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INCIDENTS INVOLVING THE 1971 FUND

AEGEAN SEA

Note by the Spanish Delegation

1 Introduction

1.1 This document sets out the situation as regards the latest developments in the *Aegean Sea* case since the Executive Committee's 54th session in the light of the judgment rendered by the Court of Appeal in La Coruña on 16 June 1997. The judgment is now final and enforceable and it is essential that the Fund, in line with the text and spirit of article 7.6 of the Fund Convention, facilitates its enforcement without new allegations in this phase. This document also details the official position of the Spanish Government on several outstanding issues which have been considered by the Committee in the past and which deserve careful examination by Member States.

1.2 The Committee will also be interested to consider the context of the decisions to be taken in this session in the *Aegean Sea* case. The Committee may recall that at its sessions in June and October 1996 the Spanish Delegation made statements criticising the 1971 Fund's handling of claims following the *Aegean Sea* incident. The Spanish Delegation expressed the disappointment of the Spanish Administrations at the insufficient payments made to Spanish claimants. From a Spanish perspective, the assessments made by the Fund's experts in the *Aegean Sea* case were excessively low and the request for evidence to substantiate the claimant's losses had been out of proportion.

1.3 Some Member States have stated in recent Executive Committee's sessions that Spain was attempting to put pressure on the 1971 Fund to gain advantages. However, it is worth remembering the fact that in spite of this criticism, Spain has always broadly accepted the rules laid down by the 1971 Fund in respect of the admissibility of claims and the substantiation of damage. In fact, since 1982 Spain, in accordance with its responsibility, has promoted its membership of the 1971 Fund and the benefits available from this membership by direct contact with national organizations as well as industry and community groups especially with potential claimants (*inter alia* fishermen, tour operators, yacht owners and local councils). However, the operation of the 1971 Fund in Spain has not met the expectations of either the Spanish claimants or the Spanish Administrations (Central Administration and Xunta de Galicia) concerned with the *Aegean Sea* incident. The Spanish Administrations are still awaiting a satisfactory explanation of that in spite

of the complexity of the case. At the 54th session of the Executive Committee, the 1971 Fund's Director recognised that the assessment of fishery claims was not an exact science and that there would very often be different opinions as to the correct assessment of the damage.

1.4 We are determined not to repeat the arguments for and against the assessments of damage made by the Fund's experts and those of the Spanish claimants. As is so often the case the truth lies no doubt somewhere in between. Now it is time to adhere to the criteria upheld by the Court of Appeal in La Coruña to assess the damage and speed up the payments on the basis of the latest judgment.

1.5 Member States are aware that the Spanish claimants have waited for almost four years (until 30 April 1996) for a preliminary judgment rendered by the Spanish Criminal Court and almost five years (until 15 June 1997) for a final judgment. Both judgments correct the Fund's view on many points, including in the issues relating to assessment of the damage and liability. It is the opinion of the Spanish Government that it is time to take stock of the situation and reach a solution seeking to enforce the latest decision of the Spanish Court even out-of court. The Committee may recall that, given the length of the delay in the payment of claims by the 1971 Fund in the Aegean Sea case, the Spanish Government took the decision on 30 May 1997 to grant a new low interest loan of Pts 12 500 million (52 million pounds) to certain Spanish claimants.

1.6 The Committee should note that the 1971 Fund, since its establishment in 1978, has been involved in some 75 incidents and has paid over US$180 million in compensation. In the great majority of these incidents, claims have been settled out-of-court. The Spanish Government does not wish to gloss over the cases which the 1971 Fund has handled properly in recent years but our target must be to ensure the success of all the cases without exception. So far, court actions against the 1971 Fund have been taken in respect of six accidents, namely the *Haven* (Italy, 1991), *Aegean Sea* (Spain 1992), *Braer* (United Kingdom, 1993) and *Keumdong N°5*, *Sea Prince* and *Yuil N°1* (Republic of Korea, 1993, 1995 and 1995) incidents. The intervention of the Fund in the Courts has brought negotiations to a standstill and has prevented further payments thus very seriously affecting the image and the credibility of the Fund in some Member States. This trend is a source of considerable problems because with more cases being brought to court the provision of prompt compensation to claimants is virtually impossible.

