



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1971

EXECUTIVE COMMITTEE  
58th session  
Agenda item 3

71FUND/EXC.58/3  
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## INCIDENTS INVOLVING THE 1971 FUND

### AEGEAN SEA

Note by the Director

**Summary:**

Information is given on the developments in respect of the Director's discussions with the Spanish Government on the important issues relating to distribution of liabilities, level of the 1971 Fund's payments, evidence of losses actually suffered by claimants, and time bar.

**Action to be taken:**

Consider the Director's proposals for steps to be taken in order to make progress in this case.

#### 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, 71FUND/EXC.55/4 paragraphs 3, 4 and 71FUND/EXC.57/3, paragraph 5).

1.2 This document deals with the developments which have taken place since the Executive Committee's 57th session. In particular, it reports on certain discussions which have been held with a representative of the Spanish Government and on the level of payments.

## **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 (£96 million). Compensation has been paid in respect of 836 claims for a total amount of Pts 1 627 million (£6.7 million). Out of this amount, the UK Club has paid Pts 782 million (£3.2 million) and the 1971 Fund Pts 845 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 (£96 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 (£104 million).

## **3 Distribution of liabilities and questions relating to recourse**

### **3.1 Background**

3.1.1 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.

3.1.2 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.

3.1.3 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).

3.1.4 The issues relating to the distribution of liabilities and recourse were discussed *inter alia* at the Executive Committee's 55th session. In this regard reference is made to the Director's analysis in paragraph 6.3 of document 71FUND/EXC.55/4 and to a note presented by the Spanish Delegation (document 71FUND/EXC.55/4.1) as well as to the Record of Decisions of that session (document 71FUND/EXC.55/19, paragraphs 3.3.1 - 3.3.31).

### 3.2 Consideration of this issue at the Executive Committee's 57th session

3.2.1 At its 57th session the Executive Committee noted that a meeting had been held in Madrid in November 1997 with the Director of the Minister's Office (Director del Gabinete de Ministro) of the Ministry of Public Administrations, who was 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. The Director informed the Committee that there had been a constructive exchange of views at the meeting concerning the main problems which had hampered progress. The Committee noted that the Director had invited the Spanish Government to provide the 1971 Fund with a note setting out any proposals which the Government might have as regards possible solutions, and that he had referred to the criteria which a claim must fulfil in order to be admissible for compensation and to the need for claimants to produce evidence to substantiate their losses.

3.2.2 The Director informed the Executive Committee that he had received a letter from the Spanish Ambassador in London dated 29 January 1998 dealing with a number of points in relation to the *Aegean Sea* incident. It was noted that, in the letter, the Ambassador had stated that in the Spanish Government's view it was not time to have further disputes between the 1971 Fund and Spain over pending issues and had emphasised that more could be achieved by being constructive. It was further noted that he had stated that this would require a collective effort to seek a global solution and that the 1971 Fund and the Spanish Government should make new efforts to work in the same way towards this end.

3.2.3 It was noted that, at the Committee's 55th session, the Director had expressed the view that 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 also noted that when payments were made to plaintiffs (claimants), the defendants who had made those 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% and the pilot/Spanish State would pay 50% of the awarded amounts.

3.2.4 It was also recalled that, at the Executive Committee's 55th session, the Spanish delegation had 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. It was noted that the Spanish delegation had 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.

3.2.5 It was recalled that, at the Committee's 55th session, the Spanish delegation had stated that it had obtained three legal opinions confirming the Government's interpretation of the judgement. It was also recalled that, in reply to a question, the delegation had stated that it would request authorisation to make these opinions available to other delegations.

3.2.6 The Director informed the Executive Committee that he had obtained an opinion from a former judge of the Spanish Supreme Court, Mr Jaime Santos Briz, on the interpretation of the judgements as regards the distribution of liabilities between the parties concerned.

3.2.7 The Committee noted that Mr Santos Briz had drawn the following conclusions in his opinion:

- (a) The claimants could request the execution of the Court of Appeal's judgement against the insurer and the 1971 Fund, and until they had been fully compensated, also against the pilot and against the Spanish State, which was subsidiarily civilly liable in relation to the pilot. Between them, the former (the insurer and the 1971 Fund) were liable for 50% of the damage and the State was liable for the other 50%.
- (b) The insurer and the 1971 Fund could bring recovery action against the State in the event that they had paid the 50% of the damage which should have fallen on the Spanish State.

- (c) The final distribution of the compensation payments between the various parties declared civilly liable after all recovery actions were carried out should be: the insurer and the 1971 Fund 50% of the total compensation for the damage, the State the remaining 50%.

3.2.8 The Spanish delegation drew attention to the fact that the Court of Appeal had upheld the judgement of the Court of first instance as regards the civil liabilities of the parties concerned and that the Spanish Courts had 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 was joint and several);
- (b) subsidiary liabilities: the owner of the ship and the Spanish State.

