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COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
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Agenda item 3

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INCIDENTS INVOLVING THE 1971 FUND

AEGEAN SEA

Note by the Director

1 Introduction

1.1 Criminal proceedings were initiated in the Criminal Court of first instance in La Coruña against the master of the *Aegean Sea* and the pilot in charge of the ship's entry into the port of La Coruña. The Court of first instance rendered its judgement in the *Aegean Sea* case on 30 April 1996. The 1971 Fund and other parties appealed against this judgement. The Court of Appeal in La Coruña rendered its judgement on 18 June 1997. The judgement of the Court of Appeal is final. The Court of Appeal awarded specific amounts in compensation in respect of certain claims (cf document 71FUND/EXC.55/4, paragraph 5.6). However, a number of claims for compensation were referred to the procedure for the execution of the judgement, since the Courts considered the evidence presented by the claimants to be insufficient to substantiate the amount of the losses suffered. Developments in these proceedings were reported in documents FUND/EXC.47/3, paragraph 3, FUND/EXC.49/3, paragraph 3, FUND/EXC.50/4, paragraph 4 and 71FUND/EXC.55/4 paragraphs 3, 4 and 5).

1.2 This document deals with the developments which have taken place since the Executive Committee's 55th session. In particular, it reports on certain discussions which have been held with a representative of the Spanish Government, on a legal opinion obtained by the 1971 Fund on the distribution of liabilities between the parties concerned, and on a request by a claimant for full payment of his claim.

2 Claims situation

2.1 The Joint Claims Office set up by the 1971 Fund and the shipowner's P & I insurer (the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd (UK Club)), has received 1 277 claims totalling Pts 24 809 million (£99 million). Compensation has been paid in respect of 835 claims for a total amount of Pts 1 617 million (£6.7 million). Out of this amount, the UK Club has paid Pts 782 million (£3.2 million) and the 1971 Fund Pts 835 million (£3.5 million). It should be noted that many of the claims

presented to the Joint Claims Office which have not been settled have, in the 1971 Fund's view, become time-barred, as reported in document FUND/EXC.47/3.

2.2 Claims were also submitted to the Criminal Court in La Coruña, totalling some Pts 24 730 million (£103 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 did not submit any claims in the criminal proceedings. Some of these claimants, together with others who have not submitted claims to the Joint Claims Office, have indicated that they will present their claims at a later stage in civil proceedings against the shipowner, his insurer and the 1971 Fund. The claims in this category for which amounts have been notified total Pts 26 855 million (£107 million).

3 Meeting with a representative of the Spanish Government

3.1 The Executive Committee has, at previous sessions, instructed the Director to investigate the possibility of reaching out-of-court settlements with claimants covered by the judgement of the Court of first instance on the basis of the requirement for evidence laid down in that judgement.

3.2 At its 55th session, the Executive Committee noted that the Spanish Government had recently proposed that a meeting should be held between the Government and the 1971 Fund to explore the possibilities of reaching a global agreement in respect of the claims in the fishery sector, but that a date for such a meeting had not yet been fixed.

3.3 At the Committee's 55th session, the Spanish delegation stressed the importance of adhering to the criteria upheld by the Court of Appeal in La Coruña to assess the damage and pay compensation on the basis of the Court of Appeal's judgement. The Spanish delegation stated that it was time to seek an enforcement of the final judgement out of court, even though under Spanish procedural law the quantification could be postponed until the judgement was executed.

3.4 At the Director's initiative a meeting was held in Madrid on 10 November 1997 with the Director of the Minister's Office (Director del Gabinete de Ministro) of the Ministry of Public Administration, who is responsible for co-ordinating the interests of the Central Government and of the Government of the Region of Galicia (Xunta de Galicia) in the *Aegean Sea* case. At the meeting there was a constructive exchange of views concerning the main problems which have prevented progress from being made. The Director invited the representative of the Spanish Government to provide the 1971 Fund with a note setting out any proposals which the Government might have as regards possible solutions. The Director also referred to the criteria which a claim must fulfil in order to be admissible for compensation and the need for claimants to produce evidence to substantiate their losses.