1.7 In terms of compensation, one of the cases involving the smallest total payment so far is the *Aegean Sea* case where £6.7 million has been paid to claimants. By contrast, the case involving the largest payment so far is the *Braer* incident, where £46 million has been paid to claimants. Although each case involves a different set of circumstances, it is difficult to find a simple explanation of how in some cases relevant progress has been made in the early stages even if in the end the aggregate amounts claimed greatly exceeded the maximum available payable under the 1969 Civil Liability Convention and the 1971 Fund Convention while in other cases, the situation has remained blocked for many months, even years, since the early stages.

1.8 It is certainly true that the payment of millions of pounds to the Spanish claimants in the *Aegean Sea* case has been delayed due to two key factors, namely the total amount of the claims arising out of the case, which exceeds £160 million and thereby greatly exceeded the maximum amount available under the Conventions, and in the Fund's view the lack of enough evidence presented by the claimants. The Spanish Administrations recognize both key factors at the same time, the Fund has to admit that the Spanish Courts in some way are correcting the Fund's view. It is the opinion of the Spanish Government that it is not time to seek new grounds for dispute over the pending issues regarding the assessment of the damage either from the Fund's view or from the Spanish claimants's perspective. We can achieve more by being constructive. This represents a collective effort to seek an enforcement of the final judgment out of Court, even though, under Spanish procedural law the quantification may be postponed until the judgment is executed. To this end, the Spanish Administrations consider it vital to recall that the 1971 Fund is basically a mutual insurance established by Governments and with a political backbone, but financed by oil interests to provide compensation to victims of pollution damage from tankers. Moreover, we have to return to article 7.6 of the Fund Convention and recognize that the Fund must respect any judgment rendered by a national court in the sense that the facts and findings in that judgment may not be disputed by the Fund.

1.9 The judgment rendered by the Court of Appeal on 16 June 1997 covers a number of different topics. The Spanish Government is of the view that there are two important issues to be considered, firstly the strict liability of the Fund ruling out any ground to maintain a possible recourse (art. 9.2. of the Fund Convention) and secondly the question of the procedures out of the Court for the execution of the judgment rendered by the Court of Appeal (art. 7.6. of the Fund Convention).

1.10 Leaving the *Aegean Sea* case aside for a moment, the Spanish Government considers that the respect which the 1971 Fund has gained over the years due to the efficiency of the Secretariat has been undermined by the growing number of court cases. Furthermore, the disappearance on 20 February 1997 of the voluntary industry agreements TOVALOP & CRISTAL and the future link with the entry into force of the HNS Convention should, in theory, encourage more States to join the 1992 Fund. However, these developments will depend on the capacity of the current 1971 Fund to adapt itself in order to meet the expectations of the Governments and the potential claimants around the world. Some measures have already been implemented but others deserve careful consideration in order to prepare the institution for enlargement. We should seek to cover in all the cases the gap between needs and expectations, on the one hand, and delivery, on the other. To this end, the Spanish Government considers very relevant the study currently under way on the possibilities of the 1992 Fund using arbitration, mediation or conciliation to promote the out-of-court settlements of disputes, the study of the claims settlement procedures of commercial insurers and the review of the working methods within the Fund Secretariat linked, in our view, to the question of procedures to facilitate out-of- court settlements,

1.11 We also attach great importance to the question of the Fund's experts. In our view, the IOPC Fund should have a fresh and new vision on the use of experts and perhaps reconsider in the near future the Spanish proposal (71 Fund/EXC.51/2) to establish a comprehensive Code of Conduct for the appointment and reappointment of experts and their working methods in the assessment of claims. Our intention is to explore ways to strengthen the 1992 Fund in this controversial area and possibly produce a commonsense codification on what kind of experts have to be engaged, what criteria have to be used to assess the damage in the light of recent cases; or what standard methods are used in the assessment of claims. We do not reject the fact that the Fund might require in the future increased levels and diverse forms of external assistance. What we are looking for is to strengthen the Fund's ability to scrutinise the experts' work by laying down new mechanisms.

1.12 The Spanish Government considers that all these moves are logical as they are going to contribute to the development of international law and its practice in the field of liability and compensation for oil pollution damage and they will allow us to lay the foundation for the work of the 92 Fund in the years to come. Some measures will require decisions by Member States and slight changes in the Fund's policy, but by so doing, we will be able to improve some key areas to achieve a most effective and smoother operation of the Fund for the benefit not only of the Member States but also of the potential claimants and the oil receivers who contribute to the system. After all, the Fund has to be accountable to its Member States and, through them, to the different parties involved. Our interest in this process is to protect the interest of the Governments, the oil importers, and potential claimants, and to promote changes of real interest to the Fund so moving the institution into the new century on the basis of the best management structure possible as a unique and indispensable international forum to deal with compensation for oil pollution damage.

