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INCIDENTS INVOLVING THE IOPC FUND

AEGEAN SEA

Note by the Director

1 Introduction

This document reports the developments which have taken place in respect of the *Aegean Sea* incident (Spain, 3 December 1992) since the 48th session of the Executive Committee.

2 Claims situation

2.1 As at 15 June 1996, 1 277 claims had been received by the Joint Claims Office, totalling Pts 24 809 million (£125 million). Compensation had been paid in respect of 815 claims for a total amount of Pts 1 598 million (£8.1 million). Out of this amount, the shipowner's P & I insurer, (the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd (UK Club)) had paid Pts 782 million (£4.2 million) and the IOPC Fund Pts 816 million (£4.1 million). It should be noted that many of the claims presented to the Joint Claims Office which have not been settled have, in the IOPC Fund's view, become time-barred, as reported in document FUND/EXC.47/3.

2.2 Claims have also been submitted to the Criminal Court in La Coruña, totalling some Pts 24 730 million (£125 million). These claims correspond to a great extent to those presented to the Joint Claims Office.

2.3 Many claimants who have presented claims to the Joint Claims Office have not submitted any claims in the criminal proceedings. Some of these claimants have, together with others who have not submitted claims to the Joint Claims Office, indicated that they will present their claims at a later stage in civil proceedings against the shipowner, his insurer and the IOPC Fund. These claims total Pts 26 855 million (£136 million). 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 concluded.

3 Court proceedings in La Coruña

3.1 Criminal Proceedings

Criminal proceedings were initiated in the Court 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.

3.2 Deposit of security by the UK Club

On 30 December 1992, the instructing judge handling the criminal proceedings ordered the shipowner to deposit security for an amount of Pts 1 121 219 450 (£5.7 million). This amount corresponds to the estimated limit of liability applicable to the *Aegean Sea*. 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.

3.3 Court's decision in August 1993

3.3.1 On 31 August 1993, the instructing judge 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 (£40 million) and the pilot for Pts 4 000 million (£20 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 (£60 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.

3.3.2 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.

3.3.3 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).

3.4 Hearing in March 1995

The Criminal Court had scheduled a hearing in the criminal proceedings to commence on 13 March 1995. The master of the *Aegean Sea* did not appear at the hearing. The public prosecutor had requested that the master and the pilot be given only a fine, whereas other accusing parties had requested that the master and the pilot should be given a prison sentence in excess of two years. In accordance with Spanish law no one can be tried in his absence in a criminal court when at least one

accusing party has requested a prison sentence of more than two years. In view of this situation, the Court did not consider it possible to continue the hearing in the master's absence and decided to postpone the hearing.

3.5 Hearing in January/February 1996

3.5.1 The postponed hearing took place from 9 January to 1 February 1996. At this hearing the Court considered not only the criminal aspects but also the claims for compensation which had been presented in the criminal proceedings against the shipowner, the master, the UK Club, the IOPC Fund, the owner of the cargo on board the *Aegean Sea* and the pilot.

3.5.2 Detailed information on the hearing was given in document FUND/EXC.47/3.

4 Judgement of the criminal court

4.1 The Criminal Court rendered its judgement on 30 April 1996. The judgement, which is 82 pages long, gives a brief summary of the requests made by the public prosecutor and all other accusing parties. It analyses the technical and nautical aspects of the incident as well as the actions of the master and the pilot, and determines the criminal liability of the master and the pilot. The judgement finally deals with all claims for compensation presented by the accusing parties, except the claims of those parties who had reserved their right to pursue their claims in civil proceedings at a later stage and five other claims which were not referred to in the judgement and in respect of which no evidence had been submitted.

4.2 Criminal liability of the master and the pilot

4.2.1 The Court found that the master had acted in an imprudent manner, without the diligence required of the captain of a vessel such as the *Aegean Sea*, as he did not carry out the manoeuvre cautiously enough in view of the place and time in which the events took place. It was noted that it was the first time that the master had entered the port of La Coruña, and that he had not requested any information on the topography of the port or on how to approach the port. It was also noted that the entry had taken place at night and in bad weather. The Court considered that the manoeuvre chosen by the master had not been the most appropriate in the prevailing conditions as he had carried out the manoeuvre quickly, in a place where there was insufficient space to allow him to take evasive actions. It also stated that the master had taken insufficient precautions and that he had relied on the manoeuvrability of the vessel without having verified carefully the possible consequences of his actions, bearing in mind the dangerous cargo the ship was carrying and the adverse weather conditions. The master was held liable for criminal negligence and sentenced to pay a fine of Pts 300 000 (£1 500) or one day's imprisonment for each Pts 5 000 (£25) not paid.

