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INCIDENTS INVOLVING THE 1971 FUND

AEGEAN SEA

Note by the Director

1 Introduction

1.1 Criminal proceedings were initiated in the Criminal Court of first instance in La Coruña against the master of the *Aegean Sea* and the pilot in charge of the ship's entry into the port of La Coruña. Developments in these proceedings prior to 1997 were reported in documents FUND/EXC.47/3, FUND/EXC.49/3, paragraph 3 and FUND/EXC.50/4, paragraph 4).

1.2 The Criminal Court of first instance rendered its judgement in the *Aegean Sea* case on 30 April 1996. The 1971 Fund and other parties appealed against this judgement.

1.3 The Court of Appeal in La Coruña rendered its judgement on 18 June 1997. The judgement of the Court of Appeal is final. However, a number of claims for compensation have been referred to the procedure for the execution of the judgement (cf paragraph 5.1 below).

1.4 In order to facilitate delegations' assessment of the situation, the present document sets out the developments in the legal proceedings, viz the judgement of the Court of first instance, the 1971 Fund's appeal, the appeals lodged by the other parties, the Fund's response to these appeals and the position taken by the Court of Appeal on various issues. The document also deals with certain other issues relating to the claims for compensation.

1.5 An English translation of the Court of Appeal's judgement is available to delegations on request.

2 Claims situation

2.1 The Joint Claims Office set up by the 1971 Fund and the shipowner's P & I insurer (the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd (UK Club), has received 1 277 claims totalling Pts 24 809 million (£103 million). Compensation has been paid in respect of 835 claims for a total

amount of Pts 1 617 million (£6.7 million). Out of this amount, the UK Club has paid Pts 782 million (£3.2 million) and the 1971 Fund Pts 835 million (£3.5 million). It should be noted that many of the claims presented to the Joint Claims Office which have not been settled have, in the 1971 Fund's view, become time-barred, as reported in document FUND/EXC.47/3.

2.2 Claims have also been submitted to the Criminal Court in La Coruña, totalling some Pts 24 730 million (£103 million). These claims correspond to a great extent to those presented to the Joint Claims Office.

2.3 Many claimants who have presented claims to the Joint Claims Office have not submitted any claims in the criminal proceedings. Some of these claimants, together with others who have not submitted claims to the Joint Claims Office, have indicated that they will present their claims at a later stage in civil proceedings against the shipowner, his insurer and the 1971 Fund. These claims total Pts 26 855 million (£112 million).

3 Criminal liability of the master and the pilot

3.1 The Court of first instance found that the master had acted in an imprudent manner, without the diligence required of the captain of a vessel such as the *Aegean Sea*, as he did not carry out the manoeuvre cautiously enough in view of the place and time in which the events took place. It was noted that it was the first time that the master had entered the port of La Coruña, and that he had not requested any information on the topography of the port or on how to approach the port. It was also noted that the entry had taken place at night and in bad weather. The Court considered that the manoeuvre chosen by the master had not been the most appropriate in the prevailing conditions as he had carried out the manoeuvre quickly, in a place where there was insufficient space to allow him to take evasive action. It also stated that the master had taken insufficient precautions and that he had relied on the manoeuvrability of the vessel without having verified carefully the possible consequences of his actions, bearing in mind the dangerous cargo the ship was carrying and the adverse weather conditions. The master was held liable for criminal negligence and sentenced to pay a fine of Pts 300 000 (£1 250) or one day's imprisonment for each Pts 5 000 (£21) not paid.

3.2 The pilot was also found to have acted in an imprudent manner. It was noted that, in accordance with the Regulations issued by the Port Authority of La Coruña, the pilot should not have allowed the *Aegean Sea* to enter the port of La Coruña by night unless the weather was good. Good weather conditions in the Regulations meant conditions which allowed the pilot to board the vessel in the designated area. It was also noted that the pilot knew that he was not able to board the *Aegean Sea* in the designated area, as shortly beforehand, due to bad weather, he had disembarked another vessel under his pilotage. It was further noted that the pilot had not waited for the *Aegean Sea* in the pilotage area. It was finally noted that, although the draught of the vessel did not have any relevance to the incident, in breach of the Regulations he had allowed the *Aegean Sea* to enter the port at low tide. The Court held that the pilot was liable for criminal negligence as he was under the obligation to provide pilotage services from the exterior limits of the port but did not do so. The pilot was sentenced to pay a fine of Pts 300 000 (£1 500) or one day's imprisonment for each Pts 5 000 (£25) not paid.

3.3 The master and the pilot appealed against the judgement and requested that they should be acquitted.

3.4 The public prosecutor did not appeal in respect of the criminal liability of the master and the pilot. From this it can be inferred that the public prosecutor agreed with the Court of first instance's assessment of the criminal liability aspects.

3.5 The Spanish State appealed against the judgement in respect of the pilot and requested that he should be acquitted since he was not, in the State's view, guilty of any criminal negligence. As for the State's appeal in respect of the State's liability for the acts of the pilot, reference is made to paragraph 4.4 below.

3.6 The 1971 Fund did not appeal in respect of the criminal liabilities. In its reply to the appeals of the other parties, the 1971 Fund stated that the Fund was not involved in criminal liability and that the Fund accepted the judgement of the Court of first instance as regards such liabilities.

3.7 The Court of Appeal basically agreed with the assessment made by the Court of first instance on the matter of the criminal liability of the master and the pilot. The Court of Appeal therefore upheld the judgement of the Court of first instance in this regard in respect of both of them.

3.8 The Court of Appeal found that the actions of the master were negligent. The reasoning of the Court of Appeal can be summarised as follows:

> The master's lack of communication with the pilot, in not asking for details of where and when the latter would board and of possible changes in the weather, indicates negligence on his part, irrespective of whether there might have been negligence also on the part of the pilot. The master was not familiar with the port of La Coruña and was approaching it for the first time in adverse weather conditions. His lack of communication with the pilot, when he did not have the support of any navigational aid system for entering the port, which has a restricted entry channel, is indicative of negligence and laziness. His apparent confidence that the pilot would board at the point marked on the chart - which was not in fact accurate - is no defence, since even if the chart had been correct, there were significant hazards in the vicinity even before reaching that point.

3.9 The Court of Appeal found that the pilot was also negligent. The reasons given by the Court of Appeal are summarised as follows:

> Since an oil tanker was involved, the pilot was required to provide his pilotage services from the outer limits of the port. The pilot adopted a careless attitude. Instead of indicating to the master of the vessel the point at which he would find the pilot boat, so that the pilot could board, the pilot merely gave the master a few vague and imprecise instructions, without any specific details. As a result the master, led astray by the markings on his chart of the area as regards the point at which the pilot was to board, continued alone to this latter point, which was not the correct one, and which was therefore some distance from where the pilot was positioned. The pilot failed to maintain communications with the ship, waiting in a safer, more sheltered place, for the tanker to arrive. He did not react when he realised that the vessel was commencing the approach manoeuvre to line up with the entry channel. Finally, the pilot remained silent even when he noticed that the weather was getting worse and the visibility reducing to nil. The pilot remained in the inner port until, much later, after the squall had passed, he saw that the vessel had run aground on the rocks. It is clear that in this case the *Aegean Sea* was in the compulsory pilotage zone and that the pilot was therefore under an obligation to take action.

4 Civil liabilities

4.1 The Court of first instance held that the master of the *Aegean Sea* and the pilot were directly liable for the incident. The Court also held that the master and the pilot were jointly and severally liable, each of them on a 50% basis, to compensate victims of the incident. It was also held that the UK Club and the 1971 Fund were directly liable for the damage caused by the incident and that this liability was joint and several. In addition, the Court held that the owner of the *Aegean Sea* and the Spanish State were subsidiarily liable.

4.2 In the Director's view it was incorrect in law to hold the 1971 Fund jointly and severally liable with the master and the UK Club. He takes the view that joint and several liability can be imposed only when the legal basis for the liability is the same for all the defendants in question. In the *Aegean Sea* case the basis of the liability of the master and the UK Club is not the same as that of the 1971 Fund. However, the 1971 Fund did not appeal on this point.

4.3 In its appeal the 1971 Fund invoked Article 4.3 of the 1971 Fund Convention as regards the Spanish State's claim in respect of pollution damage under Article I.6 of the 1969 Civil Liability Convention. That Article provides that, if the Fund proves that the pollution damage resulted wholly or partially from an act of omission done with intent to cause such damage or from the negligence of such person, the Fund may be exonerated wholly or partially from its obligation to pay compensation to such a person. The Fund invoked the provision on the ground that the negligence of the pilot contributed to the incident and that the Spanish State was subsidiarily liable for the pilot's acts. It should be noted that the Fund did not invoke this provision in respect of the State's costs for preventive measures, since the article provides that there should be no such exoneration with regard to costs for preventive measures.

