INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

ADMINISTRATIVE COUNCIL
14th session
Agenda item 4

71FUND/AC.14/4
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RECORD OF DECISIONS OF THE FOURTEENTH SESSION OF THE ADMINISTRATIVE COUNCIL

(held on 24 and 28 May 2004)

Acting Chairman: Mr J Wren (United Kingdom)

Opening of the session

In the absence of the Administrative Council's Chairman, Captain Raja Malik (Malaysia), the session was opened by the Director.

Election of acting Chairman

The Administrative Council elected Mr John Wren (United Kingdom) as Chairman for the session and as Vice-Chairman of the Council.

1 Adoption of the Agenda

The Administrative Council adopted the Agenda as contained in document 71FUND/AC.14/1.

2 Participation

2.1 The following States having at any time been Members of the 1971 Fund were present:

Albania
Algeria
Antigua and Barbuda
Australia
Bahamas
Bahrain
Belgium
Cameroon
Canada
China (Hong Kong Special Administrative Region)
Colombia
Cyprus
Denmark
Finland
France
Germany
Ghana
Greece
India
Ireland
Italy
Japan
Liberia
Malta
Marshall Islands
Mexico
Morocco
Netherlands
Nigeria
Norway
Panama
Poland
Portugal
Republic of Korea
Russian Federation
Spain
Sweden
United Arab Emirates
United Kingdom
Vanuatu
Venezuela

2.2 The following States which had not at any time been Members of the 1971 Fund were represented as observers:

Argentina	Iran (Islamic Republic of)	Singapore
Chile	Peru	Tanzania
Congo	Philippines	Turkey
Ecuador	Saudi Arabia	Uruguay
Grenada		

2.3 The following intergovernmental organisations and international non-governmental organisations were represented as observers:

Intergovernmental organisations

European Commission
International Maritime Organization (IMO)
International Oil Pollution Compensation Fund, 1992

International non-governmental organisations:

BIMCO
Comité Maritime International (CMI)
Federation of European Tank Storage Associations (FETSA)
Friends of the Earth International (FOEI)
International Association of Independent Tanker Owners (INTERTANKO)
International Chamber of Shipping (ICS)
International Group of P&I Clubs
International Salvage Union (ISU)
International Tanker Owners Pollution Federation Ltd (ITOPF)
Oil Companies International Marine Forum (OCIMF)

3 Incidents involving the 1971 Fund

3.1 *Nissos Amorgos*

3.1.1 The Administrative Council took note of documents 71FUND/AC.14/2 and 71FUND/AC.14/2.Add.1 submitted by the Director concerning the *Nissos Amorgos* incident.

Criticism of the 1971 Fund

3.1.2 The Administrative Council recalled that, at its 13th session in February 2004, the Venezuelan delegation had read out a statement in which were included criticisms on a number of points in respect of the 1971 Fund's handling of the legal actions pending before the Venezuelan courts in relation to the *Nissos Amorgos* incident and that this statement was reproduced in the Annex to the Record of Decisions of that session. It was also recalled that the Director's observations on certain points raised in that statement and the statements by some delegations were also reflected in the Record of Decisions (document 71FUND/AC.13/8).

3.1.3 The Council noted that the main points made in the statement by the Venezuelan delegation could be summarised as follows:

- It was not true, as alleged by the 1971 Fund, that the delays in the payment of the compensation were attributable to the Venezuelan courts.

- The 1971 Fund had requested the 'avocamiento'[<1>] based on the consolidation of the actions in court and when the Supreme Court had decided in its favour in a judgement dated 20 November 2002, the Fund had appealed against the judgement on three occasions.

- An appeal lodged by the Fund in the Supreme Court on 26 March 2003 had been drafted in an impolite way against the judges of the Court and showed an obvious willingness to act in defence of other Venezuelan Public Institutions.

- There seemed to exist an attitude of threat from the Fund continuously intending to file pleadings against Venezuela.

- Although the criminal action against the master had become time-barred on 28 August 2001, Assuranceföreningen Gard (Gard Club), as the party responsible for the master's defence, had not requested a declaration to that effect from the Venezuelan Courts even though more than two years had passed since that date. If the criminal case were time-barred, the subsidiary civil action, in which the 1971 Fund had been included as co-defendant, would be left without any legal effect.