4.2.2 The pilot was also found to have acted in an imprudent manner. It was noted that, in accordance with the Regulations issued by the Port authority of La Coruña, the pilot should not have allowed the *Aegean Sea* to enter the port of La Coruña by night unless the weather was good. Good weather conditions in the Regulations meant those conditions which allowed the pilot to board the vessel in the designated area. It was also noted that the pilot knew that he was not able to board the *Aegean Sea* in the designated area, as shortly beforehand, due to bad weather, he had disembarked another vessel under his pilotage. It was further noted that the pilot had not waited for the *Aegean Sea* in the pilotage area. It was finally noted that, although the draught of the vessel did not have any relevance to the incident, in breach of the Regulations he had allowed the *Aegean Sea* to enter the port at low tide. The Court held that also the pilot was liable of criminal negligence as he was under the obligation to provide pilotage services from the exterior limits of the port but did not do so. The pilot was sentenced to pay a fine of Pts 300 000 (£1 500) or one day's imprisonment for each Pts 5 000 (£25) not paid.

4.3 Persons liable

4.3.1 The Court held that the master of the *Aegean Sea* and the pilot were directly liable for the incident. It was also held that the UK Club and the IOPC Fund were directly liable, together with the master and the pilot, for the damage caused by the incident and that this liability was joint and several. In addition, the Court held that the owner of the *Aegean Sea* and the Spanish State were subsidiarily liable.

4.3.2 The fact that the master and the pilot were found criminally liable on an equal level should, in the view of the IOPC Fund's Spanish lawyer, mean that the master/UK Club/IOPC Fund would ultimately pay 50% of the compensation and the pilot/the Spanish State would pay the other 50%. It should be noted that the Spanish State is liable for the acts of the pilot.

4.3.3 In the IOPC Fund's view it is incorrect to make the master liable because under the Civil Liability Convention (Article III.4), which forms part of Spanish law, no claim for compensation may be made against the servants or agents of the shipowner, and the master clearly falls within this category. This is, however, a matter that does not directly concern the IOPC Fund.

4.3.4 In the Director's view it is also incorrect in law to hold the IOPC Fund jointly and severally liable with the master and the UK Club. He takes the view that joint and several liability can be imposed only when the legal basis for the liability is the same for all the defendants in question. In the present case the basis of liability of the master and the UK Club is not the same as that of the IOPC Fund. The IOPC Fund has appealed on this point.

4.4 Court's decision in respect of claims for compensation

4.4.1 It should be noted that under Spanish procedural law, the court may, in respect of a claim for compensation, determine the criteria to be applied for the assessment of the quantum of the damage suffered, leaving the determination of the amount of compensation to the execution of the judgement, after the claimant has been given the possibility of providing evidence of his loss within the parameters laid down in the judgement. The execution of the judgement is dealt with by the same judge who rendered the first instance judgement. In the *Aegean Sea* case, the Court decided that many claims should be quantified during the procedure for the execution of the judgement.

4.4.2 The table set out overleaf shows that the Court in many cases considered the evidence presented by the claimant insufficient to substantiate the amount of the losses suffered. The Court thus took the same view as the IOPC Fund in this respect. The Court did not accept the conclusions of the study carried out by the University of Santiago de Compostela as regards the quantification of the losses allegedly suffered by fishermen, shellfish harvesters and mussel farmers, and also on this point the Court took the same position as the IOPC Fund. The IOPC Fund has from the outset maintained that each claimant, or each group of claimants, had to submit appropriate documentation to substantiate the losses. As regards the claims in the fishery sector, the Court shared with the IOPC Fund's view as regards the necessity for the claimants to submit supporting documentation.

