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COMPENSATION
FUND 1971

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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 Spanish position on the distribution of liabilities between the parties concerned and on the execution on the Court of Appeal's judgement.

1.2 As the Spanish Delegations have stated in the past, due to different factors, 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). This is a new opportunity to recall to the Executive Committee that it is not the intention of the Spanish Government to seek new grounds for dispute over the pending issues regarding the assessment of the damage or vis-à-vis the legal issues. Our intention is to try to identify a global solution to the case in 1998 through an enforcement of the final judgement out of court.

To this end, it is the intention of the Spanish Government to make available to the IOPC Fund and to other delegations at the next 1971 Assembly IOPC Fund the technical assessment made by the Spanish Administration following the criteria established by the Spanish Courts and the legal opinions which are the basis of the Spanish position in the pending issues (distribution of liabilities and questions relating to recourse; problems of execution of the Court of Appeal's judgement; and time bar).

Although the legal opinions confirming the Spanish Government's interpretation of the judgement rendered by the Court of Appeal in respect of the distribution of liabilities between the parties involved are already available, the technical assessment following the criteria set out by the Spanish Courts has yet to be completed by the Spanish Administration, before its official presentation to the Fund, given the complexity of the case and the different interest involved and taking into account the special situation of a number of claimants in the fishery and aquaculture sectors who reserved their right to claim compensation in civil proceedings to be brought at a later date after the completion of the criminal proceedings. The Committee may recall that in these claims there are not still criteria set out by the Spanish Courts to assess the losses.

For this reason, the Spanish Government will be in a better position to make all the reports available to the Fund, (technical and legal), at the same time at a later stage.

1.3 Therefore, this note is only a preliminary information and we kindly request this Committee to take note of its contents and to revert to the issues relating to distribution of liability and recourse (paragraph 2) at a later stage and at this session to review the situation regarding the execution of the Court of Appeal's judgement attending the request of the claimants who have already awarded a specific amount to let the Fund make payments in full (paragraph 3).

2 Distribution of liabilities and questions relating to recourse

2.1 As the Fund Member States certainly know, the Court of Appeal in Spain upheld the judgement of the Court of First instance as regards the civil liabilities of the parties concerned. The Spanish Courts have decided the following levels of liabilities:

- (a) Direct Liabilities: the master, the pilot, the UK Club and the 1971 Fund (in the case of the UK Club and the 1971 Fund this liability is joint and several).
- (b) Subsidiary Liabilities: the owner of the ship and the Spanish State.

The Committee may recall the main grounds stated by the Spanish delegation at the 55th Committee session (document 71FUND/EXC.55/4/1 and paragraphs 4.2.4 - 4.2.7 of document 71FUND/EXC.57/3). The Spanish Government still considers, in spite of the legal opinion obtained by the 1971 Fund, that for many reasons it is inappropriate to maintain the question of the recourse against the Spanish State and that the State's liability can only be invoked if the total amount of the established claims exceeds the amount to be paid by the UK Club and the 1971 Fund. In our view, it is crucial to differentiate the level of liabilities of each party.

2.2 The Spanish Government believes that it is very unlikely that the Spanish Courts within the Spanish legal system set out a 50% distribution of the compensation payments between the UK Club and the 1971 Fund on the one hand and the Spanish State on the other. The Spanish Government considers factually wrong and unfair to address the question of 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 against third parties (Articles 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, it should be reminded that the Spanish State is only subsidiarily liable and therefore the UK Club and the Fund should make payments up to their limits.

(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 Member States) under Article 9.2 as a separate question should take into account the level of different liabilities involved on the basis of the applicable national law. In the Spanish Law, the international conventions are directly applicable when have been published officially without the necessity of implementation domestic rules (art. 96.1 of the Spanish Constitution) and there are not provisions in the conventions applicable to the case which justify a breach of the Fund's strict and direct liability. Furthermore, the legal opinion obtained by the Spanish State after a detailed analysis of the problems involved by different lawyers and professors came to the conclusion 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 would be applicable in a later stage the subsidiarily liability.

