



## INCIDENTS INVOLVING THE 1971 FUND

### AEGEAN SEA

#### Note by the Director

**Summary:**

As instructed by the Executive Committee the Director has held discussions with the Spanish Government with the objective of reaching a global agreement, which would settle all outstanding issues. Significant progress has been made towards that objective. Discussions have been held concerning the admissible quantum of all claims (except those for which the amount of compensation has been fixed by the Courts). A provisional agreement on the admissible quantum of the established claims has been reached.

There exist differences of opinion between the Spanish State and the 1971 Fund on two legal issues, namely the distribution of liabilities between the State and the Fund and the question of whether the actions brought by a number of claimants in the civil courts are time-barred. The Director has held discussions with the Spanish Government on these issues and it is believed that an agreement to resolve these differences of opinion between the Spanish State and the Fund could be reached. An outline of a global solution is indicated.

**Action to be taken:**

Decide whether to authorise the Director to conclude an agreement with a global settlement of all outstanding issues on the basis of certain specific elements.

## 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 judgement 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 1st session of the Administrative Council. 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 Claims totalling some Pts 22 750 million (£84 million) were presented before the Criminal Court of La Coruña in respect of losses suffered by fishermen and shellfish harvesters and the costs of clean-up operations.
- 2.2 Sixty-three claims totalling Pts 24 255 million (£90 million) were also presented 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.
- 2.3 The UK Club has also presented claims in the Civil Court of La Coruña in respect of clean up and preventive measures associated with salvage operations for Pts 1 182 million (£4.4 million). On 18 October 2000 these claims were settled in the amount of Pts 661 million (£2.4 million).
- 2.4 The total amount of all the claims submitted before the criminal and civil courts of La Coruña is Pts 48 187 million (£178 million).
- 2.5 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).

### *Level of payments*

- 2.6 In view of the uncertainty as to the total amount of the claims arising out of the *Aegean Sea* incident, the Executive Committee decided initially to limit the 1971 Fund's 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 815 million (£3 million). All the other claims for about Pts 16 110 million (£59.6 million) were referred to the procedure for the execution of the judgement.
- 3.2 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.
- 3.3 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.

- 3.4 The Executive Committee authorised the Director to agree with the claimants to request the Court to suspend the legal proceedings, 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).
- 3.5 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 made a joint request to the court to suspend these proceedings. The Court granted this request.
- 3.6 Three claimants involved in the procedure for the execution of the judgement did not agree with the suspension of the proceedings. Proceedings in respect of these claims are continuing before the Court in La Coruña.

#### **4 Loans to claimants**

- 4.1 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 (£9.2 million) for shellfish harvesters and fishermen. This credit facility was set up through a Spanish State-owned bank. 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).
- 4.2 The terms of the credit facility 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 assist the Government to take all steps required to obtain compensation from the 1971 Fund or any other party. Under the terms of the facility the claimants retain the right to compensation over and above the amounts of the loans.

#### **5 Maximum amount payable under the 1971 Fund Convention**

- 5.1 Under Article V.9 of the 1969 Civil Liability Convention, the limitation amount applicable to the *Aegean Sea* as expressed in Special Drawing Rights (SDR) shall be converted into the national currency on the basis of the official value of that currency *vis-à-vis* the SDR on the date of the constitution of the shipowner's limitation fund.
- 5.2 By decision of 30 December 1992, the Criminal Court of La Coruña ordered the shipowner to constitute a limitation fund, fixing the limitation amount at Pts 1 121 219 450 (£4.2 million). The limitation fund was constituted by means of a bank guarantee provided by the UK Club on behalf of the shipowner for the amount set by the Court.
- 5.3 The conversion of the maximum amount payable under the 1971 Fund Convention, 60 million SDR, should be made using the same rate as that applied for the conversion of the shipowner's limitation amount (cf Article 1.4).
- 5.4 The value of the SDR in pesetas on the date of the constitution of the limitation fund was 1SDR = Ptas 158.55789. Accordingly, the maximum amount of compensation payable in respect of the *Aegean Sea* incident under the 1969 Civil Liability Convention and the 1971 Fund Convention (60 million SDR) converted into pesetas using the rate on that date gives Pts 9 513 473 400.

## 6 Main outstanding issues

6.1 There are three main outstanding issues:

- the quantification of claims, except those for which an amount was determined by the Courts (section 6 below);
- the distribution of liabilities between the Spanish State and the shipowner/UK Club/1971 Fund (section 7.1 below); and
- the issue of time bar in respect of the claimants which brought action in the civil courts (section 7.2 below).

6.2 At its 62nd session, held in October 1999, the Executive Committee instructed the Director to pursue his discussions with the Spanish Government with the objective of reaching a global agreement which would settle all outstanding issues (document 71FUND/EXC.62/14, paragraph 3.3.19).

## 7 Discussions concerning the quantification of the losses

7.1 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 (£17.5 million) as regards fishermen and shellfish harvesters and at Pts 8 329 million (£30.8 million) as regards the mariculture sector. Documentation relating to the losses suffered by companies in the mariculture sector was submitted.

7.2 The assessment made by the IEO did not cover all claims in the fishery, mariculture and other sectors, nor did this assessment cover the pending claims relating to clean-up operations, eg that of the Spanish Government.

