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INCIDENTS INVOLVING THE IOPC FUND

AEGEAN SEA

Note by the Director

1 The Incident

1.1 On 3 December 1992, the Greek OBO AEGEAN SEA (57 801 GRT) ran aground while approaching La Coruña in north-western Spain. The ship was carrying approximately 80 000 tonnes of crude oil. The vessel broke in two and burnt fiercely for about 24 hours, whereafter the forward section sank some 50 metres from the coast. The stern section smouldered for several days but remained largely intact. Approximately 6 500 tonnes of crude oil and 1 700 tonnes of heavy fuel oil were found in the aft section. This oil was removed by salvors working from the shore. No oil remained in the sunken forward section. Whilst the quantity of oil spilled is unknown, it appears that most of the cargo was either consumed by the fire on board the vessel or dispersed in the sea.

1.2 Due to the heavy weather, little could be done to recover oil at sea but attempts were made to protect sensitive areas using booms deployed from ships and from the shore. As a result of the nature of the oil cargo (Brent Blend Crude) and the vigorous wave action typical of the exposed coast, there was considerable natural dispersion of the oil slicks. Several stretches of shoreline east and north-east of La Coruña were contaminated and Ria de Ferrol was heavily polluted.

1.3 In areas where access from the shore was possible, efforts were made to remove floating oil, using vacuum trucks, skimmers and pumps. A quantity of about 5 000m³ of oil/water mixture was collected and delivered to local oil reception facilities for processing.

1.4 The cleaning of polluted beaches commenced in late December 1992. An estimated quantity of 1 200m³ of oiled sand and contaminated debris was removed. This material was delivered to a contractor for final disposal.

1.5 The more sheltered Ria de Ferrol, which contains mudflats and saltmarshes, was also polluted. Work in the estuary, which was completed in July 1993, involved the manual removal of oily beach material and debris, and the washing of rocks and manmade surfaces. A total quantity of approximately 1 500 tonnes of material was transported to a disposal contractor for treatment.

1.6 A comprehensive fishing ban was imposed from the outset in the affected area comprising near-shore waters and the shoreline between Sisargas Islands and Cabo Ortegal. The gathering of shellfish was also prohibited. As conditions improved, these restrictions were removed, and fishing returned to normal in August 1993. The restrictions affected some 3 000 fishermen, including shellfish harvesters.

1.7 There is extensive raft cultivation of mussels in Ria de Betanzos, and although physical contamination of the rafts by oil was slight, tainting of mussels occurred. There are also other mariculture facilities in the area, namely turbot and salmon farms, and clam and mussel purification plants. Some of the farms were slightly affected by tainting, and the purification plants were closed for several months. All the plants have been reopened.

2 Claims Handling

2.1 The Spanish authorities have set up a public office in La Coruña which gives information to potential claimants concerning the procedure for presenting claims and hands out claims forms provided by the shipowner's P & I insurer (the United Kingdom Steamship Assurance Association (Bermuda) Ltd, UK Club) and the IOPC Fund to claimants.

2.2 After consultation with the Spanish Government and the Government of the Region of Galicia, the shipowner, the UK Club and the IOPC Fund have established a joint office in La Coruña ("the Joint Claims Office") which receives and handles claims for compensation. This office works closely with the Spanish authorities and the claimants in order to facilitate the handling of the claims.

3 Claims for Compensation

3.1 General Situation

3.1.1 As at 31 August 1994, 1 215 claims have been received by the Joint Claims Office totalling Pts 21 300 million (£105 million). Payments have been made in respect of 699 claims for a total amount of Pts 464 956 664 (£2.3 million). All payments have been made by the UK Club.

3.1.2 Claims have also been submitted to the Court of first instance in La Coruña. As at 31 August 1994, these claims totalled some Pts 20 765 million (£104 million). The IOPC Fund's lawyers and experts are at present carrying out detailed examination of the claims documents. It appears that the claims presented to the Court to a large extent correspond to the claims presented to the Joint Claims Office.

