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OIL POLLUTION  
COMPENSATION  
FUND

EXECUTIVE COMMITTEE  
46th session  
Agenda item 3

FUND/EXC.46/4  
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## INFORMATION ON OTHER INCIDENTS

### AEGEAN SEA

Note by the Director

#### **1 Introduction**

Since the 45th session of the Executive Committee, certain developments have taken place in respect of the *Aegean Sea* incident.

#### **2 Court hearing**

2.1 The Penal Court in La Coruña had scheduled a hearing in the criminal proceedings against the master of the *Aegean Sea* and the pilot 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.

2.2 The Court has fixed the hearing to start on 9 January 1996.

#### **3 Request for the IOPC Fund to pay 60 million SDR into Court**

3.1 On 30 November 1995, a lawyer representing a large number of claimants filed a request that the Penal Court should order the IOPC Fund to constitute a fund with the Court of 60 million Special Drawing Rights (SDR). The Joint Claims Office learned about this request on 5 December 1995.

3.2 In his petition to the Court, the lawyer has stated that such payment would be in conformity with the IOPC Fund's obligation under the Civil Liability Convention and the Fund Convention to constitute a fund. In support of this request, the lawyer has referred to the fact that the total amount of the claims pursued in the Penal Court exceeds the amount available under the Civil Liability Convention and the Fund Convention. The lawyer has drawn attention to the fact that his clients have reserved in the criminal action

their civil rights to be pursued later before a civil Court. He has also mentioned that there are other potential claims. He has maintained that for this reason the total amount payable under the Conventions should be paid into the Court so that it would be available for distribution by the Court.

3.3 In the Director's view, there is no basis in the Fund Convention for this request. Under the Civil Liability Convention, as a condition for his being entitled to limit his liability, the shipowner is obliged to set up a limitation fund. The Fund Convention does not contain any corresponding provision. For this reason, the maximum amount of 60 million SDR in the Fund Convention applies without any establishment of a "fund" with the Court. There is no provision in the Fund Convention which obliges the IOPC Fund to make deposits or payments into court. For these reasons, the Director takes the view that IOPC Fund should oppose the request made by this lawyer as having no basis in the Fund Convention, which forms part of Spanish law.

3.4 It should be noted that the amount of 60 million SDR is the total sum available under both Conventions. The mentioned amount payable by IOPC Fund is 60 million SDR minus what is actually paid by the shipowner or his insurer under the Civil Liability Convention. The IOPC Fund has already made payments to claimants in this case for a total of Pts765 352 151 (£4.0 million), and the UK Club has paid Pts782 209 889 (£4.1 million).

3.5 The IOPC Fund's Spanish lawyer has advised the Director that, under Spanish law, a defendant cannot be ordered to make payments into the court in criminal proceedings but only to put up security for payments which could be ordered by the court.

3.6 The Fund's Spanish lawyer has also advised the Director that the Penal Court cannot make a distribution of any amount available to parties who have not presented claims for compensation in the criminal proceedings.

3.7 It will be recalled that in August 1993 the Court in La Coruña ordered the UK Club and the IOPC Fund to provide security within seven days for Pts 12 000 million (£58 million). 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.

3.8 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).

#### 4 Time-bar

4.1 The question of time-bar is governed by Article VIII of the Civil Liability Convention as regards the shipowner and his insurer and by Article 6.1 of the Fund Convention as regards the IOPC Fund. Article 7.6 of the Fund Convention is also of interest in this regard. These Articles read:

##### *Civil Liability Convention*

##### *Article VIII*

"Rights of compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage. Where this incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence."

*Fund Convention*

*Article 6.1*

"Rights to compensation under Article 4 or indemnification under Article 5 shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 7, paragraph 6, within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage."

*Article 7.6*

"Without prejudice to the provisions of paragraph 4, where an action under the Liability Convention for compensation for pollution damage has been brought against an owner or his guarantor before a competent Court in a Contracting State, each party to the proceedings shall be entitled under the national law of that State to notify the Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the Court seized and in such time and in such a manner that the Fund has in fact been in a position effectively to intervene as a party to the proceedings, any judgement rendered by the Court in such proceedings shall, after it has become final and enforceable in the State where the judgement was given, become binding upon the Fund in the sense that the facts and findings in that judgement may not be disputed by the Fund even if the Fund has not actually intervened in the proceedings."