3.2.9 The Spanish delegation stated that the Spanish Government still considered that for many reasons it was inappropriate to maintain the question of recourse against the Spanish State and that the State's liability could be invoked only if the total amount of the established claims exceeded the amount to be paid by the UK Club and the 1971 Fund.

3.2.10 The Spanish delegation stated that the Spanish Government considered it factually wrong and unfair to address the question of recourse against the Spanish State on the following grounds:

- (a) 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 was clear in the Fund Convention, the negligence of a government was not a case of exoneration from liability for the 1971 Fund. Furthermore, the shipowner could not be exonerated from his liability due to the inclusion of the word "wholly" in Article III.2 of the Civil Liability Convention, 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 who were directly liable could take advantage of the existence of a fund supplementing their liability. In the *Aegean Sea* case, the Spanish State was only subsidiarily liable and therefore the UK Club and the Fund should make payments up to their limits.
- (b) 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 had 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 Spanish law, the international conventions were directly applicable when they had been published officially, without the necessity of implementing domestic rules (Article 96.1 of the Spanish Constitution) and there were no provisions in the Conventions applicable to the case which justified 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 had come to the conclusion that the first liabilities to be executed were the direct and joint liabilities (in the *Aegean Sea* case, the master, the pilot, the UK Club and the 1971 Fund) and that if compensation were not enough, the subsidiarily liability would be applicable in a later stage.
- (c) On 16 September 1997 the judge in charge of the execution of the judgement had 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. The Spanish State had 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 had appealed again. It was very unlikely that the judge would change his decision. It was clear in the light of the previous decision taken by the Spanish judge that the claimants were entitled to request the enforcement of the judgement awarding them compensation against the UK Club and the 1971 Fund first, and only if there was not

enough money according to the limits established by the 1969 Civil Liability Convention and the 1971 Fund Convention would the claimants be entitled to claim in excess of that amount against the Spanish State as being subsidiarily liable.

3.2.11 The Spanish delegation suggested that the question of possible recourse against the Spanish State should be referred to the Assembly since it was a very important question of policy. The delegation mentioned that the 1971 Fund had not taken recourse action against a State in any other case. The delegation pointed out 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 or because the State had no liability for the acts of the pilots, and that therefore 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 those groups. In view of this, the Spanish delegation considered that, in order to maintain uniformity and consistency, the Fund's policy on recourse action against Member States should not be made on a case by case basis.

3.2.12 The Spanish delegation observed that the Executive Committee had not previously considered in depth whether to challenge the shipowner's right to limit his liability. Furthermore, the Spanish delegation drew attention to the fact that the Committee was now considering a possible recourse action against the Spanish State on the basis of the pilot's 50% liability for the incident, whereas the Committee had not at previous sessions considered the possibility of recourse action against the shipowner on the basis of the master's liability for the incident, which was also 50%. The Spanish delegation requested further clarification in respect of the link between the shipowner's right to limit his liability and the decision of the Spanish Courts vis-à-vis the shipowner's subsidiary liability.

3.2.13 In reply, the Director reminded the Committee that an investigation into the cause of the incident had been carried out by a Commission set up by the Spanish administration. The Director stated that it appeared to him that the Spanish Government's decision at the time not to challenge the shipowner's right to limit his liability was based on the report of the Commission, as was the 1971 Fund's corresponding decision. The Director mentioned that the Spanish Courts had specifically held that the shipowner was entitled to limit his liability. The Director also made the point that the negligence of the master established by the Spanish Courts did not constitute fault or privity of the shipowner and that there were therefore no grounds for depriving the shipowner of his right to limitation.

3.2.14 Some delegations stated that, since the judgements rendered by the Spanish Courts appeared not to respect certain basic principles of the 1969 Civil Liability Convention, it was necessary to find solutions outside these judgements which would respect these basic principles as well as the criteria for the admissibility of claims laid down by the Assembly and the Executive Committee, in particular as regards the requirement that compensation could only be paid to claimants who produced evidence substantiating their losses. It was emphasised that it was the duty of all Member States to implement and apply the Conventions correctly. Attention was also drawn to the importance of the provisions in the Convention relating to time bar being respected, and concern was expressed in respect of those claimants who had reserved their rights to present their claims in civil proceedings at a later stage.

3.2.15 The Executive Committee decided to postpone its consideration of the issues concerning the distribution of liabilities and recourse to its 58th session, so as to enable delegations to study the various legal opinions obtained by the Spanish Government and the 1971 Fund.

3.2.16 One delegation drew attention to the fact that recourse action against the Spanish State might have to be brought before a certain date in order not to be time-barred.

