



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
59th session
Agenda item 3

71FUND/EXC.59/4
20 October 1998

Original: ENGLISH

INCIDENTS INVOLVING THE 1971 FUND

AEGEAN SEA

Note by the Director

Summary:

It is understood that a number of claimants have brought legal action in the civil courts against the 1971 Fund, although the Fund has not been served with the actions. The question is whether these actions are time-barred. Legal opinions on the distribution of liabilities between the Spanish State and the 1971 Fund and on the time-bar issue have been obtained. An agreement has been concluded between the Spanish State and the 1971 Fund to the effect that the period for the Fund to take recovery action against the State is extended by one year. The Spanish State has not been able to give a formal undertaking on certain points, and as a result the 1971 Fund has not been able to increase payments from 40% to 100% in respect of certain claims.

Action to be taken:

Instruct the Director as to whether the 1971 Fund should invoke the defence of time-bar in the civil proceedings in La Coruña.

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 and 4, 71FUND/EXC.57/3, paragraph 5 and 71FUND/EXC.58/3, paragraph 4. The procedure for the execution of the judgement has not yet commenced.

1.2 This document deals with the developments which have taken place since the Executive Committee's 58th session. It reports on a number of claims recently submitted before a Civil Court in La Coruña by some claimants who had indicated in the criminal proceedings that they would present their claims at a later stage. The document refers to the question of whether these claims are time-barred and summarises legal opinions on the time-bar issue. The document also sets out the legal opinions obtained by the Parties on the distribution of liability between the Spanish State and the 1971 Fund.

2 Claims situation

2.1 Background

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 (£104 million)^{<1>}. Claims were also submitted to the Criminal Court in La Coruña, totalling some Pts 24 730 million (£104 million). These claims correspond to a great extent to those presented to the Joint Claims Office. Compensation has been paid in respect of 838 claims for a total amount of Pts 1 712 million (£7.7 million). Out of this amount, the UK Club has paid Pts 782 million (£3.2 million) and the 1971 Fund Pts 930 million (£4.5 million).

2.2 Level of payments

2.2.1 At its 36th session the Executive Committee took the view that, due to the high total amount of the claims presented to the Court, caution had to be exercised when making payments to claimants, in order to ensure that the provisions in Article 4.5 of the 1971 Fund Convention relating to equal treatment of victims were respected. The Committee instructed the Director that the 1971 Fund should make only partial payments in respect of accepted claims not exceeding 30%-40% of the amount approved (document FUND/EXC.36/10, paragraph 3.3.21). In the light of the uncertainty of the total amount of the claims, the Director decided to limit the payments to 25% of the established damage suffered by each claimant.

2.2.2 In the light of certain information provided by the Spanish authorities in October 1994, the Director informed the Executive Committee, at its 41st session, that in his view the uncertainty as to the total amount of the claims had been reduced. The Committee noted that, for this reason, the Director had decided to increase partial payments to 40% of the damage suffered by the respective claimants as assessed by the 1971 Fund on the basis of the advice of its experts at the time when a partial payment or additional partial payment was to be made. The Committee endorsed the Director's decision (document FUND/EXC.41/2, paragraphs 4.1.4 and 4.1.5).

2.3 Claims presented to the Civil Court

It is understood that approximately 60 claims have recently been brought against the shipowner, the UK Club and the 1971 Fund in the Civil Court of La Coruña by a number of companies and individuals, principally in the mariculture sector, who did not submit any claims in the criminal proceedings but who had indicated in those proceedings that they would present their claims at a later stage in civil proceedings. It is also understood that the total amount of these claims is Pts 22 000 million (£92 million). The 1971 Fund has not been notified of these claims.

<1> In this document the conversion of amounts in Spanish Pesetas into Pounds Sterling is made on the basis of the rate of exchange at 9 October 1998 (£1 = Pts 238), except in respect of the amounts paid by the UK Club and the 1971 Fund where conversion has been made at the rate of the date of payment.

