



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
63rd session
Agenda item 3

71FUND/EXC.63/2
10 March 2000
Original: ENGLISH

INCIDENTS INVOLVING THE 1971 FUND

AEGEAN SEA

Note by the Director

Summary:

A number of claimants have brought legal action in the civil courts against the 1971 Fund, although the Fund has not been served with the actions. The question is whether these actions are time-barred.

There exist differences of opinion between the Spanish State and the 1971 Fund as to the distribution of liabilities between the State and the Fund. An agreement has been concluded between the Spanish State and the 1971 Fund to the effect that the period for the Fund to take recovery action against the State is extended until 12 June 2000.

The Spanish Government has submitted documentation in support of the claims in the fishery and mariculture sector. Discussions concerning the admissible quantum of these claims are being held.

Action to be taken: Information to be noted.

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. The 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. The Court of Appeal in La Coruña rendered its judgment on 18 June 1997. The judgement of the Court of Appeal is final. The Court of Appeal awarded specific amounts in compensation in respect of certain claims (cf document 71FUND/EXC.55/4, paragraph 5.6). However, a number of claims for compensation were referred to the procedure for the execution of the judgement, since the Courts considered the evidence presented by the claimants to be insufficient to substantiate the amount of the losses suffered. Developments in these proceedings were reported in documents

FUND/EXC.47/3, paragraph 3, FUND/EXC.49/3, paragraph 3, FUND/EXC.50/4, paragraph 4, 71FUND/EXC.55/4 paragraphs 3 and 4 and 71FUND/EXC.57/3, paragraph 5).

- 1.2 This document deals with the developments which have taken place since the Executive Committee's 62nd session. In particular, it reports on various meetings which have taken place with representatives of the Spanish Government and the Regional Government of Galicia (Xunta de Galicia) with the objective of reaching a global agreement which would settle all outstanding issues.

2 Claims situation

2.1 Background

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 (£93 million). Claims were also submitted to the Criminal Court in La Coruña, totalling some Pts 24 730 million (£84 million). These claims correspond to a great extent to those presented to the Joint Claims Office. Compensation has been paid in respect of 838 claims for a total amount of Pts 1 712 million (£7.7 million). Out of this amount, the UK Club has paid Pts 782 million (£3.2 million) and the 1971 Fund Pt 930 million (£4.5 million).

2.2 Level of payments

In view of the uncertainty as to the total amount of the claims arising out of the *Aegean Sea* incident, the 1971 Fund initially limited payments to 25% of the established damage suffered by each claimant. This figure was increased to 40% in October 1994.

3 Execution of the Court of Appeal's judgement

- 3.1 If a claimant has not proved the quantum of the damage suffered, the quantification may, under Spanish law, be deferred to the procedure for the execution of the judgement. In such a 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 Criminal Court of first instance and the Court of Appeal considered the evidence presented by many claimants to be insufficient to substantiate the amount of the losses suffered. The total of the claims which the Courts found substantiated by acceptable evidence was about Pts 840 million (£3.3 million). All the other claims for about Pts 16 109 million (£31 million) were referred to the procedure for the execution of the judgement.
- 3.2 During the hearing in the Criminal Court of first instance, a number of claimants raised the issue of the method to be applied for converting 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). Those claimants 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 SDR of the International Monetary Fund had not entered into force at the time of the *Aegean Sea* incident.
- 3.3 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 used in the court proceedings in the *Haven* case.
- 3.4 In its judgement the Criminal 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. The Court of Appeal held that the maximum amount payable by the 1971 Fund was 900 million Poincaré

francs or 60 million SDR, which should 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. The Court of Appeal stated that the claimants were entitled to opt for the method of conversion that they considered to be most favourable to them.