4.4.3 The Court rejected an item of the claim presented by the City of La Coruña for Pts 46 million (£2.1 million) for costs of cleaning certain beaches, because the City had not carried out any such operations. Another item in that claim, for Pts 4.2 million (£210 000) which related to road repairs, was also rejected, since these repairs were not related to the incident. The City of Oleiros had presented a claim for Pts 1 303 million (£6.6 million) in respect of loss of natural resources. The Court rejected that part of the claim which had been opposed by the IOPC Fund. A claim by a mussel farm (Mexilor) included an item for interest (Pts 80 million or £400 000) and another item for a publicity campaign (Pts 25 million or £126 000). These items were rejected by the Court, as regards the publicity campaign because the campaign was not carried out.

4.4.4 In the judgement the claimants represented in Court were awarded compensation as set out in the table below. <1>

Claimant	Claimed Amount		Awarded Amount	
	Pts	£	Pts	£
Spanish Government	1 154 500 000	5 800 000	Execution of judgement	
Xunta de Galicia	246 212 672	1 250 000	245 336 962	1 240 000
City of La Coruña	690 000 000	3 480 000	24 281 515	120 000
City of Culleredo	50 000 000	250 000	3 000 000	15 000
City of Oleiros	1 303 158 734	6 600 000	30 644 784	155 000
Alponpor (clam park)	81 037 735	410 000	20 000 000	101 000
Daniel Fernández Rios and others (fishermen)	95 400 000	482 000	Execution of judgement	
Vicente Suarez Fernandez and others (fish sellers and transporters)	58 347 694	295 000	Execution of judgement	
Enrique Martínez Garcia, Unimar, Demarcosa and Carcabeiro Mar (mussel farm, depuration plant and marketing company)	579 565 938	2 900 000	Execution of judgement	
Mexilor (mussel farm)	416 842 506	2 100 000	307 027 638	1 600 000
Cofradía de Mera and others (association of fishermen and shellfish harvesters)	9 713 398 652	49 000 000	Execution of judgement	
José Abeledo Freire and others (shellfish harvesters)	420 000 000	2 120 000	Execution of judgement	
Cofradía de El Ferrol (association of fishermen and shellfish harvesters)	2 492 422 000	12 600 000	Execution of judgement	
Mariscadores de la Ría de El Burgo (shellfish harvesters)	1 418 209 000	7 200 000	Execution of judgement	
Ramón Rañales Cotos and others (fishermen)	79 085 600	400 000	Execution of judgement	
Teresa Carnero Romero and others (shellfish harvesters)	99 057 200	500 000	Execution of judgement	
Repsol Petroleo (owner of the cargo on board the <i>Aegean Sea</i>)	1 534 986 180	7 800 000	25 000 000	126 000
Repsol Petroleo (recovery of oil)	249 042 393	1 300 000	Court did not take any position	
Repsol Petroleo (clean-up operations)	184 216 423	930 000	184 216 423	930 000

<1> In this document, the conversions (in rounded figures) have been made on the basis of the rate of exchange on 14 June 1996, £1 = Pts 198.

5 IOPC Fund's appeal against the judgement

5.1 IOPC Fund's policy in respect of appeals

5.1.1 As regards the policy to be followed by the IOPC Fund in court proceedings in respect of appeals, in the Director's view the IOPC Fund should appeal on matters of principle where a judgement is at variance with the criteria for the admissibility of claims laid down by the IOPC Fund Assembly or Executive Committee. The Fund should, in his view, also appeal where the quantum of the compensation determined by a court differs substantially from the amount assessed by the IOPC Fund's experts and the amounts involved are considerable. He does not consider that it would be appropriate for the IOPC Fund to appeal in cases where a court has taken a view in respect of evidence which is different from the view which the IOPC Fund would have taken but where the court's decision is not unreasonable. In his opinion, the same should apply if the amount determined by a court in respect of a particular claim differs from the amount assessed by the IOPC Fund, but where the court's assessment is nevertheless reasonable, in the Fund's view. The Director considers that it would not be appropriate for the IOPC Fund to appeal in respect of small claims where no matters of principle are involved.