4.4 The Spanish State appealed against the judgement, maintaining that there was no negligence on the part of the pilot and that the incident was therefore caused entirely by the negligence of the master. The State argued that in any case the State was not subsidiarily liable for the acts of pilots, since pilots were not civil servants but belonged to an independent body, the Corporation of Pilots. In addition, the State maintained that, although ships were obliged to use a pilot in order to be allowed to enter the port of La Coruña, this did not mean that the State was liable for the acts of the pilot.

4.5 As mentioned above, the 1971 Fund did not appeal in respect of the criminal liability. However, in view of the importance for the Fund of the distribution of liability between the master and the pilot, the Fund made certain observations on this point in its response to the State's appeal. The 1971 Fund stated that once the criminal liability of the pilot was established, it followed that the State was subsidiarily liable. The 1971 Fund referred to Article 9.2 of the 1971 Fund Convention and to the position taken by the Executive Committee concerning recourse actions (cf paragraph 6.2 below). The Fund argued that, under Spanish law, pilotage was a public service of a compulsory nature supervised by the State which could only be exercised by those who had been approved by the State after an examination, ie pilotage was a State monopoly. The Fund pointed out that sanctions were imposed if a ship entered a port without a pilot contrary to requirements.

4.6 In the Director's view it was incorrect to make the master liable, because under the 1969 Civil Liability Convention (Article III.4, second sentence), which forms part of Spanish law, no claim for compensation for pollution damage may be made against the servants or agents of the shipowner, whether under the Convention or otherwise, and the master clearly fell within this category. However, this is a matter that does not directly concern the 1971 Fund. In its response to the Court of Appeal, the Fund nevertheless drew attention to this provision in the Convention.

4.7 The Court of Appeal upheld the judgement of the Court of first instance in the aspects of civil liability referred to in paragraph 4.1.

4.8 The Court of Appeal stated that the contribution to the incident of the master and the pilot was similar. The master and pilot were held liable in equal shares in civil law, since the accident could have been avoided if each of them had taken those precautions which were incumbent on them.

4.9 In respect of the appeal by the shipowner, the Court of Appeal stated that the question raised by the owner, ie the equal attribution of civil liability to the master and the pilot and, by extension, to those deriving dependent civil liability from them, had already been dealt with in the context of the criminal liability of the two accused.

5 Position taken by the Courts on individual claims

General observations

5.1 Under Spanish law, a claimant must prove the quantum of the damage suffered. However, Spanish procedural law provides that, if the claimant has not quantified the damage, the quantification may be deferred to the procedure for the execution of the judgement. In that case, the court is obliged to determine the criteria to be applied for the assessment of the quantum of the damage suffered. In the *Aegean Sea* case, the Court of first instance decided that many claims should be quantified during the procedure for the execution of the judgement and the Court of Appeal endorsed the position taken by the Court of first instance in this regard.

5.2 Any party may appeal against a decision rendered as a result of the procedure for the execution of the judgement.

5.3 The Court of first instance in many cases considered the evidence presented by the claimant to be insufficient to substantiate the amount of the losses suffered, and the Court of Appeal endorsed that position. The Courts thus took the same position as the 1971 Fund in this respect. The Courts did not accept the conclusions of the study carried out by the University of Santiago de Compostela as regards the quantification of the losses allegedly suffered by fishermen, shellfish harvesters and mussel farmers, and also on this point the Courts took the same position as the 1971 Fund (cf document FUND/EXC.47/3, paragraphs 3.5.21 - 3.5.29). The 1971 Fund had from the outset maintained that each claimant, or each group of claimants, had to submit appropriate documentation to substantiate their losses. As regards the

claims in the fishery sector, the Courts shared the 1971 Fund's view concerning the necessity for the claimants to submit supporting documentation.

5.4 The Court of first instance rejected an item of the claim presented by the City of La Coruña for Pts 46 million (£192 000) <1> for the cost of cleaning certain beaches, because the City had not carried out any such operations. Another item in that claim, for Pts 4.2 million (£17 500), which related to road repairs, was also rejected, since these repairs were not related to the incident. The City of Oleiros had presented a claim for Pts 1 303 million (£5.4 million) in respect of loss of natural resources. The Court rejected that part of the claim which had been opposed by the 1971 Fund. A claim by a mussel farm (Mexilor) included an item for interest (Pts 80 million or £333 000) and another item for a publicity campaign (Pts 25 million or £104 000). These items were rejected by the Court of first instance, as regards the publicity campaign because the campaign was not carried out.

5.5 The Court of Appeal upheld the position taken by the Court of first instance, except on the points set out below.

5.6 Pursuant to the judgement of the Court of Appeal, the claimants represented in proceedings were awarded compensation as set out in the table below.

Claimant	Claimed Amount Pts	Claimed Amount £	Awarded Amount Pts	Awarded Amount £
Spanish Government	1 154 500 000	4 810 000	Execution of judgement	
Xunta de Galicia	246 212 672	1 026 000	245 336 962	1 022 000
City of La Coruña	690 000 000	2 875 000	24 281 515	101 000
City of Culleredo	50 000 000	208 000	3 000 000	12 500
City of Oleiros	1 303 158 734	5 430 000	30 644 784	128 000
Alponpor (clam park)	81 037 735	338 000	20 000 000	83 000
Daniel Fernández Rios and others (fishermen)	95 400 000	396 000	Execution of judgement	
Vicente Suarez Fernandez and others (fish sellers and transporters)	58 347 694	243 000	Execution of judgement <2>	
Enrique Martínez Garcia, Unimar, Demarcosa and Carcabeiro Mar (mussel farm, depuration plant and marketing company)	579 565 938	2 415 000	Execution of judgement	
Mexilor (mussel farm)	416 842 506	1 737 000	307 027 638	1 279 000
Cofradía de Cedeira and others (association of fishermen and shellfish harvesters)	9 713 398 652	40 472 000	Execution of judgement	
José Abeledo Freire and others (shellfish harvesters)	420 000 000	1 750 000	Execution of judgement	
Cofradía de El Ferrol (association of fishermen and shellfish harvesters)	2 492 422 000	10 385 000	Execution of judgement	
Mariscadores de la Ría de El Burgo (shellfish harvesters)	1 418 209 000	5 909 000	Execution of judgement	

<1> In this document, the conversions of Pesetas into Pounds sterling (in rounded figures) have been made on the basis of the rate of exchange on 12 September 1997, £1 = Pts 240

<2> The Court of Appeal awarded compensation to one claimant in this group in the amount of Pts 3 009 068 (£12 500)

Ramón Rañales Cotos and others (fishermen)	79 085 600	330 000	Execution of judgement
Teresa Carnero Romero and others (shellfish harvesters)	99 057 200	413 000	Execution of judgement
Repsol Petroleo (owner of the cargo on board the *Aegean Sea*)	1 534 986 180	6 396 000	Rejected
Repsol Petroleo (recovery of oil)	249 042 393	1 038 000	Court did not take any position
Repsol Petroleo (clean-up operations)	184 216 423	768 000	Execution of judgement

5.7 Appeals were lodged by the 1971 Fund, the shipowner, the UK Club, the master, the pilot, the Spanish State and eight other parties.

5.8 Once the parties have lodged their replies to the appeals, they are not allowed under Spanish procedural law to make any further written submissions to the Court of Appeal. The Court may decide to hold an oral hearing, but no oral hearing was held in the *Aegean Sea* case.

5.9 The 1971 Fund has not been notified of whether the other parties submitted replies.

5.10 In its appeal the 1971 Fund stated that it could be obliged to pay compensation only for damage which fell within the definitions of "pollution damage" and "preventive measures" as laid down in Articles I.6 and I.7 of the 1969 Civil Liability Convention which formed part of Spanish law. The 1971 Fund maintained that the decisions taken by the competent bodies of the Fund as regards the criteria for the admissibility of claims for compensation should be taken into account. Attention was drawn to the preamble of the 1969 Civil Liability Convention which states that the Parties to the Convention were "desiring to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases". Reference was made in the appeal to the Report of the 7th Intersessional Working Group and to the Assembly's endorsement of this Report. The 1971 Fund stated in the appeal that the Court had admitted a number of claims which could not be considered as "damage caused by contamination" or as "preventive measures". The 1971 Fund added that parties other than the Fund might be liable for these claims. The 1971 Fund also appealed against the judgement on points where, in the Fund's view, the claim was admissible in principle but where the claimant had not substantiated his loss or the Court's assessment of the damage was incorrect.

5.11 At its 50th session, the Executive Committee noted the appeals lodged by the 1971 Fund and other parties against the judgement in respect of compensation issues and the 1971 Fund's replies to the appeals of other parties, as set out in paragraph 8 of document 71FUND/EXC.50/4. The Committee endorsed the position taken by the Director in the 1971 Fund's response to the appeals (document 71FUND/EXC.50/17, paragraph 3.2.26).