- 3.5 The Executive Committee has expressed the view that it would be difficult to apply the Court of Appeal's 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. Conversion on the basis of the Poincaré franc would have to be done using the last official value of gold in Spain, ie that of 19 November 1967, since there is no longer an official value of gold. Converting 900 million (gold) francs into Pesetas on that basis would give Pts 4 179 105 000 (£15.6 million). A conversion based on the value of the SDR on the date of the constitution of the shipowner's limitation fund, on the other hand, would give Pts 9 513 473 400 (£35.6 million).
- 3.6 Under Spanish law, the Court of Appeal's judgement is not subject to appeal and, consequently, the judgement is enforceable in respect of the claims for which specific amounts have been awarded in compensation.
- 3.7 Although the enforceability of judgements rendered by national courts was recognised in the 1971 Fund Convention, the Executive Committee considered at its 55th session that, in view of the provisions of Article 8, the Convention also provided that such enforcement could be subject to a decision of the Assembly or of the Executive Committee under Article 18.7 concerning the distribution of the total amount available for compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention. In view of the high degree of uncertainty as to the total amount of the established claims, both as regards many of the claims covered by the judgements of the Court of first instance and the Court of Appeal, and as regards the claims which might be presented at a later stage in the civil proceedings (although the 1971 Fund took the view that those claims were time-barred), the Executive Committee decided that payments to the claimants who had been awarded a specific amount in the judgements should be limited to 40% of the respective amounts so awarded (document 71FUND/EXC.55/19, paragraph 3.3.30). This decision was confirmed by the Committee at its 62nd session (document 71FUND/EXC.62/14, paragraph 3.3.6).
- 3.8 On 5 October 1999 the Court in charge of the procedure for the execution of the judgement served the 1971 Fund with pleadings submitted by various groups of claimants concerned. In those pleadings the claimants indicated the evidence which they intended to submit to the Court at a later stage to prove their losses and the evidence which they requested the Court to obtain on their behalf. The only evidence submitted with the pleadings was two reports prepared by an expert appointed by the Court on losses suffered by two fish wholesalers and a certificate issued by the Xunta de Galicia indicating the amount of the losses suffered by shellfish harvesters affected by the *Aegean Sea* incident.
- 3.9 The 1971 Fund requested the Court to suspend the proceedings since the evidence referred to in the pleadings was incomplete. On 5 October 1999 the judge issued an order extending the period for the Fund's submission of its pleadings by three months.
- 3.10 On 21 February 2000 five groups of claimants submitted documentation supporting their claims, including a report prepared by an expert appointed by the Court on losses suffered by a group of fish and shellfish sellers, the claimants' calculations of losses according to the criteria laid down by the Court of Appeal for the execution of the judgement and reports from two accountants containing calculations of two claims. Accordingly, on that date the Court issued an order lifting the suspension of the proceedings. The experts engaged by the UK Club and the 1971 Fund are examining this documentation.

4 Claims presented to the Civil Court

- 4.1 Some 60 claims totalling Pts 22 000 million (£85.4 million) have been brought against the shipowner, the UK Club and the 1971 Fund in the Civil Court of La Coruña by a number of companies and individuals, principally in the mariculture sector, who had not submitted any claims in the criminal proceedings but who had indicated in those proceedings that they would present their claims at a later stage in civil proceedings. These actions have not been served on the 1971 Fund, the shipowner and the UK Club.
- 4.2 On 16 February 2000 the 1971 Fund was served with a claim brought against the shipowner, the UK Club and the 1971 Fund in the Civil Court by three tug owning companies in the amount of Pts 611 million (£2.3 million) for the costs incurred by these companies during the clean-up operations. This action has not been served on the shipowner and the UK Club. The experts engaged by the shipowner, Club and Fund are examining the documentation provided with the claim. The 1971 Fund's Spanish lawyer is preparing the Fund's pleadings in respect of this claim.
- 4.3 The claimants referred to in paragraphs 4.1 and 4.2 have maintained that the maximum amount available under the 1969 and 1971 Conventions should be converted into Spanish Pesetas using the market value of gold.

5 Main outstanding issues

- 5.1 It has been agreed with the Spanish Government that in order to facilitate progress, efforts should focus on the following questions:
- an examination of the documentation presented by the Spanish Government in support of the claims in the fishery and aquaculture sectors (section 6 below);
 - the distribution of liabilities between the Spanish State and the shipowner/UK Club/1971 Fund (section 7 below); and
 - an analysis of the legal issue relating to time bar in respect of a group of claimants (section 8 below).
- 5.2 As mentioned in section 6 below, meetings are being held between representatives of the Spanish Government and of the UK Club and the 1971 Fund in order to facilitate the assessment of the claims.
- 5.3 The Director intends to continue the discussions with the Spanish Government on the time bar issue and on the distribution of liabilities between the Spanish State and the shipowner/UK Club/1971 Fund.