3.1.3 At its 36th, 38th and 39th sessions, the Executive Committee took note of the situation in the court proceedings in respect of the claims filed with the Court. In view of the high amount of these claims, the Executive Committee took the view that caution had to be exercised when making payments to claimants at this stage, in order to ensure that the provisions of Article 4.5 of the Fund Convention relating to equal treatment of victims were respected. The Committee therefore instructed the Director, at its 36th session, that the IOPC Fund should, at this stage, only make partial payments in respect of accepted claims which should not exceed 30-40% of the amount approved (document FUND/EXC.36/10, paragraph 3.3.21).

3.1.4 In the light of the uncertainty as to the total amounts of the claims, the Director decided to limit any payment by the IOPC Fund, at least for the time being, to 25% of the established damage suffered by the claimants concerned. The Executive Committee was informed of the Director's decision at its 38th session (document FUND/EXC.38/9, paragraph 3.3.15).

3.1.5 In view of the continuing uncertainty as to the total amount of claims, the Director has maintained the position that any payments by the IOPC Fund should be limited to 25% of established damage suffered by the claimants concerned. The Executive Committee is invited to express its opinion on this issue.

3.1.6 Meetings will be held in Spain on 22 and 23 September 1994 between the Spanish Government, the Government of the Region of Galicia, a number of claimants, the IOPC Fund and the UK Club.

3.1.7 In the following paragraphs, information is given on the situation in respect of various groups of claims.

3.2 Property Damage

708 claims have been received for damage to property (houses and boats). Payments totalling Pts 45 171 744 (£223 600) have been made in settlement of 658 claims.

3.3 Clean-up Costs

There are 96 claims relating to clean-up operations and preventive measures, totalling some Pts 3 080 million (£15.2 million). Partial payments totalling Pts 600 000 (£2 970) have been made to 16 claimants, and a further three claims are awaiting approval by the IOPC Fund. In thirteen cases, a settlement offer has been made and a response is awaited from the claimants. Another 46 claims have been reviewed, and final assessment of these claims awaits further evidence from the claimants. Four claims are being assessed. One claim has been rejected as duplicating another claim.

3.4 Near-Shore Aquaculture

3.4.1 In the area affected by the spill, there is significant aquaculture industry concentrated in the Sada-Lorbé area, cultivating mussels, salmon, oysters and scallops. The cultivation of mussels is the most important activity, representing more than 80% of the total harvest value.

3.4.2 In a Resolution issued on 12 April 1993 by the Fisheries Council of the Region of Galicia, it was stated that all cultivated produce within the Sada-Lorbé area should be destroyed. The experts engaged by the IOPC Fund, the shipowner and the UK Club did not consider that it was justified to carry out a total destruction of these products. However, it was accepted by these experts that, with the optimum time for the first of the 1993 mussel seeding drawing near, it was necessary to take steps to limit the consequences of the incident for future production. On the strength of the test results available at that time, which showed that the mussels were still tainted, the experts acknowledged the justification for a sufficient quantity of the largest commercially harvestable size mussels being destroyed to make space for the first of the 1993 mussel seed intake due by May/June 1993. Such a partial destruction was, however, not carried out. The experts considered it premature to destroy smaller mussels covered by the Resolution, or to destroy salmon, oysters and scallops, in view of the possibility of taint being removed by a process of natural depuration. The Resolution was, nevertheless, put into effect on 9 August 1993, and the destruction was completed by 24 September.

3.4.3 The experts engaged by the IOPC Fund and the UK Club endeavoured to obtain sufficient evidence in the form of sample testing in order to enable them to assess whether the destruction of the above-mentioned products was justified. A monitoring programme was carried out to determine the development of taint in the mussels.

3.4.4 In respect of the farmed mussels and salmon that were destroyed pursuant to the Resolution of the Fisheries Council, the Director accepted in April 1994 that, on the basis of the test results provided, it was not unreasonable to destroy the marketable sized mussels and salmon that would have been harvested during 1993.