Opinion by the former Venezuelan Supreme Court Judge, Dr Josefina Calcaño de Temeltas

3.1.4 The Council noted that, in view of the criticisms made in the statement by the Venezuelan delegation at the February 2004 session, the Director had instructed a former Venezuelan Supreme Court Judge, Dr Josefina Calcaño de Temeltas, to review the legal proceedings that had taken place in the Venezuelan Courts since the incident and to give her opinion on the validity of the criticisms made by the Venezuelan delegation in that statement. The Council also noted that Dr Calcaño had been given access to all the documents submitted by the parties before the Courts in Venezuela and a number of documents presented to the Administrative Council as well as the relevant IOPC Funds Annual Reports.

3.1.5 The Council further noted that, as a result of her examination, Dr Calcaño had submitted a report dated 18 May 2004, reproduced in the Annex to document 71FUND/AC.14/2/Add.1, in which she had dealt with all the criticisms set out in the above-mentioned statement and had concluded that all criticisms were absolutely unfounded.

3.1.6 The Council noted that Dr Calcaño had concluded in particular that there was strong evidence in the court file that the main reason for the delays in the court proceedings was the repeated pleadings and appeals submitted by lawyers representing some of the claimants. The Council also noted that she had concluded that there had been a lack of speed in the Venezuelan courts, including the Supreme Court, dealing with the numerous proceedings. The Council further noted that Dr Calcaño had concluded that the measures taken by the 1971 Fund in relation to the *Nissos Amorgos* incident had been correct and totally in accordance with the instruments which governed the Organisation and its operations and in strict compliance with the policy of compensation and recourse laid down by the Governments of the Member States.

Legal proceedings

3.1.7 The Council recalled that the incident had given rise to legal proceedings in a Criminal Court in Cabimas, Civil Courts in Caracas and Maracaibo, the Criminal Court of Appeal in Maracaibo and the Supreme Court, and that a number of claims had been settled out of court and the corresponding legal actions withdrawn.

[<1>] Under Venezuelan law, in exceptional circumstances, the Supreme Court may assume jurisdiction, 'avocamiento', and decide on the merits of a case. Such exceptional circumstances are defined as those which directly affect the 'public interest and social order' or where it is necessary to re-establish order in the judicial process because of the great importance of the case. If the request of 'avocamiento' is granted, the Supreme Court would act as a court of first instance and its judgement would be final.

Criminal proceedings

3.1.8 It was recalled that criminal proceedings had been brought against the master and that in his pleadings to the Criminal Court the master had maintained that the damage had been substantially caused by negligence imputable to the Republic of Venezuela. It was also recalled that the 1971 Fund had submitted pleadings to the Court maintaining that the damage had been principally caused by negligence imputable to the Republic of Venezuela.

3.1.9 It was recalled that in a judgement rendered in May 2000, the Criminal Court had dismissed the arguments made by the master holding him liable for the damage arising as a result of the incident and that the master had appealed against the judgement before the Criminal Court of Appeal in Maracaibo. It was also recalled that the 1971 Fund had presented pleadings to the Court of Appeal arguing that the evidence presented had not been sufficiently considered by the Court.

3.1.10 The Council recalled that in a decision rendered in September 2000 the Court of Appeal had decided not to consider the appeal and to order the Court of Cabimas to send the file to the Supreme Court (Sala Politico-Administrativa) due to the fact that the Supreme Court was considering a request for 'avocamiento', the decision, in the view of the Fund's lawyers, appearing to imply that the judgement of the Criminal Court of Cabimas was null and void. It was noted that the criminal file remained before the Supreme Court, that the master had submitted several requests to the Supreme Court for the file to be returned to the Maracaibo Court of Appeal to allow the proceedings to continue but that there had been no response to the requests.

3.1.11 The Council noted that the 1971 Fund's lawyer had advised the Fund that in accordance with Venezuelan procedural law the criminal action against the master was time-barred since under Venezuelan law a final sentence would have to be delivered within four and half years from the date of the criminal act and that as a result the claim for compensation against the master, the shipowner and the Gard Club, subsidiary to the criminal action, was of no effect.

Claims for compensation in court

3.1.12 The Council noted the situation in respect of the significant claims for compensation pending before the Courts in Venezuela as follows:

Claimant	**Category**	**Claimed amount US$**	**Status of claim**
Republic of Venezuela	Environmental damage	$60 250 396	Pending in criminal court
Republic of Venezuela	Environmental damage	$60 250 396	Pending in civil court
Three fish processors	Loss of income	$ 30 000 000	Pending in civil court No loss proven
Total		**$150 500 792**	
		(£83.3 million)	

3.1.13 The Council recalled that at its July 2003 session it had reiterated the 1971 Fund's position that the components of the claims by the Republic of Venezuela did not relate to pollution damage falling within the scope of the 1969 Civil Liability Convention and the 1971 Fund Convention and that these claims should therefore be treated as not admissible.