6 Meetings with the Instituto Español de Oceanografía and the Xunta de Galicia

- 6.1 In September 1999 the Spanish Government presented to the 1971 Fund a study carried out by the Instituto Español de Oceanografía (IEO) containing an assessment of the losses suffered by fishermen and shellfish harvesters and by claimants in the mariculture sector. The IEO had assessed the losses at between Pts 4 110 million (£15 million) and Pts 4 731 million (£18 million) as regards fishermen and shellfish harvesters at Pts 8 329 million (£31 million) as regards the mariculture sector. Extensive documentation relating to the losses suffered by companies in the mariculture sector was submitted.
- 6.2 Three meetings have been held between representatives of the Spanish Government, the IEO, the Xunta de Galicia and the 1971 Fund. A representative of the shipowner and the UK Club also attended the third meeting. During these meetings detailed discussions have taken place on the assessments made by the IEO and considerable progress has been made. A fourth meeting will be held on 16 March 2000, and it is expected that further progress on the assessment of the losses will be made at that meeting.

- 6.3 It has been agreed that these discussions will deal only with the assessment of the quantum of the losses referred to in paragraph 6.1 above.
- 6.4 It should be noted that the assessment made by the IEO does not cover all claims in the fishery, mariculture and other sectors, nor does this assessment cover the pending claims relating to clean-up operations (cf paragraph 4.2) and related issues. It has been agreed that it will be necessary to deal also with these claims in the near future.
- 6.5 As noted by the Executive Committee at its 62nd session any global agreement settling all outstanding claims would have to cover all parties involved, including the shipowner and the UK Club (cf document 71FUND/EXC.62/14, paragraph 3.3.19).

7 Distribution of liabilities

- 7.1 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. The Court considered not only the criminal aspects of the case but also the claims for compensation which had been presented in the criminal proceedings against the shipowner, the master, the UK Club, the 1971 Fund, the owner of the cargo on board the *Aegean Sea* and the pilot.
- 7.2 In a judgement rendered in April 1996 the Criminal Court held that the master and the pilot were both liable for criminal negligence. They were each sentenced to pay a fine of Pts 300 000 (£1 200) or one day's imprisonment for each Pts 5 000 (£20) not paid. The master, the pilot and the Spanish State appealed against the judgement, but on 18 June 1997 the Court of Appeal upheld the judgement.
- 7.3 The Criminal Court of first instance and the Court of Appeal held that the master of the *Aegean Sea* and the pilot were directly liable for the incident and that they 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 Courts held that the owner of the *Aegean Sea* and the Spanish State were subsidiarily liable.
- 7.4 Differences of opinion exist between the Spanish State and the 1971 Fund as to the interpretation of the judgements. The Spanish Government has maintained that the UK Club and the 1971 Fund should pay up to the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention (60 million SDR), and that the Spanish State would pay compensation only if and to the extent that the total amount of the established claims exceeded that amount. The Fund has maintained that the final distribution of the compensation payments between the various parties declared civilly liable should be: the UK Club and the 1971 Fund 50% of the total compensation for the damage (within their respective limits laid down in the Conventions), the State the remaining 50%. The shipowner and the UK Club share the 1971 Fund's interpretation of the judgement.
- 7.5 At its 58th session the Executive Committee decided that it was necessary for the 1971 Fund to take measures to protect its right to take recovery action against the Spanish State unless the disagreement between the Spanish State and the Fund as to the distribution of liability were solved out of court. For this reason, the Director was instructed to seek to obtain, well in advance of 18 June 1998 (ie within one year of the date of the Court of Appeal's judgement), a binding commitment by the Spanish Government to the effect that, if the 1971 Fund were to bring a recovery action against the Spanish State before 18 June 1998, the Spanish State would not invoke the time bar. The Committee emphasised that such an agreement would have to be signed by somebody who, under Spanish constitutional law, would have the capacity of binding the State in this regard. The Committee further instructed the Director that, should such a commitment not

be given by the Government, the Fund should take recovery action against the Spanish State by 18 June 1998 in order to preserve the Fund's rights, pending a solution of the disagreement between the State and the Fund (document 71FUND/EXC.58/15, paragraph 3.2.21).