3.5 At the meeting the representative of the Spanish Government confirmed that the Government's decision to grant loans to certain claimants (cf paragraph 7 below) was based on a technical assessment of the claims. He undertook to send the 1971 Fund a copy of this assessment together with the evidence upon which it was based. The Director suggested that, if this new evidence were to justify it, it might be appropriate to hold a meeting between the experts engaged by the Spanish Government and the experts engaged by the UK Club and the 1971 Fund. The Director emphasised that, in order for a claim to be admissible for compensation, the individual claimants must present evidence to substantiate the amounts of their economic loss, and he stated that it was not sufficient to present evidence relating to any general impact of the oil spilled from the *Aegean Sea*. So far, no further documents have been presented to the 1971 Fund.

4 Distribution of liabilities and questions relating to recourse

4.1 Background

4.1.1 The Court of first instance and the Court of Appeal held that the master of the *Aegean Sea* and the pilot were directly liable for the incident and that they were jointly and severally liable, each of them on a 50% basis, to compensate victims of the incident. It was also 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 Court held that the owner of the *Aegean Sea* and the Spanish State were subsidiarily liable.

4.1.2 The Court of Appeal stated that the contribution to the incident of the master and the pilot was similar and that the master and pilot were therefore held liable in equal shares in civil law, since the accident could have been avoided if each of them had taken those precautions which were incumbent upon them. In respect of the appeal by the shipowner, the Court of Appeal stated that the question raised by the owner, ie the equal attribution of civil liability to the master and the pilot and, by extension, to those deriving dependent civil liability from them, had already been dealt with in the context of the criminal liability of the two accused.

4.1.3 In this context reference should be made to Article III.5 of the 1969 Civil Liability Convention and Article 9.2 of the 1971 Fund Convention. Under Article III.5, nothing in the 1969 Civil Liability Convention shall prejudice the right of recourse of the shipowner against third parties. Under Article 9.2, nothing in the 1971 Fund Convention shall prejudice any right of recourse or subrogation of the 1971 Fund against persons other than the owner and his insurer, and that in any event, the right of the Fund to subrogation against any such person shall not be less favourable than that of an insurer of the person to whom compensation has been paid. The Fund's Spanish lawyer has advised the Director that, under Spanish law, an insurer who has paid compensation acquires by subrogation the right of the person so compensated against any person liable for the damage covered by the compensation (document 71FUND/EXC.50/4, paragraph 6.7).

4.2 Consideration of this issue at the Executive Committee's 55th session

4.2.1 At its 55th session the Executive Committee examined the question of possible recourse action, basing its considerations on the Director's analysis as set out in paragraph 6.3 of document 71FUND/EXC.55/4 and on a note presented by the Spanish delegation (document 71FUND/EXC.55/4/1). The Director drew attention to the fact that the Executive Committee had taken the view that the policy of the 1971 Fund was to take recourse action whenever appropriate and that the Fund should in each case consider whether it would be possible to recover any amounts paid by it to victims from the shipowner or from other parties on the basis of the applicable national law. It was recalled that the Committee had stated that if matters of principle were involved, the question of costs should not be the decisive factor for the Fund when considering whether to take legal action. It was further recalled that the Committee had stated that the 1971 Fund's decision on whether or not to take such action should be made on a case by case basis, in the light of the prospect of success within the legal system in question (document FUND/EXC.42/11, paragraph 3.1.4).

4.2.2 In the reasons given by the Court of Appeal, the Court had attributed identical proportions of civil liability to the master and the pilot and, by extension, to those deriving dependent civil liability from them. The Executive Committee noted the Director's view that, as the liability of the State was subsidiary to that of the pilot, the State's liability would be invoked, since the pilot would not be able to make any significant payments.