7.3 Nine 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 attended most of the meetings.

7.4 The meetings dealt with the assessment of the quantum of the losses only. At a meeting in Madrid on 2 October 2000 a provisional agreement was reached between the Spanish Government and the Xunta de Galicia, on the one hand, and the 1971 Fund, the shipowner and the UK Club on the other, as to the admissible quantum of all claims for compensation arising out of the incident except that presented by the shipowner/UK Club for clean-up and preventive measures in connection with salvage. Since then a provisional agreement has been reached on the shipowner's/UK Club's claim. The provisionally agreed figures are set out in the table overleaf.

Claims	Claimed amount (million)	Agreed amount (million)
Fishermen & shellfish harvesters	14 222.17	3 220.77
Mariculture	20 048.24	5 183.61
Clean-up operations	2 679.67	560.98
Fish wholesalers, transporters & related business	2 120.80	291.62
Tourism	75.20	13.81
Financial costs	2 127.20	371.68
Spanish Government	1 154.50	460.23
Shipowner/UK Club's claim for clean up and preventive measures	1 181.59	660.81
Amounts awarded by Criminal Courts	4 577.63	814.51
Claims paid by UK Club and 1971 Fund	-	254.55
Total (million Ptas)	48 187.01	11 832.55
Total (£)	£178 million	£44 million

- 7.5 At the Madrid meeting consideration was also given to the question of how to take in account the fact that the major part of the compensation would only be paid some eight years after the incident.
- 7.6 The question of whether interest on agreed claims should be paid by the 1971 Fund was discussed by the 5th Intersessional Working Group in 1980. The Working Group took the view that, if interest was admissible under national law, the 1971 Fund would be obliged to follow the applicable national law, although the rate and period of interest could be agreed between claimants and the Fund during negotiations (document FUND/A.4/10, Annex, paragraph 21). The Assembly generally endorsed the results of the Working Group's discussions (document FUND/A.4/16, paragraph 13).
- 7.7 The Director has been advised by the 1971 Fund's Spanish lawyer that the general position of Spanish law is that interest is only payable on non-contractual claims from the date when the claim has become liquid, which is normally the date when the amount of the compensation is fixed by the court. In the case of the *Aegean Sea* the amount of compensation has not been fixed for most of the claims. The Fund's Spanish lawyer has also advised that in accordance with the jurisprudence of the Spanish Supreme Court the amount of the loss or damage fixed by the court could be increased to take into account the depreciation of the Spanish Peseta. The Spanish Government and the 1971 Fund are studying this issue.
- 7.8 The provisional agreement as to the quantum of the claims is subject to agreement on the two other outstanding issues, namely the distribution of liabilities and the time bar.

## **8 Legal issues**

### *Distribution of liabilities*

- 8.1 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.
- 8.2 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.
- 8.3 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.
- 8.4 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.

- 8.5 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).
- 8.6 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.
- 8.7 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.
- 8.8 On 2 June 2000 the Spanish Ambassador in London and the Director signed a new agreement extending the periods referred to in paragraph 8.7 to 12 June 2001 and 12 May 2001 respectively.

*Question of time bar*

- 8.9 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.
- 8.10 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.

- 8.11 During 1998 and 1999 the Spanish Government and the 1971 Fund exchanged legal opinions on the issue.
- 8.12 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.
- 8.13 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.
- 8.14 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).

## **9 Discussions with the Spanish Government on the legal issues**

- 9.1 The Director has held fruitful and constructive discussions with representatives of the Spanish Government. During these discussions both parties have maintained their positions on the distribution of liabilities and on the issue of time bar as reflected in sections 8.1 and 8.2 above. It was recognised by both sides that these matters would be for the Spanish courts to decide unless an out-of-court settlement was reached. Although maintaining the positions, the parties recognised that there was always some uncertainty as to the outcome of court proceedings on these very complicated issues.
- 9.2 The Director takes the view that litigation in respect of the issues of distribution of liabilities and time bar would be very protracted. As has been emphasised by the Assembly and the Executive Committee on numerous occasions, the purpose of the 1971 Fund is to pay compensation to victims of pollution damage. For these reasons, the Director considers that a global settlement of all outstanding issues would be in the interest of all parties involved.

- 9.3 At a meeting held in Madrid on 3 October 2000, it was suggested that a solution could be found by the Spanish Government and the 1971 Fund each compromising on their legal positions. An option would be that the Fund would refrain from invoking that the claims presented in the Civil Court are time-barred, whereas the Spanish State would accept a distribution of liabilities between the pilot/Spanish State and the master/shipowner/UK Club/1971 Fund. A global solution could be that the 1971 Fund/UK Club/shipowner/master pay a fixed amount in respect of all claims and that as a result all court actions would be withdrawn.
- 9.4 Subject to any instructions which the Assembly may wish to give him, the Director intends to continue the discussions with the Spanish Government for the purpose of reaching an agreement with the Government on a proposal for a global settlement to be submitted for consideration to the Assembly at its next session.

**10 Action to be taken by the Assembly**

The Assembly is invited:

- (a) to take note of the information contained in this document;
  - (b) to instruct the Director to continue his discussions with the Spanish Government for the purpose of reaching an agreement with the Government on a proposal for a global settlement to be submitted for consideration by the Assembly at its next session; and
  - (c) to give the Director such other instructions as the Assembly may deem appropriate in respect of this incident.
-