- 7.6 On 12 June 1998 the Spanish Ambassador in London and the Director signed an agreement under which the Spanish State undertook not to invoke the time bar if the competent bodies of the Fund were to decide to take recourse action against the Spanish State to recover 50% of the amounts paid by the Fund, provided that such an action was taken within one year of the date of the agreement. The 1971 Fund, on its part, undertook not to bring legal action against the State within the first eleven months of the date of the agreement.
- 7.7 On 9 June 1999 the Spanish Ambassador in London and the Director signed a new agreement under which the Spanish State undertook not to invoke the time bar if the recourse action against the Spanish State was taken before 12 June 2000. In a letter to the Director, the Spanish Ambassador stated that Spain recognised that the agreement applied provisionally from the date of signature but that it would enter into force when Spain informed the 1971 Fund that all the procedures required under Spanish law had been complied with. In the letter it was stated that the provisional application of the agreement would terminate if Spain did not notify the Fund before 12 May 2000 that all these procedures had been complied with, or if Spain notified the Fund before that date that these procedures would not be complied with. In the letter it was further stated that Spain undertook in case of termination of the provisional application not to invoke the time bar if the Fund took recourse action against Spain within 30 days of 12 May 2000 or, where applicable, of the receipt of such notification.
- 7.8 In a letter to the Spanish Embassy dated 28 February 2000 the Director drew attention to the fact that the 1971 Fund had not been informed as to whether all the procedures required under Spanish law for the entry into force of the agreement had been complied with.
- 7.9 The agreement signed on 9 June 1999 expires on 12 June 2000. Unless an agreement is reached with the Spanish Government before 12 June 2000 to extend further the period for bringing recourse action, the Director considers that the Fund should take recourse action against the Spanish State, in accordance with the Executive Committee's instructions given at its 58th session (cf paragraph 7.5 above).

8 Question of time bar

- 8.1 The question of time bar is governed by Article VIII of the 1969 Civil Liability Convention as regards the shipowner and his insurer and by Article 6.1 of the 1971 Fund Convention as regards the 1971 Fund. In order to prevent his claim from becoming time-barred, a claimant must take legal action against the 1971 Fund within three years of the date when the damage occurred, or must notify the 1971 Fund before the expiry of that period of a legal action for compensation against the shipowner or his insurer. This period expired in the *Aegean Sea* case for most claimants on or shortly after 3 December 1995.
- 8.2 A number of claimants in the fishery and aquaculture sectors filed criminal accusations against four individuals. These claimants did not submit claims for compensation in those proceedings, but only reserved their right to claim compensation in future proceedings (ie in civil proceedings to be brought at a later date after the completion of the criminal proceedings) without any indication of the amounts involved. These claimants neither brought legal action against the 1971 Fund within the prescribed time period, nor notified the 1971 Fund of an action for compensation against the shipowner or the UK Club. In December 1995 the Executive Committee, recalling that it had previously decided that the strict provisions on time bar in the 1969 Civil Liability Convention and the 1971 Fund Convention should be applied in every case, took the view that these claims should be considered time-barred *vis-à-vis* the 1971 Fund.

- 8.3 During 1998 and 1999 the Spanish Government and the 1971 Fund exchanged legal opinions on the issue.
- 8.4 The opinions presented by the Spanish Government were given by the Legal Department of the Ministry of Public Administrations, by a Spanish law firm and by four professors at the Universidad Carlos III in Madrid. The opinions obtained by the Spanish Government concluded that the actions brought against the 1971 Fund in the Civil Court were not time-barred. The main reason for this conclusion was that under Spanish law criminal proceedings suspended the running of prescription periods and that therefore the three-year periods of prescription established by the 1969 and 1971 Conventions must be calculated from the day when the final judgement in the criminal proceedings was rendered, ie from 18 June 1997. In the opinion by the four professors it was stated that the Spanish translation of the term 'shall be extinguished' in the 1969 Civil Liability Convention used the word 'prescribirán' and that the translation of the same term in the 1971 Fund Convention used the term 'caducarán'. They stated that in view of this contradictory terminology, it must be found that both Conventions contemplated periods of prescription ('prescripción'). In their view, the criminal proceedings had the effect of interrupting the period of prescription and that therefore this period had not started to run. The professors expressed the view that if not interrupted by the criminal proceedings, which in effect they were, these periods were interrupted by the contacts and negotiations which had taken place between claimants and the Joint Claims Office, which could be considered as recognition of debts.
- 8.5 The 1971 Fund obtained opinions by a former Spanish Supreme Court judge and by two law professors and practising lawyers. The conclusion in these opinions was that the claims in question were extinguished and thus time-barred. The two professors made the point that the actions for compensation referred to in the time bar provision were individual actions and that these actions had to be brought within three years from the date when the damage occurred. In their view the time bar provisions were provisions of substantive law and not procedural, and provisions of substantive law took precedence over procedural law. All three authors stated that under the Spanish Constitution and the jurisprudence of the Spanish Supreme Court international treaties took precedence over domestic law and that for this reason the conflict must be resolved in accordance with the provisions of the Conventions. They expressed the view that claimants who had only reserved their right to claim compensation in future proceedings (ie civil proceedings to be brought at a later date after completion of the criminal proceedings) were time-barred because the reservation of the right to bring an action at a later date could not be considered as an individual legal action in accordance with Article 6.1 of the 1971 Fund Convention.
- 8.6 In the light of the differing views expressed in the various legal opinions, at its 62nd session the Executive Committee agreed with the Director that the very complex issues relating to time bar should be discussed further with the Spanish Government and instructed him to continue those discussions (cf 71FUND/EXC.62/14, paragraph 3.3.10).
- 8.7 The claimants referred to in paragraph 4.2 have also submitted a legal opinion on the issue of time bar by a professor at Cadiz University which concludes that the claims are not time-barred.