3 Distribution of liabilities and questions relating to recourse

3.1 Background

3.1.1 The Criminal 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 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).

3.1.5 The issues relating to the distribution of liabilities and recourse were discussed further at the Executive Committee's 57th session. Reference is made to paragraphs 4.3 and 4.4 of document 71FUND/EXC.57/3 and to the Record of Decisions of that session (document 71FUND/EXC.57/15, paragraphs 3.2.6 - 3.2.23).

3.1.6 The respective positions of the 1971 Fund and the Spanish State concerning the distribution of liability can be summarised as follows:

The Director has expressed the view that a plaintiff (claimant) is entitled to request the enforcement of a judgement awarding him compensation against the pilot and, if the latter is unable to pay, against the State, or against the master/UK Club/1971 Fund (and subsidiarily against the shipowner). When payments are made to plaintiffs (claimants), the defendants who have 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.

The Spanish delegation has maintained that it was crucial to differentiate the level of liabilities of each party. The Spanish delegation has 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 Legal opinions presented by the Spanish Government

3.2.1 Two opinions on the interpretation of the judgements as regards the distribution of liabilities between the parties concerned were presented to the 1971 Fund by the Spanish Government in April 1998, namely by the Legal Department of the Ministry of Public Administrations and by a Spanish law firm (Cuatrecasas). These two opinions in Spanish are available to delegations on request.

3.2.2 The opinion by the Legal Department of the Ministry of Public Administrations is very brief. It states that the liability of the State is subsidiary in the event of insolvency on the part of the pilot (the shipowner similarly responding subsidiarily in the event of insolvency on the part of the master), as opposed to the direct liability declared for the UK Club and the 1971 Fund. In the opinion it is maintained that the claimants have a right to request enforcement directly against the UK Club and the 1971 Fund but not against the State, and that the Club and the Fund would therefore have to respond to each of the claims within the limits of their respective liabilities under the Conventions. It is stated in the opinion that, in the procedure for the enforcement of the judgements rendered in the criminal proceedings, the 1971 Fund could not raise the issue of the distribution of liabilities, since this issue had to be dealt with in later proceedings. In conclusion, the opinion states that in criminal proceedings the direct liability and the subsidiary liability represent a first and second degree liability, which imposes an obligation on those liable in the first degree, and that the victim can request enforcement against those subsidiarily liable only when the liability of those directly liable has been exhausted.

3.2.3 The opinion by the Cuatrecasas law firm deals mainly with the question of time-bar but makes a brief reference to the distribution of liabilities. It concludes that the liability of the UK Club and the 1971 Fund, within the limits of their respective liabilities under the Conventions, precedes that of the Spanish State. It is stated that the liability of the Spanish State is subsidiary to the pilot's liability and limited to half of the total amount of compensation.

3.3 Legal opinion obtained by the 1971 Fund

3.3.1 The 1971 Fund 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. This opinion was made available to the Spanish Government in April 1998.

3.3.2 Mr Santos Briz drew 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 (within their respective limits laid down in the Conventions), the State the remaining 50%.

3.3.3 Having been instructed to comment on the two opinions presented by the Spanish Government, Mr Santos Briz has confirmed his earlier opinion that, after all recovery actions between the liable parties have been carried out, the final distribution of the compensation payments between the various parties

declared civilly liable should be: the insurer and the 1971 Fund 50% (within their respective limits laid down in the Conventions), the State the remaining 50%.

4 Question of time bar

4.1 Relevant provisions in the Conventions

4.1.1 Actions against the shipowner, the insurer and the 1971 Fund become time-barred within three years of the date when the damage occurred, unless the claimant has taken certain legal steps. The issue is whether the various groups of claimants have taken the steps required under the 1971 Fund Convention before the expiry of that period.