5.1.2 If time allows, the Director would submit to the Committee for consideration whether and to what extent the IOPC Fund should appeal against a particular court decision or judgement. However, in many cases this is not possible due to the short time periods for lodging appeals. In the *Aegean Sea* case, the judgement was rendered on 30 April 1996 and appeals had to be lodged within 20 days of the IOPC Fund having been notified of the judgement (10 May 1996). In all cases the Director would report to the Executive Committee at its next session on any appeal lodged on behalf of the IOPC Fund, and the Committee would be free to decide that the IOPC Fund's appeal, or part thereof, should be withdrawn.

5.2 General basis of the IOPC Fund's appeal

5.2.1 In its appeal in the *Aegean Sea* case, the IOPC Fund has stated that it can be obliged to pay compensation only for damage which falls within the definitions of "pollution damage" and "preventive measures" as laid down in Articles I.6 and I.7 of the Civil Liability Convention which form part of Spanish law. The IOPC Fund has maintained that the decisions taken by the competent bodies of the Fund as regards the criteria for the admissibility of claims for compensation should be taken into account. Attention has been drawn to the preamble of the Civil Liability Convention which states that the Parties to the Convention were "desiring to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases." Reference has been made in the appeal to the Report of the 7th Intersessional Working Group and to the Assembly's endorsement of this Report. The IOPC Fund has stated in the appeal that the Court has admitted a number of claims which cannot be considered as "damage caused by contamination" or as "preventive measures". The IOPC Fund has added that parties other than the Fund may be liable for these claims.

5.2.2 The IOPC Fund has also appealed against the judgement on points where, in the Fund's view, the claim is admissible in principle but where the claimant has not substantiated his loss or the Court's assessment of the damage is incorrect.

5.3 Spanish Government

5.3.1 The Spanish Government had presented a claim for Pts 1 154 500 000 (£5 800 000). The Court held that the quantum of the losses claimed had not been proved and for that reason referred the quantification to the execution of the judgement.

5.3.2 The greater part of this claim, Pts 740 million (£3.7 million), related to the cost of replacing some 286 000m³ of sand on certain recreational beaches. During the court hearing the IOPC Fund pointed out that a programme for replacement of sand on these beaches had been established by the Government before the *Aegean Sea* incident had occurred and that the replacement had started prior to the incident. The IOPC Fund drew attention to the fact that erosion caused significant quantities of sand to disappear from these beaches every year, and mentioned that only some 1 230m³ of oily sand had been removed from these beaches after the *Aegean Sea* incident. For these reasons, the IOPC Fund took the view that

the part of this claim concerning the replacement of sand was not admissible, except as regards the replacement of 1 230m³ of sand.

5.3.3 The Spanish Government had also claimed compensation for Pts 100 million (£500 000) for certain investigations into the long-term effects of the pollution. In the Director's view, studies of this kind are admissible only if they relate to clean-up operations or preventive measures.

5.3.4 The IOPC Fund has appealed against the two above-mentioned items of the Spanish Government's claim.

5.4 Government of the Region of Galicia (the Xunta)

5.4.1 The Xunta had claimed compensation for a total amount of Pts 246 212 672 (£1.25 million) and was awarded Pts 245 336 962 (£1.24 million).

5.4.2 One of the items claimed by the Xunta of Galicia related to the cost of certain measures to monitor the quality of the air following the incident. This claim was accepted by the Court. In the Director's view, these costs do not relate to damage caused by contamination, nor to preventive measures. The IOPC Fund has, therefore, appealed against the judgement on this point.

5.4.3 The Xunta's claim also included costs of Pts 42 million (£212 000) for work carried out by 70 biologists during a period of 30 days immediately after the incident. No evidence was presented as to what these biologists did to prevent or minimise pollution damage. In the Director's view, on the basis of the evidence available, these costs are not admissible. The IOPC Fund has therefore appealed on this point.

5.4.4 The claim submitted by the Xunta included an item for (Pts 1 252 725 (£6 300)), relating to the cost of materials used or damaged during certain helicopter operations for the purpose of rescuing the crew of the *Aegean Sea*. The Director takes the view that these operations do not fall within the definitions of "pollution damage" or "preventive measures", and the IOPC Fund has appealed therefore in respect of this item.

5.4.5 There are also a number of items included in the Xunta's claim which in principle have been accepted by the Court but where no evidence has been given as to the purpose of the operations or their results. The total amount claimed is Pts 8 336 274 (£42 100) and relates to charges for boats, a tug, vehicles and technical services. The IOPC Fund has included in the appeal a statement to the effect that it is not possible to determine whether the items in question are admissible without further evidence, and has requested that these items should be considered in the context of the execution of the judgement on the basis of evidence to be presented.