9 Loans to claimants

- 9.1 In June 1997 the Executive Committee was informed of the Spanish Government's decision to provide a credit facility of Pts 10 000 million (£37 million) for aquaculture companies and of Pts 2 500 million (£9.3 million) for shellfish harvesters and fishermen. This credit facility was set up through a Spanish State-owned bank. In October 1998 the Committee was informed that the Spanish Government had decided to increase the credit facility to a maximum of Pts 22 500 million (£84 million). The Spanish delegation made the point that the granting of these loans would facilitate progress, since the 1971 Fund would have to negotiate with only one single claimant, namely the Spanish Government (cf document 71FUND/EXC.59/17, paragraph 3.3.19).

9.2 The terms of the credit facility set up through a Spanish State-owned bank provide that the claimants cede irrevocably to the bank their rights to any compensation that might be due to them as a result of the *Aegean Sea* incident and agree to take all steps required to obtain compensation from the 1971 Fund or any other party. The claimants, under the terms of the facility, retain the right to compensation over and above the amounts of the loans.

10 Suspension of legal proceedings

10.1 At the 61st session of the Executive Committee the Spanish delegation stated that it had consulted the lawyers representing two groups of claimants in the fishery, aquaculture and mariculture sectors and that these lawyers had indicated that their clients were prepared to agree with the 1971 Fund to suspend litigation provisionally before the Spanish courts, both as regards the procedure for the execution of the criminal judgement and as regards the civil proceedings. That delegation expressed the view that such a provisional suspension would facilitate negotiations between the 1971 Fund and the Spanish Government but that it was for the claimants and the 1971 Fund to consider whether to agree to such a provisional suspension.

10.2 The Committee considered that the provisional suspension of the legal proceedings before the courts would benefit the negotiations between the Spanish Government and the 1971 Fund. It was noted, however, that this issue had not yet been fully discussed with the 1971 Fund's lawyer. The Committee also noted that this issue would have to be discussed with the other parties involved in the proceedings, in particular the shipowner and the UK Club.

10.3 The Executive Committee authorised the Director to agree with the claimants to request the court to suspend the legal proceedings before the Spanish courts, provided that the Director, after consultation with the 1971 Fund's lawyer, was of the view that such a suspension would not prejudice the Fund's position (document 71FUND/EXC.61/14, paragraph 4.2.18).

10.4 The lawyers representing the majority of claimants involved in the procedure for the execution of the judgement and the lawyers representing the 1971 Fund, the shipowner and the UK Club are discussing whether to make a joint request to the court to suspend these proceedings. It is expected that the Court would grant such a request.

10.5 It is intended that discussions for the purpose of agreeing on a suspension will take place with the lawyers representing the claimants in the civil proceedings.

11 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 instruct the Director to pursue his discussions with the Spanish Government with the objective of reaching a global agreement which would settle all outstanding issues; and
 - (c) to give the Director such other instructions as the Committee may deem appropriate in respect of this incident.
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