4.2.3 The Director stated that, in his view, a plaintiff (claimant) was entitled to request the enforcement of a judgement awarding him compensation against the pilot and, if the latter was unable to pay, against the State, or against the master/UK Club/1971 Fund (and subsidiarily against the shipowner). The Committee noted that when payments were made to plaintiffs (claimants), the defendants who had made these payments could, in the view of the 1971 Fund's Spanish lawyer, take recourse action to claim reimbursement from the other defendants so that ultimately the master/UK Club/1971 Fund would pay 50% of the awarded amounts and the pilot/Spanish State would pay 50% of these amounts.

4.2.4 The Spanish delegation pointed out that the distribution of liability and the question relating to recourse were among the most important and complex legal issues of the *Aegean Sea* case. This 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, it was crucial to differentiate the level of liabilities of each party. The Spanish delegation stated that the judgements meant that the UK Club and the 1971 Fund should pay the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention and that the Spanish State would pay compensation only if the total amount of the established claims exceeded that amount.

4.2.5 The Spanish delegation stated that it considered it inappropriate to address the question of recourse against the Spanish State. This delegation maintained that the negligence of a Government was not a case for exoneration of liability for the 1971 Fund and that the liability of the Spanish State was only subsidiary to that of the 1971 Fund. The delegation maintained that the first liabilities to be executed were the joint and direct liabilities and that, if compensation from the persons directly liable was not sufficient, then enforcement should be sought against the persons who were subsidiarily liable. The Spanish delegation took the view that the recognition of the 1971 Fund's subrogation (Articles 9.1 and 9.2 of the 1971 Fund Convention) was intended to avoid the situation in which those who were directly liable took advantage of the existence of a fund supplementing their liability. In the Spanish delegation's view, in the *Aegean Sea* case the Fund was not supplementing the liability of the Spanish State which was only subsidiary.

4.2.6 The Spanish delegation drew attention to the fact that the 1971 Fund had not taken recourse action against a State in any other case. The delegation mentioned that in many Fund Member States pilots had no liability for oil pollution damage due to provisions in national law channelling liability to the shipowner, that in a number of Member States the State had no liability for the acts of pilots and that, 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. It was maintained by the Spanish delegation that decisions as to whether the 1971 Fund should take recourse action should not be made on a case by case basis, since it was crucial that the Fund should act uniformly and consistently. The Spanish delegation expressed the view that it would not be acceptable if the Spanish State were treated differently from other States. The Spanish delegation mentioned a possible link between the *Aegean Sea* case and the *Sea Empress* case where the cause of the initial grounding had been found to be due to pilot error.

4.2.7 The Spanish delegation requested that the Executive Committee should remove the question of recourse action against the Spanish State from the agenda of future sessions stating that it was factually wrong and inappropriate to say that the 1971 Fund had grounds for recourse action in civil proceedings at a later stage. The Spanish delegation mentioned that, as the recourse was associated with previous payments, and taking into account the fact that the payment made was excessively low to date, this question should not be a top priority item for the 1971 Fund.

4.2.8 The Spanish delegation stated that it had obtained three legal opinions confirming the Government's interpretation of the judgement. In reply to a question, the delegation stated that it would request authorisation to make these opinions available to other delegations.

4.2.9 The Executive Committee decided to postpone its consideration of the question of recourse until a later session. The Committee instructed the Director to obtain a second opinion in relation to the interpretation of the judgement in respect of the distribution of liabilities between the parties involved (document 71FUND/EXC.55/19, paragraph 3.3.20).

4.3 Legal opinion obtained by the 1971 Fund

4.3.1 In accordance with the Executive Committee's decisions, the Director instructed Mr Jaime Santos Briz, judge of the Spanish Supreme Court from 1979 to 1996, to give an opinion on the interpretation of the judgements as regards the distribution of liabilities between the parties concerned. Mr Santos Briz is a well-known Spanish legal writer and author of an important book on Spanish third party liability law.

4.3.2 In his instructions to Mr Santos Briz, the Director set out the positions of the Spanish Government and of the 1971 Fund as regards the interpretation of the judgements concerning the distribution of liabilities between the parties involved. The Director emphasised that Mr Santos Briz should give an impartial and objective opinion.