2 Position taken by the Courts on individual claims

2.1 Under the Spanish procedural law, if a claimant has not quantified the damage, the quantification may be deferred to the procedure for the execution of the judgment. In that case, the court is obliged to determine the criteria to be applied for the assessment of the quantum of the damage suffered. In the *Aegean Sea* case unfortunately many claims will have to be quantified during the procedure for the execution of the judgment. However, the criteria for the quantification of the damage in the main fishery claims were determined by the Court of First Instance and have been upheld by the Court of Appeal rejecting the Fund's position. It is the opinion of the Spanish Government that it is time to assess the damage in this area and make further payments accordingly.

2.2 In the appeal submitted by the 1971 Fund there was firstly an objection to the breadth of the concept of pollution damage as defined in the judgment, the cost of the preventive measures and the loss or damage caused by the said preventive measures. This objection has been rejected by the Spanish Courts. The judgment reads:

> "The strict interpretation which the Fund wishes to adopt is not acceptable because, if it were, a major proportion of the purposes of the Conventions applicable would not be achieved, namely to ensure that sufficient or full compensation is available to persons suffering loss as a result of pollution and for that reason a more flexible reading of the said definitions is necessary, although this does not mean that an unrestricted flow of derived damage is admitted."

2.3 Other objections made by the 1971 Fund in its appeal have not been accepted by the Court of Appeal and the details are at the disposal of the Member States. The only 1971 Fund claim that the Court of Appeal has accepted was the exemption from liability to pay full compensation for the losses incurred by the Spanish Government, as the judge considered that since the Government is also liable for the negligent action of a dependent person (ie the pilot), it must accept partially legal responsibility in accordance with the article 4.3 of the Fund Convention. The degree of exoneration from the said liability was fixed at 50% in respect of the claim presented by the Spanish State and therefore it is not applicable to the rest of the claims of the case where the UK Club and the 1971 Fund will have to pay up to the limits of its liability without any exoneration.

3 Distribution of liability and questions relating to recourse

3.1 To return to the issue of liability, the Court of Appeal upheld the judgment of the Court of First Instance as regards the civil liabilities of the parties concerned. The Courts held that the master and the pilot were directly liable for the incident. It was further held that the UK Club and the 1971 Fund were directly liable for the damage caused by the incident and that this liability was joint and several. In addition, the shipowner and the Spanish State were subsidiarily liable in the manner and within the limits laid down in the first judgment. The Committee may recall that the approach taken by the 1971 Fund in the Spanish Court of First Instance intervening against the pilot and requesting that the Spanish State shall be liable jointly and severally and thus maintaining the petition that the 1971 Fund be declared not to have direct liability in the matter was rejected in the first instance.

3.2 The key point in the first judgment now upheld by the Court of Appeal says:

> "There is now declared the direct civil liability of the Insurers of the vessel, the company United Kingdom Mutual Steamship-Assurance Association (Bermuda) Ltd, though with the restrictions laid down in Article V of the Convention of 20 November 1969 concerning civil liability for damage caused by oil-contamination under the statutory fund was set up, this civil liability being in the sum which is the limit of its liability, viz 1 121 219 450 pts. It is also necessary to declare the direct civil liability of the 1971 Fund, as being one that is to be borne jointly and severally with that of the aforesaid entity. As instituted in the Fund Convention 71 the purpose of the 1971 Fund is, as article 4.I.c. States, to compensate every victim of damage due to contamination in so far as that person or organization has not received full and adequate compensation as defined in the 1969 Civil Liability Convention when the damage exceeds the limits of liability of the owner, it being very evident that the size of the resulting compensation will exceed that sum when the ceiling on the Fund's liability as defined in Article 4 of the 1971 Fund Convention is applied."