5.12 Details of the claims which were the subject of appeals are set out in paragraphs 5.13-5.24 below.

5.13 Spanish State

5.13.1 The Spanish State had presented a claim for Pts 1 154 500 000 (£4.8 million). The Court of first instance held that the quantum of the losses claimed had not been proved and for that reason referred the quantification to the procedure for the execution of the judgement.

5.13.2 The Spanish State did not appeal as regards its claim for compensation.

5.13.3 The greater part of this claim, Pts 740 million (£3.1 million), related to the cost of replacing some 286 000m^3 of sand on certain recreational beaches. During the court hearing the 1971 Fund pointed out that a programme for the replacement of sand on these beaches had been established by the State before the *Aegean Sea* incident had occurred and that the replacement had started prior to the incident. The 1971 Fund drew attention to the fact that erosion caused significant quantities of sand to disappear from these beaches every year, and mentioned that only some 1 230m ^{3} of oily sand had been removed from these beaches after the *Aegean Sea* incident. For these reasons, the 1971 Fund took the view that the part of this claim concerning the replacement of sand was not admissible, except as regards the replacement of 1 230m ^{3} of sand.

5.13.4 The Spanish State had also claimed compensation for Pts 100 million (£417 000) for certain investigations into the long-term effects of the pollution. In the Director's view, studies of this kind are admissible only if they relate to clean-up operations or preventive measures.

5.13.5 The 1971 Fund appealed against the two above-mentioned items of the Spanish State's claim.

5.13.6 The Court of Appeal rejected the 1971 Fund's appeal in these respects, together with its appeal on all other points where the admissibility was at issue, stating that the strict interpretation of the definitions of "pollution damage" and "preventive measures" which the 1971 Fund wished to adopt was not acceptable because, if it were adopted, a major part of the purpose of the Conventions would not be achieved. The Court also stated that a more flexible reading of the definitions was necessary and that it was not acceptable that the guidelines or directives established by the organs of the 1971 Fund should have binding effect.

5.13.7 It should be noted that in its submissions to the Court of first instance, the 1971 Fund did not argue that the criteria for admissibility adopted by the Fund bodies should have binding effect. The Fund stated that the documents presented (ie the Record of Decisions of the 17th session of the Assembly and the Report of the 7th Intersessional Working Group) were of fundamental importance for the understanding of which claims were admissible under the Conventions. The 1971 Fund argued that the decisions taken by the competent bodies of the Fund as regards the criteria for the admissibility of claims for compensation should be taken into account (cf paragraph 5.10 above).

5.14 Government of the Region of Galicia (the Xunta)

5.14.1 The Xunta had claimed compensation for a total amount of Pts 246 212 672 (£1.03 million) and was awarded Pts 245 336 962 (£1.02 million).

5.14.2 The Xunta did not appeal against the judgement.

5.14.3 A number of items claimed by the Xunta of Galicia which were accepted by the Court of first instance related to activities which, in the Director's view, did not, or had not been proved to, relate to damage caused by contamination, nor to preventive measures, namely:

(i) certain measures to monitor the quality of the air following the incident;

(ii) work carried out by 70 biologists during a period of 30 days immediately after the incident;

(iii) materials used or damage caused during certain helicopter operations carried out for the purpose of rescuing the crew of the *Aegean Sea;*

(iv) several scientific studies of the contamination in mussels and barnacles;

The 1971 Fund therefore appealed against the judgement on these points requesting that these items should be dismissed since the activities involved did not relate to pollution prevention or alternatively that the items should be referred to the procedure for the execution of the judgement, since there was insufficient evidence available to allow a conclusion to be drawn as to whether the activities qualified for compensation.

5.14.4 The Xunta had also claimed compensation for Pts 30 million (£125 000) relating to the cost of a campaign to promote Galician fish products. The Executive Committee had rejected this claim at its 42nd session, since the promotional activities were considered of too general a nature (document FUND/EXC.42/11, paragraph 3.3.12). This item was in principle admitted by the Court of first instance. The 1971 Fund appealed in respect of this item.

5.14.5 The Court of Appeal rejected the 1971 Fund's appeal in respect of the claim by the Xunta de Galicia on all points. The grounds for the rejections were those set out in paragraph 5.13.6 above, ie that the criteria for admissibility adopted by the 1971 Fund were too strict.

5.15 City of La Coruña

5.15.1 The City of La Coruña had claimed compensation of Pts 690 million (£2.88 million). The Court of first instance awarded the sum of Pts 24.3 million (£101 000).

5.15.2 The City of La Coruña did not appeal.

5.15.3 The 1971 Fund appealed on two points. Firstly, the Court of first instance recognised as admissible certain costs for the restoration of damage allegedly caused to an area around Punta Hermina. The Court accepted that the claimed restoration work had not been carried out but nevertheless awarded compensation in the claimed amount of Pts 12.9 million (£54 000). As four years had elapsed since the incident, it was clear, in the 1971 Fund's view, that the restoration work would not be undertaken. This area also fell within a zone which had been totally redeveloped, for reasons other than the *Aegean Sea* incident. Secondly, the claim included certain costs incurred by the police, the fire brigade and other public services totalling Pts 11.5 million (£48 000). In the 1971 Fund's view, these items did not relate to pollution damage or preventive measures. The Fund therefore requested that both items should be rejected.

5.15.4 The Court of Appeal rejected the 1971 Fund's appeal in respect of the alleged damage to Punta Hermina on the grounds that damage to the value did occur and that, although the restoration had not been carried out (but might take place at any time), this did not detract from the reality of the specific damage. No specific mention was made in the judgement regarding the 1971 Fund's appeal relating to the police, the fire brigade and other public services. It is to be assumed that the appeal in respect of these items was rejected on the ground that the 1971 Fund's interpretation of the Conventions was too strict.

5.16 City of Culleredo

5.16.1 The City of Culleredo claimed compensation of Pts 50 million (£208 000). The judgement rendered by the Court of first instance awarded the claimant Pts 3 million (£12 500).

5.16.2 The City of Culleredo did not appeal.

5.16.3 The Court accepted, *inter alia*, an item for the cost of cleaning beaches within the Ría de El Burgo. In the 1971 Fund's view, it is well established that the contamination caused by the *Aegean Sea* did not reach this area, and that for this reason the claim should be rejected. An appeal was lodged to this effect.

5.16.4 The Court of Appeal did not mention this claim in its judgement. It is to be assumed that the appeal was rejected.

5.17 City of Oleiros

5.17.1 The City of Oleiros claimed the sum of Pts 1 303 million (£5.4 million). The judgement of the Court of first instance awarded Pts 30.6 million (£127 500). The rejected part of the claim related to loss of natural resources.

5.17.2 The City of Oleiros did not appeal.

5.17.3 The claim by the City included the cost of a 90-day programme for an environmental assessment for Pts 25.3 million (£105 000). No evidence was provided that this work fell within the definitions of "pollution damage" or "preventive measures". The fact that the activities in question were actually carried out was not, in the 1971 Fund's view, sufficient to make the cost thereof admissible under the Conventions. The 1971 Fund appealed in respect of this item, requesting either rejection or referral to the procedure for the execution of the judgement.

5.17.4 In its judgement, the Court of Appeal made no mention of this claim. It is assumed that the 1971 Fund's appeal was rejected on the ground that the 1971 Fund's position concerning the criteria for admissibility was too strict.

5.18 Cofradía de Cedeira and others, Jose Abeledo Freire and others, Cofradía de El Ferrol, Teresa Camero Romero and others, Ramón Rañales Cotos and others, Shellfish harvesters from the Ría de El Burgo

5.18.1 The above-named parties had submitted claims to the Court of first instance as follows:

-	Cofradía de Cedeira and others	Pts 9 713 million	(£40 million)
-	Jose Abeledo Freire and others	Pts 420 million	(£1.75 million)
-	Cofradía de El Ferrol	Pts 2 492 million	(£10.4 million)

-	Teresa Carnero Romero and others	Pts 99 million	(£412 500)
-	Ramón Rañales Cotos and others	Pts 79 million	(£329 000)
-	Shellfish harvesters from the Ría de El Burgo	Pts 1 418 million	(£5.9 million)

5.18.2 The only evidence submitted to support these claims was a study prepared by the University of Santiago de Compostela. This study considered the global losses for the affected zone and covered not only the periods in which fishing was banned but also the time after these bans were lifted. No account was taken of compensation already received or of aid payments made by the Commission of the European Union. Details of this study, as well as the views of the 1971 Fund's experts thereon, were given in document FUND/EXC.48/3, paragraphs 3.5.21-3.5.29.

5.18.3 The Court of first instance did not accept the conclusions of this study and held that each claimant had to prove that he had suffered an economic loss. It stated that in the case of fishing boat owners the loss should be proved by tax reports and/or catch records. For shellfish harvesters, the Court held that compensation should be determined on the basis of exploitation plans approved by the Fisheries Council of the Xunta de Galicia prior to the incident, while members of fishing boat crews were to be compensated according to recognised minimum salary levels.