4.2 It is recalled that the Executive Committee had at its 44th session considered, on the basis of a document presented by the United Kingdom delegation (document FUND/EXC.44/16), certain questions concerning the need for claimants to take legal action to prevent their claims from being time-barred.

4.3 A number of delegations stated that the United Kingdom delegation had raised some very interesting legal questions. However, most of these delegations expressed the view that it would not be for the IOPC Fund to interpret the provisions in the Conventions relating to time-bar, since the Fund should not act as a legal adviser to claimants. The point was also made that the provisions of the Conventions concerning the time-bar were very clear and imposed very strict rules which claimants had to observe. It was also mentioned that, since the legal situation in respect of time-bar varied from one jurisdiction to another, it would be very dangerous for the IOPC Fund to give any advice to claimants. A number of delegations pointed out that claimants should not take any risks in this regard, but should take legal action to protect their rights whenever they thought it appropriate.

4.4 The Executive Committee took the view that the IOPC Fund should not give any interpretation of the relevant provisions in the Conventions relating to time-bar and should not give legal advice to claimants. The Committee also endorsed the view that the strict provisions in the Conventions should be applied in every case (document FUND/EXC.44/17 paragraph 3.15.4).

4.5 The matter was also dealt with by the Assembly at its 18th session ( paragraphs 29.1 and 29.2 of document FUND/A.18/26). The United Kingdom delegation referred to the document which it had submitted to the 44th session of the Executive Committee (document FUND/EXC.44.16). In view of the importance of this issue for claimants, the United Kingdom delegation invited the Assembly to clarify the legal situation of those claimants with whom the IOPC Fund had agreed a full settlement on the admissible quantum of their claims, but where no payment or only a partial payment had been made. The Assembly took the view that, if such claimants did not take legal action, the IOPC Fund would not consider their claims to be time-barred.

4.6 The *Aegean Sea* incident took place on 3 December 1992. The three year time-period will therefore in respect of most claimants expire on or shortly after 3 December 1995.

4.7 A number of claimants have exercised their rights to claim compensation from the shipowner and the insurer in the criminal proceedings, as permitted under Spanish procedural law. These actions have been notified to the IOPC Fund. Actions for compensation have also been taken by these claimants,

through the public prosecutor and in some cases directly, against the IOPC Fund in these proceedings. In the Director's view, therefore, these claimants are not time-barred vis-à-vis IOPC Fund.

4.8 A number of claimants in the fishery and aquaculture sectors (represented by the same lawyer) have filed criminal accusations against four individuals, inter alia, the master (but not against the shipowner and the insurer) in the criminal proceedings. In these proceedings they have not submitted claims for compensation, but only reserved their rights 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. In their request to the Court, the claimants reserved expressly the right to exercise civil actions resulting from the criminal offence without naming any particular defendants. The effect of such a reservation would under Spanish law be a preservation of rights against those later condemned criminally and the persons financially liable for their acts, inter alia the shipowner. In view of the IOPC Fund's obligations to pay compensation under the Fund Convention, the Court has considered, on the basis of the petitions of the public prosecutor and some of the parties, that the IOPC Fund may be held directly liable in the same way as the UK Club. The IOPC Fund which has become party to the criminal proceedings at the request of the public prosecutor and a number of claimants, has become aware of the position of these claimants. The question is whether these claimants have prevented their claims for compensation from being time-barred vis-à-vis the IOPC Fund. It could be maintained that these claimants have neither brought legal action against the IOPC Fund within the prescribed time period, nor notified the IOPC Fund of an action for compensation against the shipowner or the UK Club. A strict interpretation of Article 6.1 of the Fund Convention would in the Director's view mean that the claims are time-barred. However, in view of the relationship in Spanish law between criminal and civil proceedings, it might be argued that the reservation of rights to exercise civil action referred to above should be considered as a notification of the IOPC Fund, thereby having prevented these claims from becoming time-barred. It should be noted that provisional payments have been made by the IOPC Fund and the UK Club to some of these claimants, although no agreement has been reached on the admissible quantum of these claims.

4.9 A third group of claimants have only presented their claims to the Joint Claims Office in La Coruña, but not to the Court. A number of claimants within this group are individuals in the fisheries sector who are not represented by lawyers. Some of these claimants have received provisional payments whereas others have not. The lawyer referred to in paragraph 4.8 has recently submitted a notification of further claims to the Joint Claims Office, without supporting documentation. It appears that the claimants referred to in this paragraph have not taken the steps required under the Fund Convention to prevent their claims from being time-barred.