3.4.5 The restrictions on aquaculture in the Sada-Lorbé area were lifted on 5 May 1994.

3.4.6 Thirteen claims have been received for losses relating to mussel and salmon farms, for a total of Pts 4 301 602 062 (£21.3 million). The information presented in support of these claims is very limited. With the exception of one claim, the information comprises certificates of evaluation issued by experts of the Fisheries Council of the Region of Galicia, although the various elements therein are unsupported by documentary evidence. On the basis of the information provided and after an examination of the official statistics published by the Fisheries Council, the IOPC Fund and the UK Club have made a provisional assessment of the losses sustained. As a result, one claimant has received a partial payment of Pts 23 million (£113 860). Three other claimants have been offered a total of Pts 232.5 million (£1.2 million) by way of partial payments. The remaining claims are being assessed by the IOPC Fund's experts.

3.5 Depuration Plants

Claims have been received from three plants depurating shellfish, totalling Pts 1 221 030 090 (£6.0 million). These claims are supported by certificates of evaluation issued by experts of the Fisheries Council, although the various elements therein are unsupported by documentary evidence. On the basis of the limited information provided, the experts of the IOPC Fund and the UK Club have made a provisional assessment of the losses sustained. As a result, one claimant has received an offer of a partial payment of Pts 34.5 million (£170 800). The other two claims are at present being examined by the IOPC Fund's experts.

3.6 Boat Fishing and Shellfish Harvesting

3.6.1 Some 3 680 fishermen and shellfish harvesters have submitted claims totalling Pts 8 965 781 212 (£44.4 million). Some of these claims have been lodged by individuals and other by groups. Three claimants have been paid in full for a total of Pts 3 068 668 (£15 190) while partial payments, totalling Pts 391 million (£1.9 million), have been made to five other claimants. These partial payments correspond to 25% of the damage as provisionally established on the basis of published catch statistics by the experts appointed by the IOPC Fund and UK Club. They include one payment of Pts 361 million (£1.8 million) to an association of fishermen's unions (cofradías) for distribution to their 2 700 fishermen members.

3.6.2 A meeting was held in London in July 1994 with representatives of a number of fishermen to discuss the handling of their claims. Representatives of the Spanish Government and the Region of Galicia attended the meeting. At the meeting, the Director invited the claimants to make available more information substantiating their losses, so as to enable the UK Club and the IOPC Fund to make further partial payments. The representative of the claimants stated that supporting documentation would be provided only after significant further advance payments had been made. After having re-examined the situation, the Director informed the representatives of the claimants that, in these circumstances, no further partial payments could be made at the present stage.

3.7 On-Shore Aquaculture

3.7.1 One claim for Pts 843 million (£4.2 million) has been received from an onshore farm producing salmon smolt. The information provided is very limited and comprises a certificate issued by the Fisheries Council. The various elements referred to therein are unsupported by documentary evidence. The claims is at present being assessed by the experts appointed by the UK Club and the IOPC Fund.

3.7.2 In April 1994 the experts appointed by the UK Club and the IOPC Fund visited an on-land turbot farm known to have suffered problems following the spill. This farm, which was supplied with sea water through subsurface water intakes, was prohibited by the Fisheries Council from selling its fish shortly after the incident but was allowed to market its fish from February 1993. The farm management advised the experts, however, that no market had been found for the fish and that there were on-going problems with high mortality and with poor growth rates.

3.7.3 On 13 April 1994, the Fisheries Council ordered the destruction of the turbot and the subsequent cleaning and sterilisation of the plant before the introduction of new fish. The IOPC Fund accepted the destruction of the turbot, since the fish had, as a result of the incident, suffered from poor growth and had in addition become unmarketable. The destruction was monitored by the IOPC Fund's experts who also obtained representative samples of the fish, and these have been retained pending scientific analysis. So far, no claim has been received from this turbot farm.