5.18.4 The Court of first instance also held that compensation was payable only for the period during which fishing and shellfish harvesting was prohibited due to the fishing bans imposed by the Xunta of Galicia, and that aid payments received from the European Commission should be deducted.

5.18.5 The Court of first instance referred all these claims to the procedure for the execution of the judgement for quantification.

5.18.6 In this respect, the Court of first instance stated that compensation was to be calculated on the following basis:

Fishing boat crew members	number of fishing days lost x the minimum salary laid down in collective agreement.
Fishing boat owners	income lost in the periods during which fishing was prevented, based on income obtained in the periods December 1990 to January 1991, and December 1991 to January 1992, as shown by tax returns and/or catch records.
Shellfish harvesters	number of allowed harvesting days which had been lost during the fishing bans x the maximum daily catch quota.

5.18.7 In setting out these requirements, the Court of first instance accepted to a large extent the position of principle taken by the 1971 Fund in respect of the requirement of evidence relating to the claims submitted by the fishermen and shellfish harvesters. Nevertheless, the 1971 Fund appealed against the method adopted by the Court for calculating the shellfish harvesters' losses, namely using the maximum allowable harvest days and quantities. The 1971 Fund pointed out in its appeal that it was unlikely that these maximum days and quantities could ever be realised and that the approved exploitation plans anticipated far lower total catches.

5.18.8 In its judgement the Court of Appeal did not refer to the objections raised by the 1971 Fund in respect of the criteria laid down by the Court of first instance for the calculation of shellfish harvesting losses.

Cofradía de Cedeira and others

5.18.9 The claimants in this group appealed in respect of the quantification of the damages on the ground that the report prepared by the University of Santiago proved the amount of the losses suffered. The claimants requested that the compensation should be assessed at the amount originally claimed, Pts 9 713 million (£40 million), plus a further Pts 4 500 million (£18.8 million) for long term losses following the period covered by the University report (ie up to the end of 1995) and for moral damage. The claimants criticised the approach adopted by the Court of first instance that claims should be quantified on an individual

rather than on a group basis, insisting that the University of Santiago report was indisputable and dealt adequately with the distribution of the losses between those concerned.

5.18.10 The 1971 Fund responded by disputing the validity of the Santiago University report in its totality, and in particular in respect of its conclusion that there were long term losses. The Fund also stated that the losses must be quantified on an individual basis. In addition, the Fund disputed that the report contained sufficient information to allow the equitable distribution of compensation between the individuals and groups claiming through and outside the Criminal Court of first instance (cf paragraph 5.3 above). In addition, the Fund pointed out that the Court of first instance had the power to assess the evidentiary value of a report and that it was not for the Court of Appeal to review this assessment.

5.18.11 The Court of Appeal stated that the right to claim compensation rested with the individuals and not with the Cofradía and that claims should be made individually and not jointly or en bloc. The Court also held that the losses should be determined in the procedure for the execution of the judgement. The Court rejected specifically the conclusions in the report by the University of Santiago that the pollution would have long term economic effects on fishing and shellfish harvesting. In this regard, the Court of Appeal referred to the evidence given to the Court of first instance by Mr Michel Girin, the fisheries expert retained by the 1971 Fund and the UK Club.

José Abeledo Freire and others, Teresa Camero Romero and others, Ramón Rañales Cotos and others, shellfish harvesters from the Ría de El Burgo

5.18.12 These four groups, whose claims total Pts 2 016 million (£8.4 million), did not appeal.

5.18.13 The 1971 Fund appealed in respect of the claim by the shellfish harvesters from the Ría de El Burgo and pointed out that this group did not belong to a recognised Cofradía and did not have an exploitation plan. For this reason, the 1971 Fund requested that the losses for this group should be calculated on the basis of tax returns or other documents evidencing sales in the corresponding periods in 1991 and 1992. The 1971 Fund also pointed out that the ban on shellfish harvesting for the area in question was lifted on 18 May 1993 and not, as stated in the judgement, on 18 December 1993.

5.18.14 The Court of Appeal did not mention in its judgement the 1971 Fund's request that the losses should be calculated on the basis of tax returns or other evidence of sales. In this respect, apparently concerning all those claims in respect of which the 1971 Fund had lodged appeals but which were not referred to specifically in the judgement (other than the Spanish State, the Xunta and the cities), the Court of Appeal stated that it did not agree with the arguments set out in the 1971 Fund's appeal.

5.18.15 As for the question of the date on which the ban was lifted, the Court of Appeal stated (wrongly in the opinion of the 1971 Fund) that a notice issued by the Fisheries Council showed that the position taken by the Court of first instance was correct.

Cofradía de El Ferrol

5.18.16 The claims presented by the members of this Cofradía totalled Pts 2 492 million (£10.4 million). The claimants appealed, arguing that it was clear that there were long term losses and that these were adequately demonstrated by the report of Santiago University. They requested that the amount of compensation should be fixed according to their claims submitted to the court, maintaining that losses should be considered to have extended over a period of five years following the incident.

5.18.17 The 1971 Fund replied with arguments similar to those used in respect of the appeal by the Cofradía de Cedeira and others.

5.18.18 The Court of Appeal rejected the appeal by the Cofradía de Ferrol on the ground that the effects of the pollution and their economic consequences had not been proved. In this context the Court of Appeal paraphrased a point raised by the 1971 Fund, namely that the fact that the residues of the oil took a long time to disappear did not mean that fishing and other maritime activities would not return to normal.

5.19 Alponpor (clam park)

5.19.1 Alponpor, the operator of a clam cultivation park, had claimed Pts 81 million (£337 500) and was awarded Pts 20 million (£83 000) in the judgement rendered by the Court of first instance. The amount

awarded was determined by the Court, using its discretionary powers, at an amount equal to the company's share capital.

5.19.2 The 1971 Fund appealed in respect of this claim with the request that compensation should be based on the value of the stock that could have been marketed during the period in which harvesting was prohibited.

5.19.3 In its appeal, Alponpor requested that the Court of Appeal should award compensation in the amount originally claimed. The claimant had calculated the loss on the basis that there had been a total mortality of the stock and that the substrate of the cultivation park needed to be replaced. These grounds were repeated in the appeal.

5.19.4 The 1971 Fund responded by pointing out that the evidence of abundant catches from adjacent areas after harvesting had restarted when the ban was lifted, demonstrated that there had not been any mass mortality due to the pollution and that an inspection of the substrate had shown that there was no need for such replacement. The Fund also stated that the alleged losses were far beyond those which could in practice have been sustained.

5.19.5 The Court of Appeal did not comment on the appeal made by the 1971 Fund in respect of this claim but dismissed the claimant's appeal and upheld the judgement of the Court of first instance.

5.20 Mexilor (mussel farm)

5.20.1 Mexilor had claimed compensation of Pts 416 million (£1.7 million) for losses suffered in respect of its mussel farm, and was awarded Pts 307 million (£1.3 million) by the Court of first instance.

5.20.2 Mexilor did not appeal against the judgement.

5.20.3 The 1971 Fund took the view that the assessment made by the Court of first instance was incorrect as it counted twice the value of the stock existing at the time of the incident, namely both the stock value at the time of the incident and its value when it would have been sold but for its destruction. Furthermore, the price of mussels used was the highest paid for any mussels in the area and this price was applicable to only a minute proportion of the production of mussels in Galicia. The 1971 Fund appealed on these points and pointed out that other similar claims had been referred to the procedure for the execution of the judgement for quantification.

5.20.4 The Court of Appeal did not refer in its judgement to the arguments presented by the 1971 Fund. As the claim was not referred to the procedure for the execution of the judgement by the Court of first instance, it is to be assumed that the appeal by the 1971 Fund was rejected under the general statement referred to in paragraph 5.18.14 above.

5.21 Repsol Petroleo SA (cargo owner)

5.21.1 The owner of the cargo on board the *Aegean Sea* (Repsol Petroleo SA) had originally claimed compensation for the value of the lost cargo, Pts 1 534 million (£6.4 million). In the hearing before the Court of first instance, the claim was reduced by Repsol to Pts 25 million (£104 000), corresponding to the deductible in Repsol's insurance cover. The 1971 Fund maintained that this claim did not fall within the definition of "pollution damage" and should therefore be rejected. The Court included this claim as admissible against the 1971 Fund. The 1971 Fund considered this to be incorrect and therefore appealed in respect of this claim.

5.21.2 The Court of first instance held that, as the cargo insurer was not party to the criminal proceedings, the insurer would have to submit his claim in subsequent civil proceedings and would be entitled to claim for the recovery of the amount paid by him to Repsol. In its appeal, Repsol argued that either the Court of first instance should have awarded Repsol compensation for the full value of the lost cargo, compensation which Repsol would pay to the cargo insurer, less deductible, or alternatively the cargo insurer should have been awarded the full value of the lost cargo in the criminal proceedings. The 1971 Fund stated that since the cargo insurer was not party to these proceedings, the Court could not, under Spanish law, grant the insurer compensation. The 1971 Fund further maintained that, in any event, this claim did not fall within the definition of "pollution damage" and should therefore be rejected.