Settled claims

3.1.14 The Council noted that the following claims had been settled out of court:

Claimant	Category	Settlement amount Bs	Settlement amount US$
Petroleos de Venezuela S.A. (PDVSA)	Clean up		$8 364 223
ICLAM	Preventive measures	Bs15 268 867	
Shrimp fishermen and processors	Loss of income		$16 033 389
Other claims [2]	Property damage and loss of income	Bs289 000 000	
Total		Bs304 268 867 (£85 000)	**$24 397 612 (£13.6 million)**

3.1.15 It was noted that two claims submitted by ICLAM[3] in the amount of $36 000 (£19 000) had been settled but that they had not been withdrawn from the Courts.

Maximum amount available for compensation

3.1.16 It was recalled that the shipowner had provided a guarantee to the Cabimas Court for Bs3 473 million (£1 million), being the limitation amount applicable to the *Nissos Amorgos* under the 1969 Civil Liability Convention. It was also recalled that on 27 June 1997 the Cabimas Court had issued an order providing that the maximum amount payable under the 1969 Civil Liability Convention and the 1971 Fund Convention, namely 60 million SDR, corresponded to Bs39 738 million or $83 221 800 (£46 million).

Level of payments

3.1.17 It was recalled that, at its 4th session held in March 2001, the Administrative Council had increased the level of payments from 25% to 40% of the actual loss or damage suffered by individual claimants, authorising also the Director to increase the level of the 1971 Fund's payments up to 70% when the 1971 Fund's total exposure in respect of the incident fell below $100 million (document 71FUND/AC.4/ES.7/6, paragraph 3.3.9).

3.1.18 It was recalled that at its 11th session in July 2003 the Administrative Council, taking into account the exceptional circumstances in the *Nissos Amorgos* case, and in particular that the claims by the Republic of Venezuela were duplicated, had decided to increase the 1971 Fund's level of payments from 40% to 65% of the loss or damage actually suffered by each claimant. It was also recalled that the Council had further stated that in the unlikely event that the Venezuelan Courts were to accept both claims by the Republic, the 1971 Fund would nevertheless disregard one of them (document 71FUND/AC.11/3, paragraphs 3.25 and 3.26). It was further recalled that the Council had also decided that the authorisation given to the Director at its 4th session should be maintained, namely that he was authorised to increase the level of payments to 70% when the 1971 Fund's total exposure fell below $100 million.

3.1.19 It was recalled that the Council had at previous sessions stated that if both claims by the Republic of Venezuela were withdrawn or not pursued to the detriment of other claimants, the 1971 Fund would be able to increase its level of payments to 100%.

3.1.20 It was recalled that, at the July 2003 session, a number of delegations had expressed concerns that the level of payments would remain at 65% for a considerable period of time unless a solution

[2] Paid in full by the Gard Club.
[3] Instituto para el Control y la Conservación de la Cuenca del Lago de Maracaibo

could be found to the outstanding claims. It was recalled that it had been suggested that the 1971 Fund could not do more to assist claimants and that it was for the Venezuelan Government to take the necessary steps to resolve the problems. It was also recalled that it had been suggested that the Venezuelan Government could consider *inter alia* to undertake not to pursue its claims unless this would not be detrimental to other claimants, ie to 'stand last in the queue' as some other Governments had done in previous incidents.

3.1.21 The Council also recalled that further to the Council's decision to increase the level of payments, the 1971 Fund had paid an additional $4 008 347 (£2.1 million) in respect of the claim for loss of income of the shrimp fishermen and processors referred to in paragraph 3.1.12 and $2 091 056 (£1.1 million) to PDVSA.

Search for a global solution

Consideration at the Administrative Council's February 2004 session

3.1.22 The Council recalled that representatives of some 2 000 shrimp fishermen of Lake Maracaibo had travelled to London to attend the 13th session of the Administrative Council in February 2004 with the intention of expressing to the Director their deep concern at the lack of progress in resolving the outstanding issues that were preventing the 1971 Fund from increasing the level of payments and thereby not allowing a payment in full of their settled claim.

