General Fund shall be used for the payment of claims up to 4 million SDR (£3 369 200) per incident (minor claims) (cf Article 12.2(a) of the 1992 Fund Convention). This amount would be paid from the working capital, which has been fixed by the Assembly at £20 million.

4.3 Major Claims Funds

Financial Regulation 7.2 provides that a separate Major Claims Fund shall be established for each incident to the extent that the aggregate amount of the payment of claims exceeds 4 million SDR per incident (major claims). Since the 1992 Fund's payments in respect of the *Prestige* incident will exceed that amount, a Major Claims Fund will have to be established.

5 Possible sources of funds for the *Prestige* Major Claims Fund

5.1 General Fund

- 5.1.1 In accordance with Financial Regulation 7.1(c)(iv), it would be possible for a loan to be made to the *Prestige* Major Claims Fund from the General Fund to cover expenditure arising from the *Prestige* incident over and above 4 million SDR. Such a loan would be repaid (with interest) to the General Fund when contributions to the *Prestige* Major Claims Fund are received.
- 5.1.2 The Director considers that, in order to avoid depleting the working capital and to ensure that funds are available to meet payments in respect of other new incidents, measures should be taken to avoid having to rely on significant loans being made from the General Fund to finance payments from the *Prestige* Major Claims Fund.

5.2 *Nakhodka* Major Claims Fund

- 5.2.1 Financial Regulation 7.2(d) provides that monies in any Major Claims Fund may be used to make loans to other Major Claims Funds, to the extent that sufficient money is not available in the relevant Funds. Such a loan would be repaid (with interest) when contributions to the relevant Major Claims Fund are received.
- 5.2.2 All claims arising from the *Nakhodka* incident had been settled and paid by the end of 2002 and all fees and expenses have been paid. The balance on the 1992 Fund *Nakhodka* Major Claims Fund at the end of April 2003 would stand at approximately £37 million. If past 1971 Fund practice were to be followed, the balance including interest would be repaid on 1 March 2004 to contributors to this Major Claims Fund <1>. It would therefore be possible for a significant loan to be made from the 1992 Fund *Nakhodka* Major Claims Fund to the *Prestige* Major Claims Fund.

5.3 *Erika* Major Claims Fund

The balance on the *Erika* Major Claims Fund was approximately £86 million at 31 March 2003. The monies on this Major Claims Fund will be used for payments of compensation and expenses

<1> At the same time the surplus on the 1971 Fund *Nakhodka* Major Claims Fund would be reimbursed to the contributors to that Fund.

in respect of the *Erika* incident. It is difficult to make an estimate of the amount which will be paid from this Major Claims Fund up to 1 March 2004.

6 Levy of contributions to the *Prestige* Major Claims Fund

- 6.1 The Director takes the view that the 1992 Fund should ensure that sufficient funds are available to allow prompt payments of compensation to be made for claims arising from the *Prestige* incident and to pay the expenses relating to the incident. Normally, contributions to the *Prestige* Major Claims Fund would be levied by the Assembly at its October 2003 session and contributions would be received by 1 March 2004. As mentioned above, the Director considers that some £35 million may be required for this incident up to that date (out of which 4 million SDR to be paid from the General Fund).
- 6.2 One option to finance payments to be made in respect of the *Prestige* incident up to 1 March 2004 (above the amount payable from the General Fund) would be by loans to the *Prestige* Major Claims Fund from the 1992 Fund *Nakhodka* Major Claims Fund and to some extent by loans from the General Fund. Additionally, if the balance on the *Erika* Major Claims Fund were not used in its entirety for payments during the period, loans could be taken from that Major Claims Fund.
- 6.3 The alternative would be for the Assembly to decide already at this session to levy contributions for £30 million to the *Prestige* Major Claims Fund for payment during the second half of 2003.

7 Director's proposal

In light of the significant surplus on the 1992 Fund *Nakhodka* Major Claims Fund and in order not to burden contributors with an extra levy of contributions during 2003, the Director proposes that payments of compensation and expenses relating to the *Prestige* incident should for the period up to 1 March 2004 be financed by loans from the 1992 Fund *Nakhodka* Major Claims Fund and, if required, from the General Fund or the *Erika* Major Claims Fund.

8 Action to be taken by the Assembly

The Assembly is invited, in accordance with Article 12 of the 1992 Fund Convention,

- (a) to take note of the information contained in this document;
- (b) to consider the Director's proposal that payments of compensation and expenses relating to the *Prestige* incident (above the amount payable from the General Fund) should be made through loans from the 1992 Fund *Nakhodka* Major Claims Fund and, if required, from the General Fund or the *Erika* Major Claims Fund.
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