5.21.3 In its appeal, Repsol also stated that the judgement did not mention a claim initially presented to the Court of first instance by Repsol for the cost of clean-up operations. This claim had been agreed between Repsol, the UK Club and the 1971 Fund at Pts 73 649 874 (£307 000), and 40% of that amount, ie Pts 29 459 950 (£123 000), had been paid by the 1971 Fund. Repsol requested that the Court of Appeal should admit this claim for the amount agreed. In its reply the 1971 Fund agreed with Repsol on this point.

5.21.4 Repsol finally argued that the owner of the *Aegean Sea* should not be entitled to limit its liability under the 1969 Civil Liability Convention since, in accordance with two recent decisions of the Spanish Supreme Court, civil liabilities arising out of a criminal act could not be subject to any limitation. In its reply on this point, the 1971 Fund emphasised that the shipowner's right of limitation in the *Aegean Sea* case was governed by the 1969 Civil Liability Convention and that, under the Spanish constitution, international treaties ratified by Spain, once published in the Spanish Official Gazette, became part of Spanish law and had superior rank to internal laws.

5.21.5 The Court of Appeal stated that since there was no record in the proceedings that documentation had been produced to justify the exact amount of the costs incurred by Repsol in the clean- up operations, that amount would be decided in the procedure for the execution of the judgement, although the payment would have to be adjusted in the light of the agreement reached between Repsol, the UK Club and the 1971 Fund (cf paragraph 5.21.3).

5.21.6 The Court of Appeal confirmed the decision adopted by the Court of first instance that the cargo insurer would have to submit his claim in subsequent civil proceedings to recover the amount paid by him to Repsol.

5.21.7 The Court of Appeal agreed with the 1971 Fund that the shipowner's right to limitation was governed by the 1969 Civil Liability Convention and that international treaties ratified by Spain, once published in the Spanish Official Gazette, were part of Spanish law and had superior rank to internal laws.

5.22 Daniel Fernández Ríos and others (Cofradía de Lorbe)

5.22.1 The claims in this group, totalling Pts 95 million (£396 000), were referred to the procedure for the execution of the judgement. The Court held that the compensation should be calculated on the basis of the period of the fishing bans and evidence of normal income as shown by catch landing records and tax returns from previous years. The Court also decided that the aid payments received from the European Union should be deducted from the compensation.

5.22.2 The 1971 Fund did not appeal in respect of these claims.

5.22.3 The claimants appealed, however, arguing that the losses should be considered to commence from the date of the incident (3 December 1992), not from 9 December as originally claimed. They maintained that the compensation should be fixed in respect of the period from the date of the incident until 31 December 1995 on the basis of the report by the University of Santiago. They also requested that aid payments received from the European Union should not be deducted from the compensation awarded.

5.22.4 The 1971 Fund responded to the first point by accepting that, if the claimants provided evidence that fishing was prevented by the pollution between the time of the incident and 9 December 1992, compensation was payable for that period. As for the request that the Court of Appeal should determine a different method of calculation in the procedure for the execution of the judgement, the Fund referred to its arguments against the University report in the response to the appeal of the Cofradía de Cedeira and others (see paragraph 5.18.10 above) and by pointing out that the claimants had extended the period of their original claim, which was based on the number of days on which fishing was banned, after the hearing in the Court of first instance and after having studied the report prepared by the University. The 1971 Fund also stated that any assessment of damage on theoretical grounds would be against the doctrine of the Spanish Supreme Court. The 1971 Fund pointed out that the fishing boats belonging to the Cofradía went to sea in 1993 and that the catches were then normal. With respect to the aid payments from the European Union, the 1971 Fund argued that, without such a deduction, the claimants would receive compensation in excess of the losses actually suffered. The 1971 Fund also pointed out that the payments made by the European Union could in principle be reclaimed from the shipowner, his insurer and the Fund. On this point reference is made to the position taken by the Executive Committee at its 39th session (document FUND/EXC.39/8, paragraphs 3.2.17 and 3.2.18).

5.22.5 The Court of Appeal accepted the claimants' right to compensation from 3 December 1992 but rejected their request that losses should be calculated up to the end of 1995 on the basis of the report by Santiago University. The Court stated that the original statistics were subjected to a correction factor, which introduced ambiguity in an area which, according to jurisprudence, required to be governed by principles of legal certainty, and any losses representing doubtful or uncertain consequences must be rejected. The Court concluded that there was uncertainty over some substantial details, such as the number of species unloaded and transported by lorry, and, as regards the port of origin of the species in that case, the effects of other factors which had nothing to do with the oil spill, the importance of fluctuations in catches in years preceding the accident, comments on or an examination of the slight or non-existent effects on other fish markets in the area, which experienced no perceptible variation after the accident, all of which thus determined the hypothetical nature of the report.

5.22.6 As regards the deduction of the aid payment made by the European Union, the Court of Appeal held that this "... will depend on the question of whether or not the insurance covers the purposes for which the aid is granted, which, of course, cannot be determined until the stage of the execution of the judgement, provided that the Commission of the European Union calls for repayment".

5.23 Enrique Martínez Garcia, Unimar SL, Demarcosa and Carcabeiro Mar

5.23.1 The Court of first instance had referred these claims, totalling Pts 579 million (£2.4 million), to the procedure for the execution of the judgement. The 1971 Fund did not appeal in respect of these claims.

5.23.2 Two claimants in this group (both mussel farmers) appealed. The Court of first instance had held that these claimants' losses should be assessed on the basis of trading accounts for the three years prior to the incident. The claimants argued on appeal that claims of the same type should be treated similarly and that, therefore, their losses should be assessed in the same way as that of the only other mussel farmer with a claim before the court, Mexilor SL. That claim was assessed on the basis of a theoretical calculation of lost production. Mexilor's claim was the subject of appeal by the 1971 Fund on certain points (cf paragraph 5.20.3 above).

5.23.3 In response to the claimants' appeal, the 1971 Fund maintained that claims from two businesses in the same field of activity should not necessarily be assessed in the same way and that, wherever possible, the loss should be assessed by a comparison with past performance rather than by a theoretical calculation. The Fund pointed out that in the case of Mexilor such a comparison was difficult, since that company had only recently started production.

5.23.4 The Court of Appeal rejected the claimants' appeal. The grounds for the rejection were fundamentally the same as the arguments presented by the 1971 Fund.

5.24 Vicente Suarez Fernandez and others

5.24.1 These claims, totalling Pts 58 347 694 (£243 000), were presented by a group of fish merchants and transporters. The claims of three of the individuals involved were rejected by the Court of first instance on the ground that the claimants had not provided sufficient evidence that a loss had been suffered. The claims by the other individuals were referred to the procedure for the execution of the judgement.

5.24.2 The 1971 Fund did not appeal in respect of any of these claims.

5.24.3 One claimant in this group requested on appeal that the losses should be quantified on the basis of a report which had been issued by a court appointed surveyor. The 1971 Fund responded by arguing that this surveyor had in fact not quantified the loss and that the judgement should therefore stand.

5.24.4 The claimants whose claims were rejected appealed, requesting that their claims should be re-instated and that their losses should be determined in the procedure for the execution of the judgement.

5.24.5 Of the three individuals whose claims had been rejected, one (a fish merchant) had provided evidence that he bought fish at one of the market halls closed due to the pollution. The 1971 Fund argued that this claimant could have purchased fish in other market halls. The other two claimants (transporters) had not provided any evidence. The 1971 Fund stated in its response to these three appeals that the Court

of first instance had correctly rejected these claims, since the claimants had not provided evidence that they had suffered any loss as a result of the contamination.

5.24.6 The Court of Appeal held that the claimant whose losses had been determined by the surveyor appointed by the court should be compensated in the amount determined by the surveyor, ie Pts 3 009 068 (£12 500), since the claimant had proved his losses and the surveyor's opinion had not been challenged by the other parties. The Court also accepted that the three individuals whose claims had been rejected had suffered losses and held that the losses should be quantified during the procedure for the execution of the judgement (cf paragraph 5.24.5 above).

6 Distribution of liability and questions relating to recourse

6.1 Considerations at the Executive Committee's 49th session

6.1.1 As stated above, the Court of first instance held that the master and the pilot were criminally liable on an equal basis. The Executive Committee was informed at its 49th session that, in the view of the 1971 Fund's Spanish lawyer, this meant that the master/UK Club/1971 Fund would ultimately pay 50% of the compensation and the pilot/the Spanish State would pay the other 50%.