4.1.2 The question of time-bar is governed by Article VIII of the 1969 Civil Liability Convention as regards the shipowner and his insurer and by Article 6.1 of the 1971 Fund Convention as regards the 1971 Fund. Articles 7.4 and 7.6 of the 1971 Fund Convention are also of interest in this regard. These Articles read:

1969 Civil Liability Convention

Article VIII

Rights of compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage. Where this incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence.

1971 Fund Convention

Article 6.1

Rights to compensation under Article 4 or indemnification under Article 5 shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 7, paragraph 6, within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage.

Article 7.4

Each Contracting State shall ensure that the Fund shall have the right to intervene as a party to any legal proceedings instituted in accordance with Article IX of the Liability Convention before a competent court of that State against the owner of a ship or his guarantor.

Article 7.6

Without prejudice to the provisions of paragraph 4, where an action under the Liability Convention for compensation for pollution damage has been brought against an owner or his guarantor before a competent Court in a Contracting State, each party to the proceedings shall be entitled under the national law of that State to notify the Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the Court seized and in such time and in such a manner that the Fund has in fact been in a position effectively to intervene as a party to the proceedings, any judgement rendered by the Court in such proceedings shall, after it has become final and enforceable in the State where the judgement was given, become binding upon the Fund in the sense that the facts and findings in that judgement may not be disputed by the Fund even if the Fund has not actually intervened in the proceedings.

4.1.3 The question of time-bar was considered by the Executive Committee at its 47th session on the basis of a note presented by the Director (document FUND/EXC.47/3). As instructed by the Committee, the Director studied the 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. In April 1998 the Spanish Government made available to the 1971 Fund two opinions on this issue. An opinion obtained by the 1971 Fund from Mr Jaime Santos Briz was made available to the Spanish Government on 2 October 1998.

4.2 Legal opinions presented by the Spanish Government

4.2.1 Two opinions on the question of time-bar were presented to the 1971 Fund by the Spanish Government, one by the Legal Department of the Ministry of Public Administrations and one by the Cuatrecasas law firm. These two opinions in Spanish are available to delegations on request.

4.2.2 The opinion of the Legal Department of the Ministry of Public Administrations notes that the provisions on time limits are the same in both the 1969 Civil Liability Convention and the 1971 Fund Convention. However, the Spanish translation of Article 6.1 of the 1971 Fund Convention uses the term 'caducidad' (caducity) and the translation of Article VIII of the 1969 Civil Liability Convention the term 'prescripción' (prescription). It is stated that it is nevertheless necessary to arrive at a uniform interpretation. The opinion makes the point that in Spanish law in relation to civil liability the concept of 'prescripción' is applied, whereas the concept of 'caducidad' applies in respect of so-called 'derechos potestativos' (optional rights)^{<2>}. The Conventions establish a system of direct liability, and for this reason the period for exercising the right is, in the view of the authors of the opinion, one of 'prescripción'. It is pointed out that, pursuant to Articles 111 and 114 of the Law of Criminal Procedure, once criminal proceedings have been brought, the period for 'prescripción' does not start to run until the date when the criminal proceedings are brought to an end, and it is obvious, therefore, that persons who have reserved their right to bring actions before a civil court are not time-barred. It is stated that Article 6 of the 1971 Fund Convention cannot have precedence over Articles 111 and 114 of the Law on Criminal Procedure.

4.2.3 The opinion of the Legal Department of the Ministry of Public Administrations concludes that, since the system of direct liability established by the 1969 Civil Liability Convention and the 1971 Fund Convention has to be interpreted and applied by the Spanish Courts in accordance with other provisions of domestic law, the claims for compensation submitted by those claimants who in the criminal proceedings reserved their right to bring civil actions at a later stage are not, under Spanish law, time barred.