3.8 Pure Economic Loss

So far, 115 claims have been received in respect of various types of pure economic loss, totalling Pts 124 538 072 (£616 500), such as fishing net repairers, a fish transporter, fish salesmen, an hotel, a car repair workshop and a group of fish salesroom officials for lost earnings. Two claimants have been paid in full by the UK Club for a total of Pts 888 265 (£4 400), whereas five claimants have received partial payments of Pts 787 358 (£3 900). The remaining claimants have been asked to provide further evidence of their loss.

4 Payments by the Fisheries Council of the Region of Galicia and the Commission of the European Community

4.1 At its 38th session, the Executive Committee noted that the Fisheries Council of the Region of Galicia had submitted a claim for the reimbursement of payments which it had made to fishermen and shellfish gatherers following the AEGEAN SEA incident.

4.2 Payments had thus been made by the Fisheries Council to some 365 fishermen and some 1 535 shellfish gatherers who had been prevented from fishing by restrictions imposed because of the pollution. Each person had received a certain amount for each day when he was unable to fish. The amounts paid by the Fisheries Council, totalling Pts 438 383 000 (£2.10 million), were reclaimed by the Council.

4.3 The Spanish delegation requested, at the Executive Committee's 38th session, that the Committee should postpone any decision on these claims to its 39th session. The delegation also stated that, subject to formal approval by the competent authorities, the Fisheries Council would withdraw its claim for reimbursement of the amount paid by the Council to the victims.

4.4 The Executive Committee noted that, according to the Spanish delegation, the payments by the Fisheries Council were intended as interim measures to mitigate the most imminent consequences of the pollution resulting from the AEGEAN SEA incident, that the payments were granted as humanitarian aid to alleviate in part the negative socio-economic consequences suffered by the fishermen and shellfish gatherers, and that in the relevant Regional Orders granting these payments it was stated that this aid did not affect the entitlement of victims to compensation in respect of loss or damage suffered. It was also noted that, according to the Spanish delegation, the Fisheries Council would not present

a claim against the shipowner, the P & I Club and the IOPC Fund for the overall amount of the aid given, although if the IOPC Fund were to deduct the amounts paid by the Council from the compensation payable to claimants, the Fisheries Council would reclaim those amounts from the Fund and then reimburse the individual victims.

4.5 The Executive Committee took the view that payments received by claimants in connection with an incident which were in the nature of a gift should not be deducted from compensation payable under the Civil Liability Convention and the Fund Convention, whereas payments which could be categorised as compensation or advances towards compensation should be deducted. It was agreed that the question into which category a payment fell would have to be decided in the light of the particular circumstances of the payment in question.

4.6 In a document dated 29 July 1994, the Fisheries Council confirmed that the claims in respect of the aid paid to the fishermen by the Council were withdrawn.

4.7 The payments made by the Fisheries Council were granted as humanitarian aid. The Council has withdrawn its claim for reimbursement of these payments. In the light of the decision by the Executive Committee referred to in paragraph 4.5 above, the Director takes the view that these payments should not be deducted from the compensation payable under the Civil Liability Convention and the Fund Convention. The Executive Committee is invited to give the Director instructions on this issue.

4.8 At its 38th session, the Executive Committee noted that payments had also been made to some claimants by the Commission of the European Community. The Executive Committee decided that payments made by the Commission through Directorate-General XIV should be deducted from any compensation payable under the Civil Liability Convention and the Fund Convention, since these payments related to losses which in principle, if proven, would qualify for compensation under the Conventions, whereas payments made through Directorate-General XI should not be taken into account when determining the amount of compensation payable under the Conventions, because these payments were in the nature of a gift. In August 1994, the Region of Galicia provided a list of recipients of payments from Directorate-General XIV. This information is being examined by the Joint Claims Office.