3.3 In addition to the direct liability of the UK Club and the 1971 Fund, each one within the limits set out in the Conventions, the Court of Appeal has upheld the subsidiary liability of the shipowner and of the Spanish State. The reasons for that are in article 22 of the Spanish Penal Code which acknowledges the dependent civil liability of private individuals and commercial and other corporate bodies for the crimes and misdemeanours committed by their employees or dependents in the discharge of their duties. The judgment of the first instance now confirmed says:

> "The requirements needed to declare dependent civil liability in the terms of article 22, both in respect of the Spanish State and the organisation owning the vessel, the Aegean Sea-Traders Corporation, are both present, as is the existence of a relationship between the author of the crime and the person, whether physical or corporate, having civil liability, in the form of an acknowledgment of that dependency together with the existence of the requirement that the criminal act should have been committed in the discharge of the obligations of his employment by the author of the crime. In regard to the captain, no suggestion has been made that the events now submitted for judgment did not take place while he was performing his duties, or while he was a servant of the shipping-line, for which reason his civil liability is now declared, though within the limits provided for in Articles III and V of the CLC 69. But such a suggestion has been made in connection with the employed status of the Pilot and with whether or not there exists any link with the State Administration. Though it is not true that the Pilot is a civil servant nor that he gained his professional qualification in a competitive public examination, the fact remains that the public service is empowered to oversee and regulate the function he performs for which

there is due sanction in the regulation on the pilotage service which contains provision for the service to be run either directly by the Ports Authority or through contracts with third-party organisations... It is for these reasons that it cannot be contested that the acts committed by the Pilot took place while he was discharging his professional functions and services that the Spanish State must be declared to have dependent civil liability in respect of this accused....."

3.4 One of the most important and complex legal issues of the case is how the distribution of liability should be made and the question relating to recourse. At the 50th session the Spanish Delegation maintained that, even if the Court were to hold that the pilot was liable and that the Spanish State was liable for the acts of the pilots (and this is the case when the Court of Appeal stated that the pilot was acting in his capacity as an employee of the State and that the service he provided, namely pilotage, was indisputably of a public nature) it was crucial to differentiate the level of the different liabilities involved. It is the opinion of the Government of Spain that the UK Club and the 1971 Fund (directly liable) should pay compensation up to the maximum amount laid down in the 1971 Convention, namely 60 million SDRs, and the Spanish State (only subsidiary liable) should only pay any excess over that amount.

3.5 The Spanish Government considers it inappropriate to maintain the question of the recourse against the Spanish State on the following grounds :

a) Firstly, the grounds for exonerating the 1971 Fund from liability laid down in Articles 4.2 and 4.3 of the Fund Convention did not apply in this case. As it is clear in the Fund Convention the negligence of a government is not a case of exoneration from liability for the 1971 Fund. Furthermore the shipowner cannot be exonerated from his liability due to the inclusion of the word "wholly" in the article III.2 of the CLC on the one hand and because of the involvement of the master in the case on the other. In this regard, the recognition of the 1971 Fund's right to subrogation (arts 9.1 and 9.2 of the Fund Convention) would be intended to avoid the situation in which those direct liable taking advantage of the existence of a fund supplementing their liability. In the Aegean Sea case the fund is not supplementing the liability of the Spanish State which is only subsidiarily.

b) Secondly, if the master, the UK Club and the 1971 Fund would ultimately pay 50% of the compensation and the pilot and the Spanish State would pay the other 50%, this would be in breach of the Fund's strict and direct liability under article 4.1. of the Fund Convention as has been stated by the Court of Appeal. In that sense, the Fund's right of recourse against third parties (including the Member States) under article 9.2. as a separate question should take into account the level of the different liabilities involved on the basis of the applicable national law. In the Spanish Law the Civil Code States very clearly that the first liabilities to be executed are the direct and joint liabilities (in the Aegean Sea case, the master, the pilot. the UK Club and the 1971 Fund) and if compensation is not enough it is applicable in a later stage the subsidiarily liability.

c) Thirdly, the Committee should recall that the 1971 Fund has not taken recourse action against a State in any other case and this might be a precedent impossible to follow in other cases under way taking into account that in many Fund Member States pilots have no liability for oil pollution damage due to provisions in national law channelling liability to the shipowner or simply because the State has no liability for the acts of the pilots. As a consequence, a recourse action of the type considered by the 1971 Fund in the Aegean Sea case would not succeed in States in either of these groups. From this point of view the Fund policy on recourse actions should not be made on a case by case basis in order to keep uniformity and consistency. In this matter, it would not be acceptable if the Spanish State were treated differently from other States<1>.