6.1.2 At the Executive Committee's 49th session, the Spanish delegation expressed its disagreement with the view of the 1971 Fund's Spanish lawyer that the master/UK Club and the 1971 Fund would ultimately pay 50% of the compensation and the pilot and the Spanish State would pay the other 50%. The Spanish delegation stated that the 1971 Fund was in breach of the Fund's strict liability as provided by Article 4.2 of the 1971 Fund Convention, and that the 1971 Fund should accept this direct liability. It was noted by the Spanish delegation that, in accordance with the judgement of the Court of first instance, the UK Club and the 1971 Fund would have to pay the maximum amount of compensation available under the 1969 Civil Liability Convention and the 1971 Fund Convention, and that the Spanish State would pay compensation only in excess of that amount.

6.2 Considerations at the Executive Committee's 50th session

6.2.1 In a document presented to the Executive Committee's 50th session, the Director referred to Article III.5 of the 1969 Civil Liability Convention and Article 9.2 of the 1971 Fund Convention. Under Article III.5, nothing in the 1969 Civil Liability Convention shall prejudice the right of recourse of the shipowner against third parties. Under Article 9.2, nothing in the 1971 Fund Convention shall prejudice any right of recourse or subrogation of the 1971 Fund against persons other than the owner and his insurer, and that in any event, the right of the Fund to subrogation against any such person shall not be less favourable than that of an insurer of the person to whom compensation has been paid. The Fund's Spanish lawyer advised the Director that, under Spanish law, an insurer who had paid compensation acquired by subrogation the right of the person so compensated against any person liable for the damage covered by the compensation (document 71FUND/EXC.50/4, paragraph 6.7).

6.2.2 The Director drew attention to the fact that the Executive Committee had taken the view that the policy of the 1971 Fund was to take recourse action whenever appropriate and that the Fund should in each case consider whether it would be possible to recover any amounts paid by it to victims from the shipowner or from other parties on the basis of the applicable national law. The Committee had stated that if matters of principle were involved, the question of costs should not be the decisive factor for the Fund when considering whether to take legal action. The Committee had also stated that the 1971 Fund's decision of whether or not to take such action should be made on a case by case basis, in the light of the prospect of success within the legal system in question (document FUND/EXC.42/11, paragraph 3.1.4).

6.2.3 At its 50th session, the Executive Committee noted the Director's analysis of the 1971 Fund's right of recourse under Article 9.2 of the 1971 Fund Convention as set out in paragraph 6.2.1 above. It also recalled the Fund's policy in respect of recourse actions, as reflected in paragraph 6.2.2 above. In addition, it took note of the fact that the 1971 Fund had invoked Article 4.3 of the 1971 Fund Convention as regards the Spanish State's claim in respect of pollution damage under Article I.6 of the Civil Liability Convention, but not in respect of the State's claim for costs of preventive measures pursuant to Article I.7 of that Convention.

6.2.4 The Director stated that the question of whether the pilot was liable would be decided by the Court of Appeal, as would be the issue of whether the State was liable for the acts of pilots, and that the Court of Appeal's decision on these points would clarify whether the State could be held liable for the damage resulting from the incident and, therefore, whether or not the 1971 Fund had any grounds for recourse action. He took the view that the question of whether the Fund should exercise the right of recourse was a question of policy, which the Executive Committee did not need to address at that time, since any recourse action would have to be pursued in civil proceedings at a later stage.

6.2.5 The Executive Committee endorsed the Director's analysis of the issues referred to in paragraphs 6.2.1, 6.2.2 and 6.2.4 above.

6.2.6 The Committee decided to revert to the issue of whether the 1971 Fund should pursue a recourse action against the Spanish State after the Court of Appeal had rendered its judgement (document 71FUND/EXC.50/17, paragraph 3.3.20).

6.3 Director's analysis

6.3.1 As mentioned above, the Court of Appeal upheld the judgement of the Court of first instance as regards the civil liabilities of the parties concerned. The Courts held that the master and the pilot were directly liable for the incident. It was further held that the UK Club and the 1971 Fund were directly liable for the damage caused by the incident and that this liability was joint and several. In addition, the Courts held that the shipowner and the Spanish State were subsidiarily liable.

6.3.2 In the reasons given by the Court of Appeal, the Court attributed identical proportions of civil liability to the master and the pilot and, by extension, to those deriving dependent civil liability from them.

6.3.3 The liability of the State is subsidiary to that of the pilot. It appears obvious that the pilot will not be able to make any significant payments and that the State's liability will therefore be invoked.

6.3.4 A plaintiff (claimant) may request the enforcement of a judgement awarding him compensation against the pilot and, if the latter is unable to pay, against the State, or against the master/UK Club/1971 Fund (and subsidiarily against the shipowner). When payments have been made to the plaintiffs (claimants), the defendants who have made these payments may, in the view of the 1971 Fund's Spanish lawyer, take recourse action to claim reimbursement from the other defendants so that ultimately the master/UK Club/1971 Fund will have paid 50% of the awarded amounts and the pilot/Spanish State 50% of these amounts.

6.3.5 The Spanish delegation has stated that the judgements mean that the UK Club and the 1971 Fund should pay the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention and that the Spanish State would pay compensation only in excess of that amount. The delegation has drawn attention to the fact that the 1971 Fund has not taken recourse action against a State in any other case. The delegation has mentioned that in many Fund Member States pilots have no liability for oil pollution damage due to provisions in national law channelling liability to the shipowner. It has also been pointed out by the Spanish delegation that in a number of Member States, the State has no liability for the acts of pilots. As a consequence, a recourse action of the type considered by the 1971 Fund in the *Aegean Sea* case would not succeed in States in either of these groups. In the Spanish delegation's view, it would not be acceptable if the Spanish State were treated differently from other States.

6.3.6 As is clear from the analysis set out above, the issues relating to the distribution of liability and recourse are legally very complex. These issues are also of great importance in the *Aegean Sea* case, both as regards questions of principle and in monetary terms. In the Director's view, it is not necessary for the 1971 Fund to take any decisions on these issues at the present stage. In view of the importance of these questions, it might be appropriate to allow for more time to consider them, so as to enable discussions to take place between the Spanish Government and the 1971 Fund.

7 Determination of the maximum amount payable by the 1971 Fund

7.1 During the hearing in the Court of first instance, one of the lawyers representing a number of claimants raised the issue of the method to be applied to convert into Spanish Pesetas the maximum amount payable under the 1969 Civil Liability Convention and the 1971 Fund Convention which was expressed in

(gold) francs (Poincaré francs). This lawyer maintained that the amount should be converted using the free market value of gold, instead of on the basis of the Special Drawing Right (SDR), since the 1976 Protocol to the Fund Convention which replaced the franc as the unit of account by the Special Drawing Right of the International Monetary Fund had not entered into force at the time of the *Aegean Sea* incident. In support of his request, the lawyer presented an opinion prepared by a Spanish law professor, but this opinion was not accepted as evidence by the Court.

7.2 In the hearing the 1971 Fund maintained that the conversion should be made on the basis of the SDR, and invoked mainly the same reasons as it had done in the court proceedings in the *Haven* case (cf document FUND/EXC.36/3). The Fund was not allowed, at that stage, to present any documentation on this issue.

7.3 The 1971 Fund's main arguments in support of its position can be summarised as follows:

> The amounts in the 1969 Civil Liability Convention and the 1971 Fund Convention in their original versions are expressed in (gold) francs (Poincaré francs). Under the 1969 Civil Liability Convention, the amount expressed in francs should be converted into the national currency of the State in which the shipowner's limitation fund is constituted on the basis of the official value of that currency by reference to the franc on the date of the establishment of the limitation fund. The inclusion of the word "official" in the definition of the unit of account laid down in the original text of the 1969 Civil Liability Convention was made deliberately to ensure stability in the system, and that it was clearly meant to rule out the application of the free market price of gold. The unit of account in the 1971 Fund Convention is defined by a reference to the 1969 Civil Liability Convention, and this reference must be considered to refer to the 1969 Civil Liability Convention as amended by the 1976 Protocol thereto, which had entered into force before the *Aegean Sea* incident. The application of different units of account in the 1969 Civil Liability Convention and the 1971 Fund Convention would lead to unacceptable results, particularly as regards the relationship between the portion of liability to be borne by the shipowner and the 1971 Fund, respectively, on the basis of Article 5.1 of the 1971 Fund Convention. In 1978 Spain ratified the second amendments adopted in 1976 to the Convention establishing the International Monetary Fund (IMF). As a result of these amendments, States are obliged to use the SDR instead of the (gold) franc. For this reason, gold cannot be used in Spain as unit of account.

7.4 The 1971 Fund drew the attention of the Court of first instance to the fact that, in connection with the discussion of the *Haven* incident at the Executive Committee's 32nd session, the Spanish delegation had informed the Committee that the Spanish Government had notified the Court in Genoa that it supported the Fund's position as to the method of conversion (document FUND/EXC.32/8, paragraph 3.3.3).