4.9 The Executive Committee noted that payments which were in the nature of a gift could not be reclaimed from the IOPC Fund. The Committee also noted that payments which could be categorised as compensation or advances towards compensation could be reclaimed from the shipowner and the IOPC Fund, provided that such payments related to loss or damage which fell within the scope of application of the Conventions and provided further that the payer could invoke a valid subrogation.

5 Social Security Payments

5.1 At its 38th session, the Executive Committee considered claims which had been submitted by two public bodies in respect of unemployment benefits paid to 32 individuals who allegedly had been made redundant due to the reduction in work as a result of the restrictions placed on fishery activities following the incident. The Committee also examined a claim presented by one of these public bodies for loss of income due to a reduction in contributions made to the Social Security Fund by employers who had reduced their workforce. At the request of the Spanish delegation, the Executive Committee decided to postpone its consideration of these claims to its 39th session, so as to enable the Spanish Government to submit additional information, and to enable it to consider the results of the deliberations of the Intersessional Working Group on this matter.

5.2 At the Committee's 39th session, the Spanish delegation presented the Committee with detailed information concerning the items covered by the claims referred to paragraph 5.1 above. The Committee decided to postpone its consideration of these claims to its 40th session, and instructed the

Director to prepare a document on the issues involved, in consultation with the Spanish delegation (document FUND/EXC.39/8, paragraph 3.2.21). Such a document will be presented as an addendum to the present document.

6 Legal Proceedings

6.1 The Director, the Joint Claims Office and lawyers and experts acting for the IOPC Fund are preparing an analysis of the claims lodged with the Court, in consultation with the UK Club, and this analysis will be presented to the Court at the appropriate time.

6.2 By a decision of 30 December 1992, the Court of first instance in La Coruña ordered the shipowner to deposit security for an amount of Pts 1 121 219 450 (£5.3 million). That amount corresponds to the estimated limit of liability applicable to the Aegean Sea, but the Court has not taken any decision concerning the shipowner's right to limitation. The security was constituted on 20 January 1993 by means of a bank guarantee provided by the UK Club on behalf of the shipowner for the amount set by the Court.

6.3 On 31 August 1993, a decision containing the following elements was rendered by the Court in La Coruña seized with the criminal proceedings against the master of the AEGEAN SEA and the pilot in charge of its entry into the port of La Coruña:

- (i) The master of the AEGEAN SEA and the pilot were ordered to provide guarantees within seven days of the order, the master for Pts 8 000 million (£38 million) and the pilot for Pts 4 000 million (£19 million).
- (ii) The UK Club and the IOPC Fund shall be liable, jointly and severally with the master and the pilot, within their respective legal limits. They were ordered to provide security for Pts 12 000 million (£57 million) within seven days. It was stated that if this security was not provided, the Court will arrest their property in accordance with the applicable provisions of the Code of Criminal Procedure.
- (iii) If the UK Club and IOPC Fund do not provide sufficient security, such security should be provided by the owner of the cargo (Repsol Petroleo SA) and the owner of the AEGEAN SEA (AEGEAN SEA Traders Corporation).

6.4 The IOPC Fund appealed against this decision. The Fund maintained that it did not have a direct liability under the Fund Convention since the IOPC Fund was liable only when the amounts actually paid under the Civil Liability Convention were insufficient to meet all claims in full. It also argued that criminal proceedings were actions against individuals and that there was no link between the Fund and the accused persons, namely the master and the pilot. This appeal was rejected, since under Spanish law decisions of this type are not subject to appeal but will be reviewed in connection with the final judgement.

6.5 In October 1993, the Executive Committee expressed its concern that the position taken by the Court requesting the IOPC Fund to provide security was at variance with the Fund Convention which formed part of Spanish law. The Committee instructed the Director not to put up any security in the Court.