4.3.3 The Director submitted the following questions to Mr Santos Briz:

(a) Should the claimants request the execution of the judgement of the Court of Appeal against the UK Club and the 1971 Fund, since the latter have been declared directly civilly liable, or could the claimants request the execution of the judgement against the pilot, also declared directly civilly liable, and in the event of him being insolvent, extend the execution against the Spanish State. If the claimants cannot request the execution against the pilot and the Spanish State, when and how would the pilot and Spanish State respond to the judgement.

(b) In the event that the judgement were to be executed exclusively against the UK Club and the 1971 Fund, could they bring a recovery action against the pilot/Spanish State and, if so, to what extent and in what manner.

(c) Finally, independent of the order in which the enforcement of the judgement takes place, what will be the final distribution of the compensation payments between the various civilly liable parties, after all the recovery actions which may exist between them have taken place.

4.4 Mr Santos Briz has presented an opinion containing a detailed analysis of the problems involved. He states that his opinion is to be based on the final judgement. In his conclusions, he answers the three questions set out above as follows:

(a) The claimants can request the execution of the Court of Appeal's judgement against the insurer and the 1971 Fund, and until they have been fully compensated, also against the pilot and against the Spanish State, which is subsidiarily civilly liable in relation to the pilot. Between them, the former (the insurer and the 1971 Fund) are liable for 50% of the damage and the State is liable for the other 50%. The enforcement of these compensation payments may be carried out through summary proceedings ("jucio de cognición abreviado") governed by the Law of Civil Procedure.

(b) The insurer and the 1971 Fund can bring recovery action against the State in the event that they have paid the 50% of the damage which should fall on the Spanish State. Since the action follows expressly from the judgement to be enforced, the procedure to be applied is that indicated in the said Law of Civil Procedure (Articles 927 *et seq*) to which refers the enforcement of criminal judgements in their civil liability aspects (Article 984, 3°, Law of Criminal Procedure).

(c) As a consequence of what is stated above, the final distribution of the compensation payments between the various parties declared civilly liable after all recovery actions have been carried out should be: the insurer and the 1971 Fund 50% of the total compensation for the damage, the State the remaining 50%. The former compensation payments include all those to which the State is entitled as claimant for damages or costs. All this will require accounting expert proof which will include and detail the total amount of the damage, deducting the sums already paid (eg, by the European Economic Community, to Repsol SA and others) with a specific allocation to the respective debtor, taking into account the percentage corresponding to each debtor and the nature of the debts. The extent and effectiveness of these accounting operations for payments of the outstanding balance is clearly beyond the limits of this opinion.

5 Execution of the Court of Appeal's judgement

5.1 Consideration at the Executive Committee's 55th session

5.1.1 At its 55th session, the Committee noted that, under Spanish law, the Court of Appeal's judgement was not subject to appeal and that, consequently, the judgement was enforceable in respect of the claims for which specific amounts had been awarded in compensation. It was also noted that in July 1997 a claimant had requested payment from the 1971 Fund of the balance of its claim, ie the amount awarded by the Courts minus the amount received from the 1971 Fund as provisional payment.

5.1.2 The Committee noted that the 1971 Fund had been notified on 16 September 1997 of a decision, issued by the judge in charge of the execution of the judgement, ordering the master of the *Aegean Sea* and the pilot to pay the fine in accordance with the judgement of the Court of first instance which had been upheld by the Court of Appeal. It was further noted that this decision 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 judgement as modified by the Court of Appeal, and that claimants were invited to submit evidence to substantiate their losses.

5.1.3 It was recalled that, most recently at its 46th session, the Executive Committee had decided that, in view of the remaining uncertainty as to the total amount of the established claims, the provisional payment of the 1971 Fund should remain limited to 40% of the damage actually suffered by the claimants as assessed by the Fund's experts.