4.2.4 The opinion of the Cuatrecasas law firm addresses the issue of the correct interpretation of Article VIII of the 1969 Civil Liability Convention and Article 6.1 of the 1971 Fund Convention. The opinion makes comments on the texts of these Conventions in their authentic versions, as well as on the Protocols of 1984 and 1992. Reference is made to the Vienna Convention on the Law of Treaties, and in particular the basic rule on the interpretation of the text of a treaty and the rules on the interpretation of treaties in case where there is more than one authentic text. The opinion states that the texts of both Conventions have the appearance of 'caducidad' (caducity) because they refer to rights, they require legal action and they establish a time period and determine the extinguishment of rights. The opinion also states that the present case does not deal with the possibility or right to change a legal situation, but the question of the extinguishment of rights due to an objective reason, when the right is not exercised by the person entitled to do so. It is stated that the right to modify a legal situation is a typical case of 'caducidad' (caducity). The opinion concludes that this is not the case in the situation under consideration.

4.2.5 The opinion makes the point that the second time period in these Articles, that of six years, has a clear appearance of 'caducidad' (caducity), whereas the character of the three-year period is more doubtful. It is pointed out that the date of the damage is not defined in the Conventions and that it appears therefore that this issue is left to national law. For this reason, it is maintained in the opinion that it is left to national law to deal with three fundamental issues:

- (i) the possibility of extending or interrupting the three-year period;

<2> ie the possibility granted by law to one of the parties to modify a legal situation through an act which none of the other parties can prevent, for example the cancelling of a contract.

- (ii) the possibility of considering that the right to claim has been exercised through the criminal proceedings in accordance with national law; and
- (iii) the possibility of fulfilling the requirement under Article VIII of the Civil Liability Convention through 'class action' which determines the 1971 Fund's liability.

4.2.6 The opinion also addresses the point made by the 1971 Fund that the criminal actions were made against the master and the pilot and were therefore not actions under the Conventions. The opinion concludes that the actions against the 1971 Fund are not time barred for the following reasons:

- (i) the actions had been brought within the period of six years of the incident, and the period of three years from the date of the damage had not been exceeded, since the determination of that date was to be made in accordance with domestic law;
- (ii) the criminal proceedings could be considered as having been brought also against the persons who were strictly liable under the Conventions and the civil proceedings could not be pursued until the criminal proceedings had been concluded;
- (iii) the commencement of criminal proceedings fulfilled the requirements of Article VIII of the Civil Liability Convention. Since that Convention did not enter into further detail, it must be assumed that this question should be referred to national law.

4.3 Legal opinion obtained by the 1971 Fund

4.3.1 The Director instructed Mr Jaime Santos Briz to study the time bar issue and to give his views on the legal opinions submitted by the Spanish Government. Mr Santos Briz was also instructed to give an opinion on the basic issue of whether the various claimants have taken the steps required under the 1971 Fund Convention before the expiry of the three-year period.

4.3.2 In his opinion Mr Santos Briz expresses the view that, in accordance with the authentic texts of the 1969 Civil Liability Convention and the 1971 Fund Convention, the terms in English 'shall be extinguished' and in French 's'éteignent' refer to the extinguishment of rights and is therefore a case of 'caducidad convencional'^{<3>} and not a case of 'prescripción' (prescription). Mr Santos Briz points out that the main difference between 'caducidad' (caducity) and 'prescripción' (prescription) is that caducity (or extinction of rights) cannot be interrupted whereas prescription can be. In his view 'caducity of a right' means that the right becomes extinct with the expiry of a fixed term, in the present case the period laid down in the applicable Conventions, unless the right is exercised within its lifetime.

4.3.3 Mr Santos Briz also considers the effect which the criminal proceedings brought as a result of the *Aegean Sea* incident have on the rights of those claimants who reserved their civil actions. In his view, criminal proceedings do not interrupt 'caducidad' (caducity). He makes the point that, since conciliation acts are no longer a prerequisite to taking civil action, such acts do not interrupt time periods relating to 'caducidad'. On this point he refers to a judgement by the Spanish Supreme Court of 1990.