7.5 In its judgement, the Court of first instance stated that as regards the 1971 Fund the applicable limit was the one laid down in Article 4 of the 1971 Fund Convention. In accordance with Spanish procedural law, the 1971 Fund requested, within 24 hours of having been notified of the judgement, that the Court should clarify its decision on this point by indicating the maximum amount payable under the 1971 Fund Convention. In its response the Court stated that there was no need for clarification.

7.6 In their appeals, the claimants referred to in paragraph 7.1 requested that the Court of Appeal should fix the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention by reference to the free market value of gold.

7.7 In its response, the 1971 Fund requested that the Court of Appeal should hold that the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention corresponded to 60 million SDR. The Fund invoked the same arguments as those set out in paragraph 7.3. The Fund also drew the Court of Appeal's attention to the fact that, at the Executive Committee's 47th session held in February 1996 (ie after the hearing in the Court of first instance), the Spanish delegation stated that the Spanish Government had always supported the 1971 Fund's position as regards the method to be applied for the conversion (document FUND/EXC.47/14, paragraph 3.2.15).

7.8 The Court of Appeal stated that the maximum amount payable by the 1971 Fund was 900 million Poincaré francs or 60 million SDR, which amount must be converted into the national currency at the official

value thereof in relation to a unit consisting of 65.5 milligrams of 900/1000 fine gold, or otherwise in relation to the value of the currency in relation to the SDR (Article V.9 of the 1969 Civil Liability Convention and Articles 1.4, 3 and 4 of the 1971 Fund Convention). The Court stated that the claimants were entitled to opt for the method of conversion that they considered more favourable to them.

7.9 As regards the position taken by the Court of Appeal on this issue, the Director would like to draw the attention of the Executive Committee to two points.

7.10 Firstly, it would in his view be difficult to apply the judgement if some claimants were to choose to have the maximum amount converted into Pesetas on the basis of the Poincaré franc, while others chose conversion on the basis of the SDR. The Director believes that an equitable distribution of the funds available for compensation would be possible only if the same maximum amount applies for all claimants.

7.11 Secondly, for those claimants who might choose to have the maximum amount converted into Pesetas on the basis of the Poincaré franc, the Court of Appeal has stated that the conversion should be made using the official value of gold. As the 1971 Fund pointed out in its pleadings to the Court of Appeal, there is no longer any official value of gold. It appears that the conversion must therefore be made using the last official value of gold in Spain, ie that of 19 November 1967, which was Pts 4.64345 per gold franc. Converting 900 million gold francs into Pesetas on this basis would give Pts 4 179 105 000 (£17.4 million)<3>. A conversion based on the value of the SDR on the date of the constitution of the shipowner's limitation fund would give Pts 9 513 473 400 (£39.6 million).

8 Negotiations with claimants

8.1 At its 49th session held in June 1996, the Executive Committee instructed the Director to investigate the possibility of reaching out-of-court settlements with claimants covered by the judgement of the Court of first instance on the basis of the requirements of evidence laid down by the Court in that judgement.

8.2 In July 1996 a meeting was held between representatives of the Spanish Government and of the Xunta of Galicia and the Director, at which it was agreed that further efforts should be made to reach out-of-court settlements. To this end, it was also agreed that a meeting should be held between the experts of the parties involved to assess the evidence presented by the claimants as required by the judge.

8.3 This meeting was held in October 1996. However, only the Xunta presented further documentation, comprising additional information concerning shellfish harvesting exploitation plans. The claimants stated that the boat fishermen were unable to provide the documents requested by the Court of first instance, namely catch landing receipts and tax returns. As a result, the experts of the 1971 Fund and the Club were not able to assess the losses of the boat fishermen in accordance with the judgement.

8.4 The lawyer representing certain fishery and shellfish harvesting claimants stated at that meeting that he would be prepared to recommend to his clients (both boat fishermen and shellfish harvesters) that they should agree to a full and final settlement at an amount calculated on the basis laid down by the Court of first instance in respect of the shellfish harvesters alone. According to the representative of the Xunta, this method gave a figure for the shellfish harvesters in the order of Pts 3 200 million (£13.3 million), whereas it appeared that the claimants arrived at a figure of Pts 3 800 million (£15.8 million). The highest estimate made by the experts engaged by the Club and the 1971 Fund of the real losses suffered by these shellfish harvesters, using the information available to them, was Pts 800 million (£3.3 million). In its calculation the Xunta had used the value of the maximum allowed catch per man per day of all species named in the exploitation plans, multiplied by the number of allowed harvesting days lost as a result of the ban. It was assumed in this calculation that each shellfish harvester obtained the maximum allowed catch both from the banks authorised by the Fisheries Council for his own Cofradía's sole use and the so-called free harvesting zone available for the use of any licenced shellfish harvester. The claimants did not provide details of how they had reached the figure of Pts 3 800 million (£15.8 million).

<3> This value is arrived at on the basis of a Government Decree of 19 November 1967 which fixed the parity of the Peseta at 0.0126953 grammes of fine gold. The gold content of the Franc Poincaré is 0.05895 grammes. Consequently, 1 Franc poincaré = Pts 4.64345. This calculation was confirmed by the Spanish Constitutional Court in a judgement of 17 December 1985.

8.5 The Executive Committee was informed at its 50th session of the proposal for a settlement referred to in paragraph 8.4 above. The Committee noted that in the view of the Club/Fund experts, however, the approach taken by the claimants was entirely artificial and assumed that stocks were unlimited, that meteorological conditions were always favourable and that the shellfish harvesters were physically capable of using all their harvest allowance of all the authorised species every authorised day, changing equipment and site as necessary to achieve this. The Committee recalled that the 1971 Fund did not accept that the calculation of the shellfish harvesters' losses should be made using the maximum allowable harvest days and the maximum allowed quantities, and that the 1971 Fund had appealed on this point. The Committee reiterated the view that under the 1969 Civil Liability Convention and the 1971 Fund Convention compensation was payable only for losses actually suffered and that the claimants had to prove the amount of their loss. For these reasons, the Committee decided that the 1971 Fund could not accept the proposal for a settlement made by the claimants' lawyer (document 71FUND/EXC.50/17, paragraphs 3.3.30, 3.3.31 and 3.3.33).

8.6 At the Executive Committee's 54th session, the Spanish delegation stressed that there was a need for further negotiations between the 1971 Fund and the claimants to try to unblock the situation, with the aim of arriving at out-of-court settlements for the main group of claimants. The delegation stated that in the Spanish view the intervention of the 1971 Fund in the Spanish Courts had brought the negotiations to a standstill and had prevented further payments. The delegation stated that, from a Spanish perspective, the assessments made by the 1971 Fund's experts in the *Aegean Sea* case were excessively low and the request for evidence to substantiate the claimants' losses had been out of proportion. The Spanish delegation invited the Executive Committee to instruct the Director to continue negotiations with the claimants in a very active manner and to make better assessments and further payments before the final court decision was rendered.

8.7 In response the Director stated that in his view the Court of first instance had generally agreed with the 1971 Fund as regards the requirement that claimants should produce evidence to substantiate their claims. The Director recognised that the assessment of fishery claims was not an exact science and that there would very often be different opinions as to the correct assessment of the damage. For this reason, it was in his view quite normal that claimants did not agree with the assessment made by the experts engaged by the 1971 Fund. He took exception, however, to the allegation that the experts had acted in a biased manner and emphasised that there was no indication that the experts had acted in such a way. He made the point that the experts had acted within the framework of the policy of the 1971 Fund as laid down by the Assembly and the Executive Committee, and in particular that a claimant had to provide evidence to substantiate his loss. As regards the request by the Spanish delegation that the Director should be instructed to pursue negotiations with the claimants, the Director drew attention to the fact that, since the judgement had been rendered by the Court of first instance, very little further evidence had been submitted by the claimants. He considered that unless the evidence required by the Court was presented, it would not be possible to make any progress towards out-of-court settlements.

8.8 A number of delegations stated that they agreed that the 1971 Fund should show flexibility in its assessment of claims. They emphasised, however, that claims could be accepted by the Fund only to the extent that the claimants provided evidence of the quantum of the economic losses actually suffered. Many delegations referred to the fact that the Court of first instance in La Coruña had in general agreed with the position taken by the 1971 Fund that each claimant had to substantiate his loss by supporting documents or other evidence.

8.9 The Executive Committee decided that the instructions previously given to the Director should be maintained, ie that the Director should investigate the possibility of reaching out-of-court settlements with claimants covered by the judgement of the Court of first instance on the basis of the requirements of evidence laid down in the judgement (document 71FUND/EXC.54/10, paragraph 3.7.9)

8.10 The Spanish Government has recently proposed that a meeting should be held between the Government and the 1971 Fund to explore the possibilities of reaching a global agreement in respect of the claims in the fishery sector, but the date for such a meeting has not yet been fixed.