5.4.6 The Xunta had claimed compensation for Pts 57.3 million (£289 000) for scientific studies of the contamination in mussels and barnacles. The Court accepted this item. In the IOPC Fund's view this claim is not admissible in its entirety, since a large part of the scientific studies did not relate to clean-up operations or preventive measures. For this reason, the IOPC Fund has requested that these items should be considered in the execution of the judgement, to allow the claimant to present evidence to show which parts of the operations related to clean-up operations or preventive measures.

5.4.7 The Xunta had claimed compensation for Pts 30 million (£152 000) relating to the cost of a campaign for the promotion of Galician fish products. The Executive Committee had rejected this claim at its 42nd session, since the promotional activities were considered of too general a nature (document FUND/EXC.42/11, paragraph 3.3.12). This item was in principle admitted by the Court. The Director has appealed in respect of this item.

5.5 City of La Coruña

The City of La Coruña had claimed compensation of Pts 690 million (£3.48 million). The Court awarded the sum of Pts 24.3 million (£123 000). The IOPC Fund has appealed on two points. Firstly,

the Court recognised as admissible certain costs for restoration of damage allegedly caused to an area around Punta Hermina. The Court accepted that the claimed restoration work had not been carried out but nevertheless awarded compensation in the claimed amount of Pts 12.9 million (£65 000). As four years have elapsed since the incident, it is clear, in the IOPC Fund's view, that the restoration work will not be undertaken. This area also falls within a zone which has been totally redeveloped, for reasons other than the *Aegean Sea* incident. Secondly, the claim submitted by the City of La Coruña includes certain costs incurred by the police, the fire brigade and other public services totalling Pts 11.5 million (£58 000). In the IOPC Fund's view, these items do not relate to pollution damage or preventive measures. The Fund has therefore requested that both items should be rejected

5.6 City of Culleredo

The City of Culleredo claimed compensation of Pts 50 million (£250 000). The judgement awarded the claimant Pts 3 million (£15 000). The Court accepted, *inter alia*, an item for the cost of cleaning beaches within the Ría de El Burgo. In the IOPC Fund's view, it is well established that the contamination caused by the *Aegean Sea* did not reach this area, and that for this reason the claim should be rejected. An appeal has been lodged to this effect.

5.7 City of Oleiros

The City of Oleiros claimed the sum of Pts 1 303 million (£6.6 million). The judgement awarded Pts 30.6 million (£155 000). The claim by the City included the cost of a 90-day programme for an environmental assessment for Pts 25.3 million (£128 million). No evidence was presented to show that this work fell within the definitions of "pollution damage" or "preventive measures". The fact that the activities in question were actually carried out is not, in the Director's view, sufficient to make the cost thereof admissible under the Conventions. The IOPC Fund has appealed in respect of this item, requesting either rejection or referral to the execution of the judgement.

5.8 Cofradía de Cedeira and others, Jose Abeledo Freire and others, Cofradía de el Ferrol, Teresa Carnero Romero and others (fishermen and shellfish harvesters)

5.8.1 The above-named claimants had submitted claims to the court as follows:

- Cofradía de Mera and others	Pts 9 713 million (£49 million)
- Jose Abeledo Freire and others	Pts 420 million (£2.12 million)
- Cofradía de el Ferrol	Pts 2 492 million (£12.6 million)
- Teresa Carnero Romero and others	Pts 99 million (£500 000)

5.8.2 The only evidence submitted to support these claims was a study prepared by the University of Santiago de Compostela. This study considered the global losses for the affected zone and covered not only the periods in which fishing was banned but also the time after these bans had been lifted. No account was taken of compensation already received or of aid payments made by the Commission of the European Union. Details of this study, as well as the views of the IOPC Fund's experts thereon, were given in document FUND/EXC.48/3, paragraphs 3.5.21-3.5.29.

5.8.3 The Court did not accept the conclusions of this study and held that each claimant had to prove that he had suffered an economic loss. It stated that in the case of fishing boat owners the loss should be proved by tax reports and/or catch records. For shellfish harvesters, the Court held that compensation should be determined on the basis of exploitation plans approved by the Fisheries Council of the Xunta prior to the incident, while members of fishing boat crews were to be compensated according to recognised minimum salary levels.

