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INCIDENTS INVOLVING THE IOPC FUND

AEGEAN SEA

Note by the Director

1 Introduction

1.1 On 3 December 1992, during heavy weather, the Greek OBO *Aegean Sea* (57 801 GRT) ran aground while approaching La Coruña harbour in north-west Spain. All 32 crew members were rescued by helicopter after the grounding. The ship, which was carrying approximately 80 000 tonnes of crude oil, broke in two and burnt fiercely for about 24 hours. The forward section sank some 50 metres from the coast. The stern section smouldered for several days but remained to a large extent 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. While 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 As regards the clean-up operations, reference is made to paragraphs 1.2-1.4 of document FUND/EXC.40/5.

1.3 The present document sets out the situation in respect of claims settlements. It also gives information on the legal proceedings in the Spanish courts.

2 Effects on fishery activities

2.1 The Fisheries Council of the Region of Galicia imposed a comprehensive fishing ban in the affected area, comprising near-shore waters and the shoreline. As conditions improved, these restrictions were removed, and fishing was back to normal in August 1993. The restrictions affected some 3 000 fishermen, including shellfish harvesters.

2.2 There is extensive raft cultivation of mussels in Ría de Betanzos. Even though physical contamination of the rafts by oil was slight, tainting of mussels occurred. There are also turbot and salmon farms and clam and mussel purification plants in the area. Some of the farms were affected by oil and the purification plants were closed for several months. All the plants have been reopened.

3 Claims handling

3.1 The Spanish authorities set up a public office in La Coruña to give information to potential claimants concerning the procedure for presenting claims and to distribute claim forms provided by the IOPC Fund. The IOPC Fund, the shipowner and the shipowner's P & I insurer (the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd, "UK Club") established a joint office in La Coruña to receive and handle claims for compensation. This Joint Claims Office has worked closely with the Spanish authorities and claimants in order to facilitate the handling of the claims

3.2 At 10.30am on Tuesday 20 June 1995, some 20 representatives of the fishermen's cofradías entered the Joint Claims Office. They were protesting against the alleged intention of the IOPC Fund to evade its responsibility to compensate those affected by the Aegean Sea oil spill. The protestors occupied an ante-room and one of the three office rooms of the Joint Claims Office and initially prevented the staff of the Joint Claims Office from leaving the office. Although refusing to leave the Joint Claims Office in spite of being requested to do so by the Joint Claims Office staff, the protestors behaved in a well mannered way. The Spanish Government was informed of the situation by the Director at an early stage, as were the local authorities. At 6pm, after attempts to persuade the protestors to leave the premises had failed, police were called by the Joint Claims Office Staff. After discussion with the police the protestors left the building peacefully at 8pm.

4 Claims for compensation

General situation

4.1 As at 15 September 1995, 1 270 claims had been received by the Joint Claims Office, totalling Pts 24 585 472 542 (£128 million). Compensation has been paid in respect of 793 claims for a total amount of Pts 1 414 million (£7.4 million). Out of this amount, the UK Club has paid Pts 782 million (£3.9 million) and the IOPC Fund Pts 632 million (£3.3 million).

4.2 Claims have also been submitted to the Court of first instance in La Coruña, totalling some Pts 20 765 million (£101 million). These claims correspond to a large extent to those presented to the Joint Claims Office. The IOPC Fund's lawyers and experts are examining the claim documents.

4.3 In view of the high total amount of the claims presented to the Court, the Executive Committee took the view, at its 36th session, that caution had to be exercised when making payments to claimants, in order to ensure that the provisions in Article 4.5 of the Fund Convention relating to equal treatment of victims were respected. The Committee instructed the Director that the Fund should make only partial payments in respect of accepted claims not exceeding 30%-40% of the amount approved (document FUND/EXC.36/10, paragraph 3.3.21). In the light of the uncertainty of the total amount of the claims, the Director decided to limit the payments to 25% of the established damage suffered by each claimant.