5.1.4 The Spanish delegation stated that Articles 24 and 117.3 of the Spanish constitution recognised the exclusive jurisdiction of the Spanish Courts as regards the enforcement of judgements rendered by those Courts. The delegation maintained that it would not be acceptable if the organs of the 1971 Fund took decisions to correct the decisions of the Spanish Courts. The Spanish delegation considered that it was not necessary for the Executive Committee to take any decision under Article 18.7 of the 1971 Fund Convention in respect of the distribution between the claimants of the amount of compensation available under the 1971 Fund Convention. This delegation stated that, since 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, there was no risk of overpayment by the 1971 Fund and that the caution exercised by the 1971 Fund in limiting the level of payments to 40% of the damage was therefore not justified. The Spanish delegation requested that the Committee should instruct the Director to pay in full the claims for which the Courts had awarded a specific amount in compensation.

5.1.5 Although the enforceability of judgements rendered by national courts was recognised in the 1971 Fund Convention, the Executive Committee considered that, in view of the provisions of Article 8, the Convention also provided that such enforcement could be subject to a decision of the Assembly or of the Executive Committee under Article 18.7 concerning the distribution of the total amount available for compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention.

5.1.6 In view of the high degree of uncertainty as to the total amount of the established claims, both as regards many of the claims covered by the judgements of the Court of first instance and the Court of Appeal, and as regards the claims which might be presented at a later stage in the civil proceedings (although the 1971 Fund took the view that these claims were time-barred), the Executive Committee decided that payments to the claimants who had been awarded a specific amount in the judgements should be limited to 40% of the respective amounts so awarded.

5.1.7 It was recognised that the question of the 1971 Fund's invoking Articles 8 and 18.7 of the 1971 Fund Convention in respect of a final judgement rendered by a competent national court raised questions of great importance. For this reason, the Executive Committee instructed the Director to make a study of this issue, on the basis of the legal situation in a limited number of Member States.

5.2 UK Club's appeal

5.2.1 The UK Club appealed against the September 1997 decision referred to in paragraph 5.1.2 on the following grounds. Firstly, the court decision did not order the two persons who were directly liable for the incident, namely the master and the pilot, to pay claimants the compensation awarded by the judgement. Secondly, if the master and the pilot were insolvent, the parties which were subsidiarily liable, namely the shipowner and the Spanish State, would have to pay compensation to claimants. Thirdly, the court should have taken into account the fact that the UK Club had already paid compensation to victims of the *Aegean Sea* incident for a total of Pts 782 209 890 (£3 259 200). Fourthly, the Court should have also taken into account the fact that the Club had established a limitation fund in the amount of Pts 1 121 219 450 (£4 671 700) in accordance with Articles V.1 and V.3 of the 1969 Civil Liability Convention. Finally, the Court should have borne in mind the fact that a sufficient sum should have been set aside to enable other claimants who had reserved their right to take civil action to enforce their claim against the limitation fund (Article V.7 of the 1969 Civil Liability Convention).

5.2.2 The UK Club's appeal was rejected on 12 November 1997 by the judge who rendered the decision of 16 September 1997, except that the judge agreed that the order should be directed also to the master and the pilot.

5.2.3 The UK Club has appealed against the decision of 12 November 1997 to the Court of Appeal. There is no indication when a decision on this appeal will be rendered.

5.2.4 As a result of the UK Club's appeal, the court order referred to in paragraph 5.1.2 is not enforceable. In view of the situation, the Director decided to wait for the result of the appeal before making any payments.

6 Request by Repsol Petroleo SA for full payment

6.1 The owner of the cargo on board the *Aegean Sea*, Repsol Petroleo SA, which is also a contributor to the 1971 Fund, had presented several claims for compensation, mainly for the cost of clean-up operations and for removal of the remaining oil from the *Aegean Sea*. The major parts of these claims were agreed between Repsol, the UK Club and the 1971 Fund at Pts 257 866 297 (£1 031 000). The claims were admitted by the Courts for that amount. The 1971 Fund paid Repsol 40% of the agreed amount, ie Pts 103 146 519 (£413 000). The unpaid balance of these claims is therefore Pts 154 719 778 (£618 000).