4.3.4 In the light of his general observations, Mr Santos Briz' conclusions in respect of the following three groups of claimants can be summarised as follows:

- (i) Claimants who presented their claims only to the Joint Claims Office but not to the Court.

These claimants have neither brought legal action against the 1971 Fund within the prescribed period, nor notified the 1971 Fund of an action for compensation against the shipowner or the UK Club, but have only made an extrajudicial notification to the Joint Claims Office. These claims should be considered extinguished.

- (ii) Claimants who filed criminal accusations against four individuals but did not submit claims for compensation in the criminal proceedings and only reserved their right to claim compensation in future proceedings (ie in civil proceedings to be brought at a later date after completion of the criminal proceedings).

<3> Caducity agreed in an international convention.

Since criminal proceedings do not have the effect of interrupting or suspending the three year time-bar period laid down in the Conventions which relates to caducity, these claims should be considered extinguished.

- (iii) Claimants who neither took legal action against the 1971 Fund, nor notified the Fund of an action for compensation against the shipowner or the insurer, but who only presented conciliation acts in respect of their claims to the Civil Court in La Coruña.

Since, according to recent judgements of the Supreme Court, conciliation acts do not have the effect of interrupting a period relating to the extinction of rights ('caducidad'), these claims are extinguished.

5 Defence of time-bar in civil proceedings

5.1 As mentioned above (paragraph 2.3), the 1971 Fund understands that a number of claimants have brought actions against *inter alia* the 1971 Fund in the Civil Court of La Coruña. The opinions obtained by the Spanish Government conclude that these claims are not time-barred, whereas the opinions obtained by the 1971 Fund reach the opposite conclusion. In the light of these differing views, the Director considers that the very complex issues should be studied further.

5.2 It is expected that these actions will be served on the 1971 Fund in the near future. Once having been served, the 1971 Fund must present all its defences within a short period of time, including any defence to the effect that the claims are time-barred, and it is not possible to raise that defence at a later stage. For this reason, the Executive Committee is invited to give the Director instructions as to whether this defence should be made. The 1971 Fund could withdraw such a defence at a later stage, if appropriate.

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

6.1 If a claimant has not proved the quantum of the damage suffered, the quantification may, under Spanish law, be deferred to the procedure for the execution of the judgement. In such a 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, the Criminal Court of first instance decided that many claims should be quantified during the procedure for the execution of the judgement, and the Court of Appeal endorsed the position taken by the Court of first instance in this regard.

6.2 The Criminal Court of first instance and the Court of Appeal considered the evidence presented by many claimants to be insufficient to substantiate the amount of the losses suffered. The total of the claims which the Courts found substantiated by acceptable evidence was about Pts 840 million (£3.3 million). All but two of these claims related to clean-up operations or preventive measures. All but two claims in the fishery sector were referred to the procedure for the execution of the judgement.

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

6.4 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 1971 Fund, to pay the claimants the amounts of compensation awarded by the judgement as modified by the Court of Appeal, and the claimants were invited to submit evidence to substantiate their losses.

6.5 The Executive Committee has 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.

6.6 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.

6.7 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).

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

6.9 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)⁴⁴ (document 71FUND/EXC.57/15, paragraph 3.2.26).

6.10 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).

7 Loans to claimants

7.1 In a note submitted to its 54th session (document 71FUND/EXC.54/8), the Spanish delegation informed the Executive Committee of the Spanish Government's decision to provide 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:

<4> The 1971 Fund has offered payments of 40% of the awarded amounts to these six claimants. Four of the claimants have accepted the offer, and payments totalling Pts 92 963 661 (£390 600) have been made to them.

- (a) ICO, 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 The Director has been notified by the Spanish Consul in London of some of the loans granted by ICO to various claimants and of the transfer of rights from these claimants to ICO.

7.3 The Director has been informed that the Spanish Government has recently decided to increase the credit facility up to a maximum of Pts 22 500 million (£94 million).