4.4 In the light of certain information provided by the Spanish authorities in October 1994, the Director informed the Executive Committee, at its 41st session, that in his view the uncertainty as to the total amount of the claims had been reduced. The Committee noted that, for this reason, the Director had decided to

increase partial payments to 40% of the damage suffered by the respective claimants as assessed by the IOPC Fund on the basis of the advice of its experts at the time when a partial payment or additional partial payment was to be made. The Committee endorsed the Director's decision (document FUND/EXC.41/2, paragraphs 4.1.4 and 4.1.5).

4.5 Dissatisfaction has been expressed in Spain, *inter alia* in the media and in connection with demonstrations in La Coruña, about the length of time it is taking to settle claims and pay compensation. In the Director's view, the delay in the settlement of claims and the payment of compensation in the *Aegean Sea* case is due to the fact that most major claimants have not presented the documentation or other evidence required for the assessment of the losses actually suffered, in spite of repeated requests made to the claimants through the Joint Claims Office and directly by the Director that such documentation be submitted. In accordance with the position taken by the Executive Committee and by the Assembly in its endorsement of the conclusions of the 7th Intersessional Working Group, the Director has informed the claimants that compensation can be paid only to a claimant who had substantiated his loss (documents FUND/A.17/35, paragraph 26.5 and FUND/A.17/23, paragraph 7.2.33).

4.6 In July 1995, a meeting was held in London between representatives of the Spanish Government and of the Government of the Region of Galicia (Xunta) and the Director to consider how progress could be made towards an out-of-court settlement of the most important groups of claims, viz those relating to fishing and aquaculture. These discussions are continuing.

Clean-up costs

4.7 The Spanish Government, the Government of the Region of Galicia and some local authorities incurred costs for clean-up operations and preventive measures. Some clean-up operations at sea and on shore were carried out by contractors engaged by the authorities.

4.8 So far, 99 claims relating to clean-up operations have been received, totalling some Pts 4 931 million (£25.7 million). Partial payments, totalling Pts 28 million (£143 400), have been made to 32 claimants. It is expected that partial payments totalling Pts 90 million (£461 500) will be made to two claimants in the near future. The remaining claims are being examined.

Property damage

4.9 A number of houses were contaminated by smoke generated by the burning oil and had to be cleaned. Yachts and other boats were also contaminated. Payments totalling Pts 47.5 million (£242 200) have been made in settlement of 699 claims for the cleaning of houses and boats.

Near-shore aquaculture

4.10 There is an important aquaculture industry in the area affected by the spill, concentrated in the Sada-Lorbé area, consisting of the cultivation of mussels, salmon, oysters and scallops. Mussel cultivation is the most important activity, representing more than 80% of the total harvest value.

4.11 A Resolution issued on 12 April 1993 by the Fisheries Council of the Region of Galicia 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 a total destruction of these products was justified. However, the experts accepted 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 that the destruction of a sufficient quantity of the largest commercially harvestable size mussels was justified, 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.

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

4.13 In April 1994 the Director accepted that, on the basis of the test results provided, it was not unreasonable to destroy the marketable size mussels and salmon that would have been harvested during 1993. As for the IOPC Fund's position of principle on claims for the destruction of farmed fish and shellfish, reference is made to the Report of the 7th Intersessional Working Group (document FUND/A.17/23, paragraphs 8.11.2-8.11.5).

4.14 Fifteen claims totalling Pts 4 723 million (£24.6 million) have been received for losses relating to clam, mussel and salmon farms. The information presented in support of these claims is very limited. On the basis of this information and after an examination of 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, partial payments have been made in respect of eight claims, totalling Pts 378 728 000 (£1.9 million). All claimants have been invited to submit further supporting documents so as to make a proper assessment of the claims possible.

4.15 Claims totalling Pts 139 282 181 (£721 700) have been received from three intertidal farms producing various species of clams and cockles. As regards one farm, which is located outside of the area affected by the oil pollution, there is no evidence that any loss was suffered. In respect of the other two farms which are located in the affected area, the evidence presented in support of the claims is limited. On the basis of the information available, the experts of the IOPC Fund and the UK Club have made a provisional assessment, and one claimant received a partial payment of Pts 760 000 (£3 940) in April 1995. Both claimants have been requested to submit further documentation.