(c) Thirdly, it is right to say that on 16 September 1997 the judge in charge of the execution of the judgement 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. The Spanish State has not been included in this order. The UK Club's appeal against the September decision was rejected on 12 November 1997 and the UK Club has appealed again. It is the opinion of the Spanish Government that it is very unlikely that the judge changes his decision. It is clear in the light of the previous decision taken by the Spanish judge that the claimants are entitled to request the enforcement of the judgement 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 the Fund 71 Convention the claimants are entitled to claim in excess of that amount against the Spanish State as being subsidiarily liable.

2.3 Apart from the legal grounds set out in the paragraph 2.2, the Committee should take into account that the question of a possible recourse against the Spanish State is a very important question of policy which might involve to the 1971 Fund's Assembly rather than the Executive Committee. The Delegations may recall the fact that the 1971 Fund had 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 not 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 against Spain would not succeed in States in either of these groups. If the recourse action against Spain were to happen, the 1971 Fund would be maintaining different solutions to similar cases with different treatments to different Member States. From this point of view, the Spanish Government strongly considers that the Fund policy on recourse action against Fund Member States should not be made on a case by case basis in order to keep uniformity and consistency.

2.4 The Committee may recall that the 1971 Fund's decision on whether or not to take recourse actions against third parties following the case by case basis was adopted in the *Rio Orinoco* incident in April 1995 (paragraphs 3.1.1 - 3.1.7 of the document FUND/EXC.42/11) but, at that time, the third party involved was a P & I Club not a State. The Spanish Government believes that the 1971 Fund is now facing a different problem and a different approach is needed.

3 Execution of the Court of Appeal's judgment

3.1 As the Spanish Delegation stated at the 55th session the Spanish Government considers 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. The Spanish Authorities believe that the 1971 Fund is 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.

3.2 The Spanish Government still considers 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. As we have stated in the past, 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 Convention should not be maintained. The Committee may reconsider this issue taking into account that this is the first case in history with a final decision in Court stating that a Member State is subsidiarily liable. Therefore, as there is no risk of overpayment, the pro-rating rule should not be applicable and those Spanish claimants with specific amounts awarded by the Spanish Courts (ie Repsol) should receive payment in full and should not remain limited to any percentage (40% or whatever). In these cases, it is clear for Spain that it is not necessary to have a guarantee to adjust the amount payable by the Fund in full at a later stage should a proportional reduction be necessary because of the involvement of the State as subsidiarily liable.

3.3 The decision of the Spanish judge taken on 12 November 1997 confirms all the above. In the decision ('Auto del Juzgado de lo Penal en procedimiento de ejecución') the key points say:

- (a) It is not necessary to request all the victims to make enforceable a judgement ('Titulo IV; Libro I; Law of Criminal Procedure which refers to the enforcement of criminal judgements as regards their civil liabilities aspects);
- (b) It is not necessary to open a special procedure ('Procedimiento concursal') to determine the quantum to be paid to each claimant;
- (c) The claimants with specific amounts awarded by the Spanish Courts should receive payment in full.

3.4 In order to clear the ground and review the Fund's policy, the Spanish Government (as other Member States) looks forward to receiving the Director's report on the execution of judgements rendered by a competent national court on the basis of the legal situation in a limited number of Member States (including Spain given the consequences in the *Aegean Sea* case).

4 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) not to consider at this session the issues relating to distribution of liability and recourse and postpone any decision until a later session (probably until the next Assembly session in April when the Spanish Government will be in a position to discuss this item and make available in advance to the rest of the Member States the legal reports which are the basis of the Spanish position contained in this document);
 - (c) 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 thus, attending the request from REPSOL, and to remove the caution exercised by the 1971 Fund in the application of Article 4.5 of the 1971 Convention for these claims; and
 - (d) to give a new mandate to the Director to search for a global solution to the *Aegean Sea* case in 1998 through an enforcement of the Court of Appeal's judgement out of Court; making new assessments of the damage suffered by the Spanish claimants on the basis of the criteria upheld by the Spanish Courts; and holding further discussions with the Spanish Government to clarify the pending legal issues.
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