5.8.4 The Court also held that compensation was payable only for the period during which fishing and shellfish harvesting was prohibited due to the fishing bans imposed by the Xunta of Galicia, and that aid payments received from the Commission should be deducted. These claims were referred for quantification to the execution of the judgement.

5.8.5 In this respect, the Court stated that compensation was to be calculated on the following basis:

Fishing boat crew members	number of fishing days lost x minimum salary of Pts 3 342/day.
Fishing boat owners	income lost in the periods during which fishing was prevented, based on income obtained in the periods December 1990 to January 1991, and December 1991 to January 1992, as shown by tax returns and/or catch records.
Shellfish harvesters	number of allowed harvesting days which had been lost during the fishing bans x the maximum daily catch quota.

5.8.6 In setting out these requirements, the Court accepted to a large extent the position of principle taken by the IOPC Fund in respect of the requirement of evidence relating to the claims submitted by the fishermen and shellfish harvesters. Nevertheless, the IOPC Fund has appealed against the method adopted by the Court for calculating the shellfish harvesters' losses, namely using the maximum allowable harvest days and quantities. The IOPC Fund has pointed out that it was unlikely that these maximum days and quantities could ever be realised and that the approved exploitation plans anticipated far lower total catches.

5.9 Alponpor (clam park)

The company operating a clam cultivation park had claimed Pts 81 037 735 (£410 000) and was awarded Pts 20 million (£101 000) in the judgement. The amount awarded was determined by the Court using its discretionary powers, at an amount equal to the company's share capital. The IOPC Fund has appealed in respect of this claim with the request that compensation should be based on the value of the stock that could have been marketed during the period in which harvesting was prohibited.

5.10 Shellfish harvesters in La Ría de el Burgo

The claim submitted to the Court was for loss of income from shellfish harvesting in the amount of Pts 1 418 million (£7.2 million). The Court referred the claim to the execution of the judgement, stipulating, as with the shellfish harvesting claims referred to in paragraph 5.8.5 above, that compensation should be calculated on the basis of the number of harvesting days lost multiplied by the value of the maximum permitted daily catch. The claimants concerned, however, are not members of a recognised Cofradía, nor do they have an approved exploitation plan. The IOPC Fund has therefore appealed against the judgement, requesting that compensation should be calculated on the basis of either tax returns or documents evidencing sales in the corresponding period in 1991 and 1992.

5.11 Mexilor (mussel farm)

Mexilor had claimed compensation of Pts 416 million (£2.1 million) for losses suffered in respect of its mussel farm, and was awarded Pts 307 million (£1.6 million). The Director has taken the view that compensation calculated by the Court is incorrect as it counted twice the value of the stock existing at the time of the incident, namely both the stock value at the time of the incident and its value when it would have been sold but for its destruction. Furthermore, the price of mussels used was the highest paid for any mussels in the area and this price was applicable to only a minute proportion of the production of mussels in Galicia. The IOPC Fund has appealed on these points and has pointed out that other similar claims have been referred to the execution of the judgement for quantification, to be assessed on the basis of documentary evidence of profit in the years 1990-1992.

5.12 Repsol Petroleo SA (cargo owner)

The owner of the cargo on board the *Aegean Sea* (Repsol Petroleo SA) had claimed compensation for the value of the lost cargo, Pts 1 534 million (£7.8 million). The IOPC Fund has maintained that this claim did not fall within the definition of "pollution damage" and should therefore be

rejected. The Court has included this claim as admissible against the IOPC Fund. The Director considers this to be incorrect, and the IOPC Fund has appealed in respect of this claim.

5.13 Other claims

Other claims, totalling Pts 812 million (£4.1 million), relating to boat fishing, transportation and sales of fish, mussel farming and a depuration plant, were also referred to the execution of the judgement. The Director considers the criteria laid down by the Court for the assessment of the losses in these instances to be reasonable, and the IOPC Fund has not appealed in respect of these claims.