Depuration plants

4.16 Claims have been received from eight depuration plants, totalling Pts 2067 million (£10.7 million). 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 in respect of all of these claims. As a result, these claimants have received partial payments totalling Pts 130 million (£664 626).

Onshore aquaculture

4.17 Three onshore fish farms in the affected area, two producing turbot and one producing turbot and salmon, have presented claims totalling Pts 2 041 million (£10.6 million) for alleged loss of stock caused by pollution. One of these claimants received a partial payment of Pts 32 million (£156 100) in March 1995. Another claimant will receive a partial payment of Pts 28.8 million (£150 000) in the near future. All claimants have been requested to submit further documentation.

Boat fishing and shellfish harvesting

4.18 Claims from some 3 680 fishermen and shellfish harvesters total Pts 10 276 million (£53.5 million). Some of these claims have been lodged by individuals and others by groups. Partial payments, totalling Pts 788.5 million (£4 million), were made during 1993, 1994 and 1995 to these claimants. Three claimants were paid in full for a total of Pts 3 068 668 (£16 000).

4.19 Several meetings were held in 1994 and 1995 with representatives of a number of fishermen and shellfish harvesters to discuss the handling of their claims. The Director has repeatedly invited the claimants to provide more information substantiating their losses, so as to enable the UK Club and the IOPC Fund to assess these claims properly and to make further partial payments. Some documentation was presented in the beginning of March 1995. This documentation has been examined by the IOPC Fund's experts but the documents presented do not contain any elements which enabled the experts to increase their previous assessment of the losses actually suffered.

4.20 An important element in the evaluation of these claims has been the official statistics compiled by Centro Informacion Pesquera e Marisquera (CIPEM) for the fisheries and shellfish harvesting sectors. The claimants have argued that the CIPEM statistics grossly under-estimate the actual income of fishermen and shellfish harvesters. The Fisheries Council of the Region of Galicia has agreed with suggestions to the effect that the official record keeping by CIPEM is substantially wrong. The IOPC Fund's experts accept that the CIPEM data may be incomplete. They take the view, however, that the CIPEM data must be considered a valid and indispensable part of the assessment, particularly for those claims which are poorly documented.

Cost of removing oil from the Aegean Sea

4.21 As mentioned in paragraph 1.1 above, the stern section of the *Aegean Sea* contained some 6 500 tonnes of crude oil and 1 700 tonnes of heavy fuel oil. The oil was removed from the wreck under the terms of Lloyds' Open Form 1990 (LOF 90) agreed between the shipowner and a salvage company (Smit Tak).

4.22 The shipowner made a payment to Smit Tak in respect of his obligation under LOF in the amount of Dutch Guilders 17.5 million (£7 million). This amount was agreed between the parties to the contract after lengthy negotiations. The IOPC Fund was not involved in these negotiations.

4.23 The shipowner has presented a claim for reimbursement of the amount agreed with Smit Tak. This claim gives rise to several issues of principle which have importance beyond the *Aegean Sea* case. For example, similar issues have to be considered in respect of a corresponding claim arising out of the *Braer* incident. Reference is made to a separate document which deals with these issues (document FUND/EXC.44/14).

5 Investigations into the cause of the incident

5.1 The Court in La Coruña is carrying out an investigation into the cause of the incident in the context of criminal proceedings. The IOPC Fund has been following this investigation through its Spanish lawyer.

5.2 A Commission set up by the Spanish administration investigated the cause of the incident. The Commission concluded 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 deteriorating weather conditions immediately before the incident. The IOPC Fund presented observations on the above-mentioned report, in consultation with the shipowner and the UK Club. Subsequently, the Spanish authorities informed the Director that the report was final and that the IOPC Fund's observations could not be taken into account.

5.3 The ship was under Greek flag and the master is a Greek national certified by the Greek authorities. The Greek Ministry of Merchant Marine ordered an investigation of the master's actions and the incident. Criminal proceedings were initiated in Greece against the master, but these proceedings were adjourned pending the result of the formal investigation. The investigation concluded that the master had not been at fault and that the incident was a result of force majeure and an act of God. The criminal proceedings have been terminated by the Greek authorities.