<1> The State liability for the acts of the pilots has been ruled out or limited in monetary terms in some Fund Member States (as in the Cavendish case in the UK in 1993). The Committee may consider the link between the Aegean Sea case and the Sea Empress case where the cause of the initial grounding has been found to be due to pilot error.

d) Fourthly, on 16 September 1997 the judge in charge of the execution of the judgment ordered the two defendants who had been held directly liable, namely the UK Club and the 1971 Fund, to pay the claimants the amounts of compensation awarded by the judgment as modified by the Court of Appeal. It is clear in the light of this decision that the claimants are going to request the enforcement of the judgment awarding them compensation against the UK Club and the 1971 Fund first and only if there is not enough money according to the limits established by the CLC 69 and Fund 71 Convention the claimants are entitled to claim in excess of that amount against the Spanish State as being subsidiarily liable. Therefore, with all due respect, it is factually wrong and unfair to say that the 1971 Fund has grounds for recourse action in civil proceedings at a later stage in the Aegean sea case.

3.6 In the light of the telling arguments stated above the Spanish Administrations request this Committee to remove the question of recourse of the Agenda for future sessions.

4 Execution of the Court of Appeal's judgment

4.1 As a matter of principle the Spanish Administrations consider mandatory a joint interpretation of the articles 4.5, 8.1 and 18.7 of the Fund Convention on the one hand, and the articles 24 and 117.3 of the Spanish Constitution which recognize the exclusive competence of the Spanish Courts to make enforceable the judgments rendered in the Spanish jurisdiction In this regard, it appears that the clause included in the article 8.1 of the Fund Convention "subject to any decision concerning the distribution referred to in article 4 paragraph 5 any judgment given against the Fund by a Court having jurisdiction in accordance with article 7 paragraph 1 & 3 shall be recognized and enforceable" means that the organs of the 1971 Fund are not entitled to make guidelines or directives on how the 1971 Fund has to execute a judgment This competence is exclusive of the national jurisdiction under act, records and judicial procedures of the State involved.

4.2 As set out in the paragraph 10 of document 71/EXC.55/4 the Court of Appeal upheld the judgment of the Court of first instance as regards all those claims in respect of which the latter Court had awarded a specified amount of compensation.

4.3 In the context of the distribution of the different levels of liabilities of the parties involved and taking into account that it is up to the Spanish Courts to make the judgment rendered by the Court of Appeal enforceable it is the opinion of the Spanish Administrations that the Spanish claimants requesting from the 1971 Fund payments in full in respect of the claims for which specific amounts have been awarded in compensation should be accepted. Furthermore, it is clear that bearing in mind that the Spanish State would pay compensation in excess of the maximum amount of compensation available under the 1969 Civil Liability Convention and the 1971 Fund Convention, the caution exercised by the 1971 Fund in the application of article 4.5. of the 1971 Fund should not be maintained. Therefore, as there is not risk of overpayments, those Spanish claimants with specific amounts awarded by the Spanish Courts should received payments in full and should not remain limited to any percentage (40% or whatever).

4.4 In this regard, the Spanish Government does not consider necessary that the 1971 Assembly takes a decision under article 18.7 concerning the distribution of the amount available among the Spanish claimants in accordance with the article 4.5 as the matter involved (the execution of the Court of Appeal's judgment) is not a competence of the 1971 Assembly. Instead, it is a competence of the Spanish Courts and it is not acceptable that the organs of the 1971 Fund correct the Court's decision.

5 Question of time-bar

The Spanish Government takes note that the question of time-bar is off the table at this session because it has been agreed between the Spanish Government and the Director that this matter should be discussed between them before any further consideration by the Committee. However it is time to inform the Committee that the official position of Spain maintained in the past is unchanged and that all the group of claims of the *Aegean Sea* are not time-barred vis-à-vis the 1971 Fund and retain the right to payments in accordance with a joint interpretation of the Fund Convention and Spanish Law.

6 Action to be taken by the Executive Committee

The Executive Committee is invited :

a) to remove the issue of possible recourse for the grounds stated in the paragraph 3.5. of this note;

b) to endorse in all its terms the latest decision rendered by the Spanish Court accepting the direct liability of the UK Club and the 1971 Fund and maintaining the liability of the Spanish State only in excess of the amount payable by the UK Club and the 1971 Fund;

c) to give instructions to the Director to facilitate the execution of the Court of Appeal's judgment in the letter and spirit of the Article 7.6 of the Fund Convention making new assessments of the damage suffered by the Spanish claimants on the basis of the criteria upheld by the Spanish Courts and making payments accordingly; and

d) to give instructions to the Director to make payments in full in respect of the claims for which the Courts have awarded a specific amount and to remove the caution exercised by the 1971 Fund in the application of Article 4.5 of the 1971 Convention.