3.2.17 In view of the fact that the 1971 Fund's policy in respect of recourse actions was well-established, the Committee did not consider it necessary to refer the issue concerning a possible recourse action against the Spanish State to the Assembly.

3.2.18 The Executive Committee noted that the Spanish Government and the 1971 Fund would simultaneously and as soon as possible exchange the legal opinions on these issues and that the Government would make available to the Fund the Government's technical assessments of the claims as soon as possible. The Committee stressed that it was important that this exchange took place at an early stage so as to enable the Spanish Government and the Fund to have meaningful discussions on these difficult issues well in advance of the Committee's next session. It was also emphasised that delegations

would need access to these opinions and assessments at an early stage so as to be able to prepare for that session (document 71FUND/EXC.57/15 paragraph 3.2.22)<sup><1></sup>.

3.2.19 The Director emphasised that it was essential that the opinions and assessments were made available early in February 1998, in order to give sufficient time to make progress by the Executive Committee's 58th session.

3.2.20 The Committee expressed serious concerns as to the way in which the 1969 Civil Liability Convention and the 1971 Fund Convention had been implemented in Spain and as to the fact that the judgements did not seem to respect the basic principles of these Conventions (document 71FUND/EXC.57/15, paragraph 3.2.24).

### 3.3 Establishment of Consultation Group

3.3.1 At its 57th session, the Committee considered it necessary to find a mechanism which would enable progress to be made towards solving the outstanding issues so that claimants could be paid as soon as possible, respecting the basic principles of the Conventions and the principles of the admissibility of claims laid down by the Assembly and the Executive Committee, including the requirement for the claimant to submit evidence to substantiate his losses.

3.3.2 To this end, the Committee decided to set up a Consultation Group to assist the Director in his search for solutions, within the framework of the principles set out in paragraph 3.2.20. The Committee appointed the following delegates as members of the Consultation Group (document 71FUND/EXC.57/15, paragraph 3.2.26):

Mr C Coppolani (France)  
Mr W Oosterveen (Netherlands)  
Professor H Tanikawa (Japan)  
Mr A Popp (Canada)  
Professor L S Chai (Republic of Korea)  
Captain A Saúl Bandala (Mexico)

3.3.3 The United Kingdom delegation mentioned that it always tried to find solutions which were in the interests of claimants. That delegation stated that it had hoped that the circumstances justifying the *Haven* Consultation Group were unique. The United Kingdom delegation expressed the view that the decision to set up a special group to advise in the *Aegean Sea* case showed that there was a need to consider the policy implications and to ensure consistency of treatment in the future. That delegation also made the point that setting up a consultation group to seek a global settlement in the *Aegean Sea* case showed an acceptance that this was the appropriate way to solve major compensation problems.

3.3.4 The Committee renewed the instructions to the Director, given at previous sessions, to investigate the possibility of reaching out-of-court settlements with claimants on the basis of the requirement for claimants to submit evidence to substantiate their losses (document 71FUND/EXC.57/15, paragraph 3.2.23).

## 4 Execution of the Court of Appeal's judgement and level of the 1971 Fund's payments

4.1 Under Spanish law, the Court of Appeal's judgement is not subject to appeal and that, consequently, the judgement is enforceable in respect of the claims for which specific amounts had been awarded in compensation.

4.2 The 1971 Fund was 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. This decision ordered the two defendants who had been held directly liable, namely the UK Club and the

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<1> The exchange of legal opinions has not yet taken place.

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.

4.3 The Executive Committee had decided, most recently at its 46th session, 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.

4.4 At the Executive Committee's 55th session, 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.

4.5 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 (document 71FUND/EXC.55/19, paragraph 3.3.29).

4.6 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.

4.7 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 (document 71FUND/EXC.55/19, paragraph 3.3.30).

4.8 At the Executive Committee's 57th session, it was noted that the Director had recently decided that, subject to any instructions to the contrary which the Committee might wish to give him, the 1971 Fund should pay immediately 40% of the specific amounts awarded by the courts to six claimants (less the provisional payments already made to two of these claimants)<sup><2></sup>.

4.9 At that session, the Spanish delegation stated that it considered that the claimants who had been awarded specific amounts in compensation should be paid in full. The delegation pointed out 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, and there was therefore not any risk of overpayment by the Fund, the caution exercised by the 1971 Fund in the application of Article 4.5 of the 1971 Fund Convention should not be maintained (document 71FUND/EXC.57/15, paragraph 3.2.37).

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<2> The 1971 Fund has offered payments of 40% of the awarded amounts to these six claimants. Two of the claimants have accepted the offer, and cheques totalling Pts 76 011 055 (£295 000) are available for collection at the Joint Claims Office in La Coruña.

## **5 Loans to claimants**

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.