6 Other appeals

It is understood that 10 other parties have lodged appeals against the judgement, including the master, the shipowner, the UK Club and the pilot. The IOPC Fund has not yet been notified of these appeals. Once notified, the IOPC Fund will have 20 days to respond.

7 Determination of the maximum amount payable by the IOPC Fund

7.1 During the hearing, one of the lawyers representing a number of claimants raised the issue of the method to be applied to convert into Spanish Pesetas the maximum amount payable under the Civil Liability Convention and the Fund Convention which was expressed in (gold) francs (Poincaré francs). This lawyer maintained that the amount should be converted using the free market value of gold, instead of on the basis of the Special Drawing Right (SDR), since the 1976 Protocol to the Fund Convention which replaced the franc as the unit of account by the Special Drawing Right of the International Monetary Fund had not entered into force at the time of the *Aegean Sea* incident. In support of his request, the lawyer presented an opinion prepared by a Spanish law professor, but this opinion was not accepted as evidence by the Court.

7.2 In the hearing the IOPC Fund maintained that the conversion should be made on the basis of the SDR, and invoked mainly the same reasons as it had done in the court proceedings in the *Haven* case (cf document FUND/EXC.36/3). The Fund was not allowed, at that stage, to present any documentation on this issue.

7.3 The IOPC Fund's main arguments in support of its position can be summarised as follows:

The amounts in the Civil Liability Convention and the Fund Convention in their original versions are expressed in (gold) francs (Poincaré francs). Under the Civil Liability Convention, the amount expressed in francs should be converted into the national currency of the State in which the shipowner's limitation fund is constituted on the basis of the official value of that currency by reference to the franc on the date of the establishment of the limitation fund. The inclusion of the word "official" in the definition of the unit of account laid down in the original text of the 1969 Civil Liability Convention was made deliberately to ensure stability in the system, and that it was clearly meant to rule out the application of the free market price of gold. The unit of account in the Fund Convention is defined by a reference to the Civil Liability Convention, and this reference must be considered to refer to the Civil Liability Convention as amended by the 1976 Protocol thereto, which had entered into force before the *Aegean Sea* incident. The application of different units of account in the Civil Liability Convention and the Fund Convention would lead to unacceptable results, particularly as regards the relationship between the portion of liability to be borne by the shipowner and the IOPC Fund, respectively, on the basis of Article 5.1 of the Fund Convention. In 1978 Spain ratified the second amendments adopted in 1976 to the Convention establishing the International Monetary Fund (IMF). As a result of these amendments, States are obliged to use the SDR instead of the gold franc. For this reason, gold cannot be used in Spain as unit of account.

7.4 The IOPC Fund drew the Court's attention to the fact that in connection with the discussion of the *Haven* incident at the Executive Committee's 32nd session, the Spanish delegation had informed the Committee that the Spanish Government had notified the Court in Genoa that it supported the Fund's position as to the method of conversion (document FUND/EXC.32/8, paragraph 3.3.3). It should be noted that at the Executive Committee's 47th session, the Spanish delegation stated that the Spanish Government had always supported the IOPC Fund's position as regards the method to be applied for the conversion (document FUND/EXC.47/14, paragraph 3.2.15).

7.5 In the judgement, the Court stated that as regards the IOPC Fund the applicable limit was the one laid down in Article 4 of the 1971 Fund Convention. In accordance with Spanish procedural law, the IOPC Fund requested, within 24 hours of having been notified of the judgement, that the Court should clarify its decision on this point by indicating the maximum amount payable under the 1971 Fund Convention. In its response the Court stated that there was no need for clarification.

8 Question of time-bar

The question of time-bar was addressed in some detail in document FUND/EXC.47/3. The Director is studying this matter further, but these studies have not yet been finalised. It is proposed that the Committee should revert to this issue at its 50th session.

9 Negotiations with claimants

The Director takes the view that it would be appropriate to continue the negotiations with those claimants whose claims are not time-barred, for the purpose of arriving at out-of-court settlements. Subject to any instruction which the Executive Committee may give him, the Director intends to continue his efforts to reach out-of-court settlements in respect of such claims.

10 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document;
 - (b) to give the Director such instructions as it may deem appropriate in respect of the proceedings before the Court of Appeal; and
 - (c) to give the Director such other instructions as it may deem appropriate in respect of the handling of the claims arising out of this incident.
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