9 Question of time-bar

9.1 The question of time-bar was addressed in some detail in document FUND/EXC.47/3. As instructed by the Executive Committee, the Director has studied this matter further. In a letter to the Spanish Government dated 4 October 1996, the Director presented the 1971 Fund's view on the time-bar issue. It has been agreed between the Spanish Government and the Director that this matter should be discussed between them before the Director's study is presented to the Executive Committee.

9.2 The Spanish Government has not yet been in a position to discuss this issue.

10 Execution of the Court of Appeal's judgement

10.1 In its judgement the Court of Appeal confirmed - with only a few exceptions - the position taken by the Court of first instance. In particular, the Court of Appeal confirmed the judgement of the Court of first instance as regards all those claims in respect of which the latter Court had awarded a specified amount of compensation.

10.2 The Court of Appeal confirmed the ruling of the Court of first instance that the master of the *Aegean Sea* and the pilot were directly liable for the incident. It was also held that the UK Club and the 1971 Fund were directly liable for the damage caused by the incident and that this liability was joint and several. In addition, the Court held that the owner of the *Aegean Sea* and the Spanish State were subsidiarily liable. The Court of Appeal confirmed that the same proportion of civil liability should rest on the master and the pilot and, by extension, on those deriving civil liability from them. The Court of Appeal stated that the compensation for the losses suffered by the Spanish State should be reduced by 50%, pursuant to Article III.3 of the 1969 Civil Liability Convention.

10.3 Under Spanish procedural law, the Court of Appeal's judgement is not subject to appeal. Consequently, under Spanish law the judgement is enforceable in respect of the claims for which specific amounts have been awarded in compensation.

10.4 In a letter of 29 July 1997, the claimant referred to in paragraph 5.20 (Mexilor) requested payment of the balance of its claim (Pts 259 027 638 or £1 million), ie the amount awarded by the Courts (Pts 307 027 638) minus the amount received from the 1971 Fund as provisional payments (Pts 48 000 000). In his reply, the Director informed the claimant that he would request that the Executive Committee should give him instructions in respect of the payment of those claims for which the Courts had awarded a specific amount.

10.5 In this connection it is necessary to consider the relevant provisions of the 1971 Fund Convention which form an integral part of Spanish law. Of special interest are Articles 4.5, 8 and 18.7 which read:

> Article 4
>
> 5. Where the amount of established claims against the Fund exceeds the aggregate amount of compensation payable under paragraph 4, the amount available shall be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under the Liability Convention and this Convention shall be the same for all claimants.
>
> Article 8
>
> Subject to any decision concerning the distribution referred to in Article 4, paragraph 5, any judgement given against the Fund by a court having jurisdiction in accordance with Article 7, paragraphs 1 and 3, shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each Contracting State on the same conditions as are prescribed in Article X of the Liability Convention.

Article 18

The functions of the Assembly <4> shall, subject to the provisions of Article 26, be:

.....

7. to approve settlements of claims against the Fund, to take decisions in respect of the distribution among claimants of the available amount of compensation in accordance with Article 4, paragraph 5, and to determine the terms and conditions according to which provisional payments in respect of claims shall be made with a view to ensuring that victims of pollution damage are compensated as promptly as possible;

.....

10.6 Under Internal Regulation 7.2, the Director shall promptly satisfy any claims for pollution damage under Article 4 of the 1971 Fund Convention which have been established by judgement against the 1971 Fund and which are enforceable under Article 8 of the 1971 Fund Convention.

10.7 In view of the provisions of Articles 4.5, 8 and 18.7, it appears that the judgement of the Court of Appeal is not enforceable against the 1971 Fund until the Assembly or the Executive Committee has taken a decision under Article 18.7 concerning the distribution of the amount available for compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention.

10.8 On 23 September 1997 the 1971 Fund was notified of a decision, issued by the judge in charge of the execution of the judgement, ordering the master of the *Aegean Sea* and the pilot to pay the fine of Pts 300 000 (£1 500) in accordance with the judgement of the Court of first instance which had been upheld by the Court of Appeal. This decision also ordered the two defendants who had been held directly liable, namely the UK Club and the 1971 Fund, to pay the claimants the amounts of compensation awarded by the judgement as modified by the Court of Appeal (cf paragraph 5.6 above). The decision invited claimants to submit evidence to substantiate their losses.

10.9 The UK Club has appealed against this decision on the following grounds. Firstly, the court decision does not order the two persons who were directly liable for the incident, namely the master and the pilot, to pay claimants the compensation awarded by the judgement. Secondly, if the master and the pilot were insolvent, the parties which were subsidiarily liable, namely the shipowner and the Spanish State, would have to pay compensation to claimants. Thirdly, the court should take into account the fact that the UK Club has already paid compensation to victims of the *Aegean Sea* incident for a total of Pts 782 209 890 (£3 259 200). Fourthly, the Court should also take into account the fact that the Club has established a limitation fund in the amount of Pts 1 121 219 450 (£4 671 700) in accordance with Articles V.1 and V.3 of the 1969 Civil Liability Convention. Finally, the Court should bear in mind the fact that a sufficient sum should be set aside to enable other claimants who have reserved their right to take civil action to enforce their claim against the limitation fund (Article V.7 of the 1969 Civil Liability Convention).

<4> Decisions in respect of issues referred to in Article 18.7 are delegated to the Executive Committee, pursuant to Article 26 of the 1971 Fund Convention which reads:

"The functions of the Executive Committee shall be:

(a) .....

(b) to assume and exercise in place of the Assembly the following functions:

(i) .....

(ii) approving settlements of claims against the Fund and taking all other steps envisaged in relation to such claims in Article 18, paragraph 7;

(iii) .....

(c) .....

10.10 It will be recalled that the Executive Committee has decided, most recently at its 46th session, that in view of the remaining uncertainty as to the total amount of the established claims, the provisional payment of the 1971 Fund should remain limited to 40% of the damage actually suffered by the claimants as assessed by the Fund's experts.

10.11 The Executive Committee is invited to consider the level of the payments which the 1971 Fund should make in respect of the claimants who have been awarded a specific amount in the judgement by the Court of Appeal upholding the judgement of the Court of first instance.

10.12 In the Director's view there is still a high degree of uncertainty as to the total amount of the established claims. This applies to many of the claims covered by the judgements of the Court of first instance and the Court of Appeal. It also applies to the claims which may be presented at a later stage in the civil proceedings, although the 1971 Fund takes the view that these claims are time-barred. For this reason the Director considers that payments should remain limited to 40%.

11 Loans to claimants

11.1 The Executive Committee will recall that the Spanish delegation, in a note submitted to the its 54th session (document 71FUND/EXC.54/8), informed the Committee of the Spanish Government's decision to set up a credit facility of Pts 10 000 million (£41.7 million) for aquaculture companies and of Pts 2 500 million (£10.4 million) for shellfish harvesters and fishermen. This credit facility was set up through a Spanish State-owned bank, Instituto de Crédito Oficial (ICO). According to the note the terms of the credit facility were as follows:

(a) The Instituto de Crédito Oficial, as the financial agency of the Spanish State, would make arrangements with one or several financial institutions in Galicia who would provide loans of up to Pts 12 500 million (£52 million). This figure could be increased by the Department of Economy of the Spanish Government.

(b) Beneficiaries: aquaculture companies and "Cofradías" which had suffered losses arising out of the *Aegean Sea* incident. The "Subdelegación del Gobierno en La Coruña" would establish the amount to be granted to each company and to each "Cofradía".

(c) Security: the Spanish claimants' right to compensation against the 1971 Fund or against other public or private bodies.

11.2 In September 1997, the lawyer representing a group of boat fishermen and shellfish harvesters informed the Director that the shellfish harvesters he represented had received loans of Pts 2 035 million (£8.5 million) from the ICO. The lawyer mentioned that the security required by the bank to grant the loans was the assignment of the rights of compensation for the losses suffered as a result of the *Aegean Sea* incident which the shellfish harvesters had against the 1971 Fund or against any other person (private or public). The lawyer mentioned that these loans should be repaid by his clients to the ICO by 30 June 1999.

11.3 The Director has not been informed of the criteria applied by the ICO to distribute the credit facilities between the individual claimants. He has not received any information regarding the other group of claimants, namely the aquaculture businesses, as to whether the claimants in this group have received any loans as a result of the decision taken by the Spanish Government.

12 **Action to be taken by the Executive Committee**

The Executive Committee is invited:

(a) to take note of the information contained in this document;

(b) to consider the issue of possible recourse (paragraph 6);

(c) to give the Director such instructions as it may deem appropriate in respect of the procedures for the execution of the judgement rendered by the Court of Appeal (paragraph 10);

(d) to give the Director instructions in respect of the payment of claims for which the Courts have awarded a specific amount (paragraph 10); and

(e) to give the Director such other instructions as the Committee may deem appropriate in respect of the handling of the claims arising out of this incident.