6.6 In its provisional pleadings on the merits of the claims for compensation, presented in September 1993, the IOPC Fund has maintained that the pilot and the Military Commandant of the Port of La Coruña (Comandante Militar de Marina) are liable for the grounding. The Fund has argued that the pilot's liability is based on the fact that he ordered the master to enter the port of La Coruña at 2.00 am, in spite of the heavy weather and being aware that the weather would deteriorate further. In addition, in the Fund's view, the pilot is liable because he did not meet the ship at the designated pilot boarding station, which he should have done in accordance with the applicable Pilot Regulations. The Court has, in fact, ordered the pilot to provide a guarantee of Pts 4 000 million (£20 million). As

regards the Military Commandant of the Port, in the view of the Fund, his liability is based on the fact that he was aware of an order prohibiting ships like the AEGEAN SEA from entering the port at that time of the night, at the prevailing state of the tide, and in such severe weather conditions. The Court has, in a decision of 18 March 1994, decided that the Military Commandant of the Port of La Coruña is not liable. It is possible that this question will be reopened, should the criminal proceedings reveal that the Military Commandant is indeed liable.

6.7 On 10 December 1993 the Court of Appeal in La Coruña revoked a decision by the Court of first instance dated 27 July 1993, in which the Court of first instance rejected a petition by a trade union that the Military Commandant of the port of La Coruña and the Harbour Master of the Repsol Petroleo oil terminal should be ordered to give evidence. The reason for the rejection given by the Court of first instance was that the petition had been made too late. The Court of Appeal ruled that the evidence requested should be taken and that the preparation for an oral hearing should be recommenced. It appears that, as a consequence of the Court of Appeal's decision, the decision by the Court of first instance dated 31 August 1993 would no longer apply and that the parties would be permitted to submit new pleadings. The Court of first instance did not, however, allow such further pleadings.

6.8 By decision of 30 June 1994, the Court of Appeal rejected the appeals presented by the IOPC Fund, the shipowner and other parties and endorsed the decision by the Court of first instance of 31 August 1993.

6.9 As a result of the latest decision by the Court of Appeal, the case has now been referred to a different criminal judge who by law will have jurisdiction over the case and who will hold an oral hearing and render judgement. It is expected that this hearing will not be held before the spring of 1995.

7 Investigations into the Cause of the Incident

7.1 The Court in La Coruña is carrying out an investigation into the cause of the incident in the context of criminal proceedings. The Spanish Government has made an administrative enquiry to establish the cause of the grounding.

7.2 The IOPC Fund has been following these investigations through its Spanish lawyer and such technical experts as may become necessary.

7.3 The Director informed the Committee, at its 39th session, that the IOPC Fund had the day before the session received a report on the investigation concerning the incident which had been carried out by a Commission set up by the Spanish administration. The Spanish delegation declared that the conclusions of the Commission were that a major part of the blame for the incident rested with the master of the AEGEAN SEA and that a contributing factor had been the rapidly deteriorating weather immediately before the incident. The Director stated that the IOPC Fund would examine this report, with the assistance of its lawyers and any technical experts as required, and that the position of the IOPC Fund in respect of the cause of the incident would be determined on the basis of this report and the results of any other relevant investigations.

7.4 The IOPC Fund has, in consultation with the shipowner and the UK Club, presented observations on the above-mentioned report. Subsequently, the Director General of the Merchant Marine has informed the Director that the report was final and that the IOPC Fund's observations could not be taken into account.

8 Action to be Taken by the Executive Committee

The Executive Committee is invited to:

- (a) take note of the information contained in the present document;
 - (b) give the Director such instructions as it may deem appropriate in respect of claims arising out of this incident, and
 - (c) give the Director such instructions as it may deem appropriate in respect of:
 - (i) limitation of payments to a certain percentage of the established damage (paragraph 3.1.5);
 - (ii) whether payments made by the Fisheries Council to fishermen and shellfish gatherers should be deducted from compensation payable under the Civil Liability Convention and the Fund Convention (paragraph 4.7); and
 - (ii) the court proceedings in La Coruña (paragraph 6).
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