8 Search for a mechanism for progress towards solving the outstanding issues

8.1 Consideration at the Executive Committee's 57th session

At its 57th session the Executive Committee considered that it was 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 a claimant to submit evidence to substantiate his losses. To this end, and within the framework of these principles, a Consultation Group was set up to assist the Director in his search for solutions (document 71FUND/EXC.57/15, paragraph 3.2.25).

8.2 Meeting between the Spanish Government and the Director in April 1998

8.2.1 At the Director's initiative, a 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 which there was a constructive exchange of views concerning the main problems which had prevented progress from being made.

8.2.2 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. The Director presented certain ideas on how, in his view, progress could be made on a number of issues. 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.

8.3 Consideration at the Executive Committee's 58th session

8.3.1 The Director informed the Committee at its 58th session that, in the light of the positive reaction from the Spanish Government on the ideas presented by him at the recent meeting in Madrid, and after discussions within the Consultation Group, the Director considered that progress could be made along the lines set out in paragraph 3.2.9 of document 71FUND/EXC.58/15. With regard to the proposal made by the Director and the views of the Spanish Government, reference is made to document 71FUND/EXC.58/15, paragraphs 3.2.9 to 3.2.19.

8.3.2 At its 58th session, the Executive Committee decided that it was necessary for the 1971 Fund to take measures to protect its right to take recovery action against the Spanish State unless the disagreement between the Spanish State and the Fund as to the distribution of liability were solved out of court. For this reason, the Director was instructed to seek to obtain, well in advance of 18 June 1998 (the date of expiry

of a period of one year from the date of the Court of Appeal's judgement), a binding commitment by the Spanish Government to the effect that, if the 1971 Fund were to bring a recovery action against the Spanish State, the Spanish State would not invoke the time bar. The Committee emphasised that such an agreement would have to be signed by somebody who, under Spanish constitutional law, would have the capacity of binding the State in this regard. The Committee further instructed the Director that, should such a commitment not be given by the Government, the Fund should take recovery action against the Spanish State by 18 June 1998 in order to preserve the Fund's rights, pending a solution of the disagreement between the State and the Fund referred to above (document 71FUND/EXC.58/15, paragraph 3.2.21).

8.3.3 The Executive Committee instructed the Director to study, with the assistance of the 1971 Fund's legal experts, the legal opinions presented by the Spanish Government on the distribution of liabilities, and to report his findings to the Executive Committee's next session.

8.3.4 The Executive Committee noted that the Spanish delegation had stated that the Spanish Government accepted that the Spanish State was in any event liable to pay the total amount of the established claims in excess of the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention, namely 60 million SDR. The Committee noted that the Spanish State was prepared to give a formal binding acceptance on these two points. The Committee considered that, if such an acceptance was given, there would be no risk of overpayment by the 1971 Fund. The Committee decided therefore that, subject to such an acceptance being given, the 1971 Fund should 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 (to the extent that these claims had not already been paid) (document 71FUND/EXC.58/15, paragraph 3.2.23).

8.3.5 The Executive Committee noted with satisfaction that the Spanish Government would make available to the 1971 Fund in the near future the assessments made by the Instituto Oceanográfico on behalf of the Spanish authorities of the damage suffered by fishermen and shellfish harvesters. The Director was instructed to examine these assessments with the assistance of the 1971 Fund's technical experts and consider whether a new assessment of the losses actually suffered by these claimants could be made by the 1971 Fund. He was instructed to consider also whether, in the light of the assessments by the Instituto Oceanográfico, further payments could be made to these claimants. It was emphasised however that, as held by the Spanish Courts, each claimant had to substantiate the losses actually suffered by him and that evidence of the general impact of the incident on the fishing industry as a whole was not sufficient (document 71FUND/EXC.58/15, paragraph 3.2.24).