4.10 A fourth group of claimants are those with whom agreements have been reached as to the admissible quantum of their claims. Many of them have been paid in full by the shipowner/UK Club, and for these claimants the question of time-bar would obviously not arise. Some claimants belonging to this group have received provisional payments for amounts corresponding to 40% of the established claims. On the basis of the position taken by the Assembly at its 18th session, the Director takes the view that these claimants are not time-barred and that they retain the right to further payments on the basis of the respective settlement agreement (paragraph 4.5 above).

## **5 Level of provisional payments**

5.1 The Spanish Government has requested an increase of the level of provisional payments to claimants.

5.2 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.

5.3 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).

5.4 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 only be paid to a claimant who had substantiated his loss (documents FUND/A/17/35, paragraph 26.5 and FUND/A.17/23).

5.5 It is recalled that a meeting was held in London in July 1995 between representatives of the Spanish Government and of the Government of the Region of Galicia and the IOPC Fund to consider how progress should be made towards an out-of-court settlement of the most important group of claims, ie those relating to fishery and aquaculture. At that meeting agreement was reached that in order to make progress towards a settlement of all claims belonging to this group it was necessary for the claimants to submit evidence to justify their claims. It was also agreed that a meeting should be held between experts on both sides to examine what evidence was available and the extent to which the evidence would support the amounts claimed. A meeting of experts had been scheduled for 14 September 1995 in La Coruña and that the meeting was cancelled at the request of the Government of the Region of Galicia.

5.6 At the meeting in London, the representatives of the Spanish Government had suggested as a first step that all the claims should be reduced to a figure which fell within the maximum amount of compensation available under the Fund Convention, ie 60 million SDR, so as to make further partial payments possible. At the Executive Committee's 44th session, the Spanish delegation stated that the Spanish Government and the Government of the Region of Galicia were prepared to withdraw their claims to the benefit of other Spanish claimants. The delegation expressed its agreement with the Director that the outstanding issues should be examined by the experts of the parties involved and the representatives of the claimants themselves.

5.7 The meeting of experts referred to in paragraph 5.5 was held in La Coruña on 2 November 1995. Some further evidence was provided, but this evidence did not allow the experts of the IOPC Fund and the UK Club to revise their previous assessments.

5.8 Recently, a lawyer representing a number of claimants in the aquaculture sector informed the Director of a number of additional claims totalling some Pts 17 000 million (£88 million), but no supporting documentation was presented. This increases the total amount of all claims presented to the Joint Claims Office to approximately Pts42 000 million (£217 million).

5.9 In its request, the Spanish Government has maintained that the IOPC Fund should take a flexible approach to the interpretation and application of Article 4.5 of the Fund Convention so that further provisional payments could be made before the end of 1995. The Spanish Government has expressed its continued support for the position taken by the Executive Committee as regards the necessity for the claimants to provide evidence to substantiate their losses. However, the Government has maintained that the evidence presented showed that damage suffered by the members of the fishery unions (Cofradías) greatly exceeded the provisional payments received so far. For this reason, the Spanish Government has requested that the Executive Committee should increase the maximum level of provisional payments in the *Aegean Sea* case from 40 to 50% of the amounts accepted by the IOPC Fund, without prejudice to a new assessment of the damage at a later stage in the light of available documentation.

5.10 The Director considers that there is still a high degree of uncertainty as to the total amount of the established claims. So far no commitment has been made to reduce the claims, except by the Spanish Government and the Government of the Region of Galicia. In this situation the Director does not consider that it would be appropriate to increase the provisional payments over 40% of the damage suffered by the respective claimants as assessed by the IOPC Fund's experts when a partial payment or additional partial payment was made.

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

The Executive Committee is invited to;

- (a) take note of the information contained in this document;
  - (b) give the Director such instructions as it may deem appropriate concerning the requests for the Fund to make payment into the Court (paragraph 3);
  - (c) give the Director such instructions as it may deem appropriate on the Fund's position concerning the issue of time-bar in respect of the various groups of claimants (paragraph 4); and
  - (d) consider the request by the Spanish Government that the level of provisional payments should be increased from 40% to 50% of the damage suffered by the respective claimants as assessed by the IOPC Fund's experts (paragraph 5).
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