6.2 In a letter to the Director, Repsol requested that the 1971 Fund should pay Repsol the balance of 60% which was outstanding on the agreed amounts, ie Pts 154 719 778 (£618 000), and pointed out that the judge had stated that established claims should be paid. Repsol referred to the fact that, five years after the incident, claimants with proven losses had still not been compensated. Repsol made the point that it was unreasonable to apply the pro-rating to a claimant who was also a contributor to the Fund and who had taken preventive measures resulting in major savings for the UK Club and the 1971 Fund and also argued that the pro-rating should not be applied automatically to all claims. Repsol drew attention to the fact that the 40% pro-rating had been applied in respect of both substantiated claims and of claimants who had not suffered any damage or who had presented inflated claims. Repsol stated that such an application would paralyse the compensation system to the prejudice of genuine claimants. Repsol expressed the view that the 1971 Fund should, by the use of experts or other appropriate means, have made a realistic estimate of the damage which would be considered reasonable and proven in order that the interests of the real victims should not be prejudiced. Repsol suggested that the 1971 Fund should be able to pay the uncontested parts of Repsol's claim in full against a guarantee by Repsol to adjust the amount payable at a later stage, should a proportional reduction be necessary.

6.3 In his reply to Repsol, the Director referred to the fact that Article 4.5 of the 1971 Fund Convention provided that if the total amount of the established claims exceeded 60 million SDR, all claims should be reduced pro rata and that there was no exception from the rule that all claimants must be treated equally.

6.4 The Executive Committee is invited to consider Repsol's request for full payment and, in particular, Repsol's proposal that payment should be made against a guarantee of the type indicated in paragraph 6.2.

7 Loans to claimants

7.1 The Executive Committee will recall that the Spanish delegation, in a note submitted to its 54th session (document 71FUND/EXC.54/8), informed the Committee of the Spanish Government's decision to set up a credit facility of Pts 10 000 million (£41.7 million) for aquaculture companies and of Pts 2 500 million (£10.4 million) for shellfish harvesters and fishermen. This credit facility was set up through a Spanish State-owned bank, Instituto de Crédito Oficial (ICO). According to the note the terms of the credit facility were as follows:

(a) The Instituto de Crédito Oficial, as the financial agency of the Spanish State, would make arrangements with one or several financial institutions in Galicia who would provide loans of up to Pts 12 500 million (£52 million). This figure could be increased by the Department of Economy of the Spanish Government.

(b) Beneficiaries: aquaculture companies and "Cofradías" which had suffered losses arising out of the *Aegean Sea* incident. The "Subdelegación del Gobierno en La Coruña" would establish the amount to be granted to each company and to each "Cofradía".

(c) Security: the Spanish claimants' right to compensation against the 1971 Fund or against other public or private bodies.

7.2 In September 1997, the lawyer representing a group of boat fishermen and shellfish harvesters informed the Director that the shellfish harvesters he represented had received loans of Pts 2 035 million (£8.5 million) from the ICO. The lawyer mentioned that the security required by the bank to grant the loans was the assignment of the right of compensation for the losses suffered as a result of the *Aegean Sea* incident which the shellfish harvesters held against the 1971 Fund or against any other person (private or public). The lawyer mentioned that these loans should be repaid by his clients to the ICO by 30 June 1999.

In November 1997 similar information was received from a lawyer representing a further group of fishermen and shellfish harvesters who have received a loan of Pts 208 million (£870 000) from the ICO. The Director has not received any information with regard to loans made by the ICO to other claimants.

7.3 The Director has been notified by a number of claimants that their rights to compensation payments from the 1971 Fund or any other entity has been assigned to the ICO. A corresponding notification has been received from the ICO.

7.4 The Director has not been informed of the criteria applied by the ICO to distribute the credit facilities between the individual claimants.

7.5 The Spanish Government has not yet been in a position to discuss this issue.

8 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 consider the issues relating to distribution of liability and recourse (paragraph 4);

(c) to consider the situation regarding the execution of the Court of Appeal's judgement (paragraph 5);

(d) to consider the request for full payment made by Repsol Petroleo SA (paragraph 6); and

(e) to give the Director such other instructions as the Committee may deem appropriate in respect of this incident.