8.4 Developments since the Executive Committee's 58th session

8.4.1 On 2 June 1998, the Spanish Government informed the Director that, for constitutional reasons, the Spanish Government was only prepared to grant a one year extension of the period for bringing recourse action by the 1971 Fund against the Spanish State. The Spanish Government stated that it was not prepared to make a written commitment on the points referred to in the Executive Committee's Record of Decisions as set out in paragraph 8.3.4 above, namely that the Spanish State would in any event pay any amount of the claims arising out of the *Aegean Sea* incident that exceeded 60 million SDR and that the maximum amount of compensation available under the 1969 Civil Liability Convention and the 1971 Fund Convention was 60 million SDR.

8.4.2 The Director informed the members of the Consultation Group of the Spanish Government's position.

8.4.3 On 12 June 1998, the Spanish Ambassador in London and the Director signed an agreement under which the Spanish State undertook not to invoke the time bar if the competent bodies of the Fund were to decide to take recourse action against the Spanish State to recover 50% of the amounts paid by the Fund, provided that such an action was taken within one year of the date of the agreement. On its part, the 1971 Fund undertook not to bring legal action against the State within the first eleven months of the date of the agreement.

8.4.4 The assessments made by the Instituto Oceanográfico referred to in paragraph 8.3.5 have not yet been made available to the 1971 Fund.

8.4.5 On 2 October 1998 a meeting took place between the Director of the Office of the Ministry of Public Administrations (Director del Gabinete del Ministro) and the Director of the 1971 Fund. During the meeting there was a constructive exchange of views. Further discussions will take place between representatives of the Spanish Government, the Consultation Group and the Director. The outcome of these discussions will be reported to the Executive Committee.

8.4.6 The Director believes that it is important that further discussions are held after the Executive Committee's session between the Spanish Government and the 1971 Fund so as to enable progress to be made towards solving outstanding issues.

9 Request by Repsol Petroleo SA for full payment

9.1 Repsol Petroleo SA (Repsol), the owner of the cargo on board the *Aegean Sea*, presented several claims for compensation, mainly for the cost of clean-up operations and the removal of the oil remaining in the *Aegean Sea*. The major parts of the claim were agreed between Repsol, the UK Club and the 1971 Fund at Pts 258 million (£1 million), and the claims were admitted by the Courts for that amount. The 1971 Fund paid Repsol 40% of the agreed amount, and the unpaid balance amounted to Pts 155 million (£620 000).

9.2 At its 58th session, the Executive Committee decided that the 1971 Fund could pay Repsol's claim in full if Repsol furnished the Fund with a bank guarantee against overpayment, in the event that the claims ultimately had to be pro rated, provided that the bank guarantee, in the view of the Director and the Fund's legal advisers, gave the Fund adequate protection. Reference was made to the Committee's decision in respect of two claimants in Italy in the *Haven* case (document FUND/EXC.47/14, paragraphs 3.1.16 - 3.1.18). The Committee took the view that all claimants should be treated equally in this regard (document 71FUND/EXC.57/15, paragraph 3.2.51).

9.3 The experts engaged by the UK Club and the 1971 Fund have assessed the outstanding part of the claim submitted by Repsol for the cost of the removal of the oil remaining in the *Aegean Sea* at Pts 5 726 116 (£24 000) and 40% of this amount, ie Pts 2 290 446 (£9 600), has been paid by the 1971 Fund.

9.4 Following the decision of the Executive Committee at its 57th session, Repsol has provided the 1971 Fund with a bank guarantee against overpayment which, in the view of the Director and the 1971 Fund's legal advisers, gives the Fund adequate protection. The 1971 Fund has paid Repsol Pts 158 155 448 (£664 500), ie the balance of 60% of the established losses.

10 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document;
 - (b) to consider the issue relating to time-bar and to give the Director instructions as to whether the 1971 Fund should invoke the defence of time-bar in the civil proceedings in *La Coruña* (paragraph 5); and
 - (c) to give the Director such other instructions as the Committee may deem appropriate in respect of this incident.
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