## **6 Question of time bar**

6.1 The question of time-bar was addressed in some detail in document FUND/EXC.47/3. As instructed by the Executive Committee, the Director has studied this matter further. In a letter to the Spanish Government dated 4 October 1996, the Director presented the 1971 Fund's view on the time-bar issue. It has been agreed between the Spanish Government and the Director that this matter should be discussed between them before the Director's study is presented to the Executive Committee.

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

## **7 Second meeting with a representative of the Spanish Government**

7.1 At the Director's initiative a further meeting was held in Madrid on 6 April 1998 with the Director of the Minister's Office (Director del Gabinete del Ministro) of the Ministry of Public Administration. At the meeting there was again a constructive exchange of views concerning the main problems which have prevented progress from being made.

7.2 The Director explained to the representative of the Spanish Government that he had no mandate from the Executive Committee or from the Assembly of the 1971 Fund to make formal proposals to the Spanish Government but that the 1971 Fund organs had instructed him to investigate the possibility of making progress in respect of the *Aegean Sea* case. For this reason, the Director presented certain ideas on how, in his view, progress could be made on a number of issues. The Director stated that, if the Spanish Government reacted positively to his ideas, he would organise a meeting of the Consultation Group during the week of 20 April 1998 and, if supported by the group, submit a proposal to the Executive Committee's 58th session.

7.3 After the meeting, the representative of the Spanish Government informed the Director that he believed that progress could be made along the lines envisaged by the Director.

## **8 Director's proposals**

8.1 After discussions within the Consultation Group, and in the light of the positive reaction from the Spanish Government on the ideas presented by the Director at the recent meeting in Madrid, the Director considers that progress could be made along the following lines.



A. There is a disagreement between the 1971 Fund and the Spanish State concerning the distribution of liability, as set out in section 3 above. If the 1971 Fund wished to recover from the Spanish State any amount which the Fund has paid or might have to pay in excess of 50% of the total amount of the established claims, the Fund would have to bring an action for recovery against the Spanish State within one year of the judgement of the Court of Appeal, ie before 18 June 1998. It is suggested that the Spanish Government would make a binding commitment to extend this time period to the effect that the Spanish State would not invoke this time bar in any action for recovery which the 1971 Fund might bring against the Spanish State at a later stage. Such an agreement would have to be concluded well in advance of that date on the Spanish side. The agreement would have to be signed somebody who, under Spanish constitutional law, would have the capacity of binding the State in this regard. If such an agreement could be reached, it would not be necessary for the 1971 Fund to take legal action against the Spanish State before that date, and further discussions could be held between the Spanish State and the 1971 Fund on the issues involved, in the light of the various legal opinions which the parties have obtained. In order to enable the parties to hold such discussions, it is essential that they exchange their legal opinions on the distribution of liabilities in the very near future.

B. The Spanish State has accepted that, pursuant to the judgement of the Court of Appeal, the State is in any event liable to pay the total amount of the established claims in excess of 60 million SDR. If the State were to confirm, in a binding way, its obligations in this regard, including its acceptance that the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention is 60 million SDR, the Director takes the view that the 1971 Fund could increase its payments to 100% of the established claims, since there would no longer be any risk of overpayment by the 1971 Fund. This would mean that the 1971 Fund would be able to pay 100% of the amounts awarded by the Court of Appeal in respect of individual claims, as well as 100% of the amounts established in final out-of-court settlements. As regards those claims in respect of which payments of 40% have been made on the basis of provisional assessments (in particular those presented by fishermen and shellfish harvesters), the Director believes it would be necessary to consider, in the light of any new evidence, whether further payments could be made.

C. The Spanish Government has stated that the loans granted to fishermen and shellfish harvesters were based on evidence of the economic losses actually suffered by them. It is understood that the evidence consists of studies carried out by the Instituto de Oceanografía. The Director believes that it would be very important for the 1971 Fund to be given access to these studies. After an examination of these studies the Fund's experts would be in a position consider whether a new assessment of the losses actually suffered by these claimants could be made.

D. The Director considers it important that the Spanish Government presents its opinion as soon as possible in respect of the time bar issue. That would allow the Spanish Government and the Director to discuss this matter between them before the Director's study is presented to the Executive Committee.

E. It would also be important for the 1971 Fund to learn of the Spanish Government's assessment of the claims of those claimants who did not present any claims in the criminal court proceedings but reserved their right to bring their claims in a civil court action at a later stage and of those who presented "conciliation acts" in respect of their claims to the Civil Court in La Coruña.

8.2 The Director understands that the Spanish Government considered the Director's ideas favourably.

**9 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 3);
  - (c) to consider the situation regarding the level of payments (paragraph 4);
  - (d) to consider the Director's proposals (paragraph 8.1); and
  - (e) to give the Director such other instructions as the Committee may deem appropriate in respect of this incident.
-