6 Court proceedings in La Coruña

6.1 Criminal proceedings have been initiated in the 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.

6.2 On 30 December 1992, the Court of first instance handling the criminal proceedings ordered the shipowner to deposit security for an amount of Pts 1 121 219 450 (£5.5 million). This amount corresponds to the estimated limit of liability applicable to the *Aegean Sea*, but the Court has not taken any decision about 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, the Court seized with the criminal proceedings rendered a decision containing the following elements.

- The master of the *Aegean Sea* and the pilot were ordered to provide guarantees within three days of the order, the master for Pts 8 000 million (£42 million) and the pilot for Pts 4 000 million (£21 million).
- The UK Club and the IOPC Fund were liable, jointly and severally with the master and the pilot, within their respective legal limits. The Club and the Fund were ordered to provide security for Pts 12 000 million (£63 million) within three days. *If this security was not provided, the Court would arrest their property in accordance with the applicable provisions of the Code of Criminal Procedure.*
- If the UK Club and IOPC Fund did not provide sufficient security, such security should be provided by the owner of the cargo (Repsol Petroleo SA), the owner of the *Aegean Sea* (Aegean Sea Traders Corporation) and the Spanish State.

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

6.5 At its 36th session, the Executive Committee expressed its concern that the Court's request for security from the IOPC Fund was at variance with the Fund Convention, which forms part of Spanish law. The Committee instructed the Director not to put up any security in the Court (document FUND/EXC.36/10, paragraph 3.3.20).

6.6 In its provisional pleadings on the merits of the claims for compensation, presented in September 1993, the IOPC Fund maintained that the pilot and the Military Commandant of the Port of La Coruña (Comandante Militar de Marina) were liable for the grounding. The Fund argued that the pilot was liable because he ordered the master to enter the port of La Coruña at 2.00 am, despite the heavy weather and being aware that the weather would deteriorate further. In addition, in the IOPC Fund's view, the pilot was liable because he did not meet the ship at the designated pilot boarding station, thus contravening the applicable Pilot Regulations. In the view of the Fund, the liability of the Military Commandant of the Port was based on his being 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.

6.7 The Court decided that the Military Commandant of the Port was not liable. It is possible that this question will be reopened, should the criminal proceedings reveal that the Military Commandant is indeed liable.

6.8 The Court of first instance had scheduled a hearing in the criminal proceedings for four weeks commencing 13 March 1995. In the criminal proceedings the Court would also consider the claims for compensation which had been presented. Since the master of the *Aegean Sea* did not appear at the hearing, the Court postponed the criminal proceedings to a later date. It is expected that the hearing will take place early in 1996.

6.9 A number of claimants who have presented claims to the Joint Claims Office have not submitted any claims in the criminal proceedings. Most of them have indicated that they will present their claims in civil proceedings at a later stage against the shipowner, his insurer and the IOPC Fund.

6.10 It should be noted that, when criminal proceedings have been brought against a given defendant, no action for compensation may be pursued in separate civil proceedings against the same defendant until the criminal proceedings have been brought to an end.

6.11 The claims for compensation presented in the criminal proceedings exceed the maximum amount of compensation available under the Civil Liability Convention and the Fund Convention. It is likely that claims for compensation will be pursued against the shipowner, his insurer and the IOPC Fund also in separate civil proceedings when the criminal proceedings have been terminated. If the total amount established by the courts were to exceed the maximum amount available, it would in the Director's view be difficult for the respective courts to ensure that the provisions in the Civil Liability Convention and the Fund Convention relating to equal treatment of claimants would be respected (Article V.4 of the Civil Liability Convention and Article 4.5 of the Fund Convention). At its 42nd session, the Executive Committee stated that it shared the Director's concern in this regard (document FUND/EXC.42/11, paragraph 3.3.15).

6.12 Under Article III.4 of the Civil Liability Convention, no claim for pollution damage may be made under the Convention or otherwise against the servants or agents of the shipowner. The master does clearly fall within the concept of "servants of the owner". Nevertheless, claims for compensation have been brought against the master of the *Aegean Sea* in the criminal proceedings.

7 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 the on-going court proceedings (paragraph 6).
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