3.1.23 It was recalled that, mindful of the concerns expressed by a number of delegations and of the lack of developments with regard to the withdrawal of the claims by the Republic of Venezuela, the Director had, at the February 2004 session, expressed the view that the Fund should approach the Venezuelan authorities and other interested parties to search for a global solution of all significant outstanding issues with a view to presenting a proposal to the Administrative Council at the earliest possible date.

3.1.24 The Council recalled that it had noted at that session that a difference of opinion existed between the parties as to the cause of the incident. It was recalled that the shipowner and his insurer had taken the position that the incident and the resulting pollution had been due to the fact that the Maracaibo Channel was in a dangerous condition due to poor maintenance. It was recalled that the Fund had in the criminal proceedings provisionally taken the position that the damage had been principally caused by negligence imputable to the Republic of Venezuela. It was also noted that the Venezuelan authorities had indicated that the Maracaibo Channel had been in good condition and that there had been no contributory negligence on the part of INC, the agency of the Republic of Venezuela responsible for the maintenance of the channel.

3.1.25 The Council recalled the proposal made by the Director at the February 2004 session on a possible global solution which should include:

- Resolution of the difference of opinion between the parties concerning the cause of the incident;
- Resolution of the claim submitted by the Republic of Venezuela in the Civil Court of Caracas;
- Declaration by the Venezuelan Courts that the criminal action against the master was time-barred and as a result the claim for compensation against the master, the shipowner and the Gard Club subsidiary to the criminal action was of no effect;
- Payment of the balance of all outstanding settled claims, which would amount to some $8.5 million (£4.5 million); and
- Return of the guarantee provided by the shipowner to the Criminal Court in Cabimas.

3.1.26 It was recalled that a global solution might not include the claims by the three fish processors since the claimants had failed to demonstrate that they had suffered a loss as a result of the incident and that these claims might have to be opposed before the courts in the normal manner.

3.1.27 The Council also recalled that in the event that a global solution incorporating the elements mentioned above were to be agreed, the total exposure of the 1971 Fund would be $54.5 million (£30 million), calculated as follows:

Claimant	**Category**	**US$**	**Status**
Three fish processors	Loss of income	$30 000 000	In court
PDVSA	Clean up	$8 364 222	Settled
Fishermen / processors	Loss of income	$16 033 389	Settled
Other claims	Property damage & income loss	$181 000	Settled
Total		**$54 578 611**	

3.1.28 It was recalled that the maximum amount available for compensation was Bs39 738 million or $83 221 800 (£46 million) and therefore payment in full of the settled claims would be possible.

3.1.29 It was further recalled that the Administrative Council had instructed the Director to approach, as a matter of urgency, the Venezuelan authorities and other interested parties to search for a global solution within the framework of the Conventions of all outstanding significant issues along the lines set out in paragraph 3.1.25 above (document 71FUND/AC.13/8, paragraph 3.5.38).

Developments since the February 2004 session

3.1.30 The Council noted that, following the instructions of the Administrative Council, the Director had written to the Venezuelan authorities, informing them of the decision taken by the Council and that, in March 2004, representatives of the 1971 Fund had visited Caracas where meetings had been held with senior staff from the Attorney General's office, the Public Prosecutor's office, the Ministry of Environment and the Ministry of Foreign Affairs.

3.1.31 It was noted that the representative of the Ministry of Environment had stated that she was not in a position to agree a global solution on behalf of the Republic of Venezuela but that she would recommend the global solution outlined in paragraph 3.1.25 to the Attorney General, the Public Prosecutor and the Minister of Environment.

3.1.32 The Council noted that, in April 2004, a representative of the Ministry of Environment had told the 1971 Fund that, in her view, the possible solution would be acceptable to the Venezuelan authorities. It was noted that the representative had pointed out, however, that such a solution required a declaration that the criminal action against the master was time-barred and, as a result, the subsidiary civil claim was of no effect, and that such declaration could only be made by the Venezuelan courts and not by the Government.

Statement by the Venezuelan delegation

3.1.33 The Venezuelan delegation stated that considering the delay of more than seven years in the payment of compensation due to various differences between the parties, that delegation wished to assist the Fund in finding a prompt and practical solution following the Fund's proposal in document 71FUND/AC.14/2, paragraph 6.4, where it was stated:

> The Administrative Council noted that if both claims by the Republic of Venezuela were withdrawn or not pursued to the detriment of other claimants, the 1971 Fund would be able to increase its level of payments to 100%.

3.1.34 The Venezuelan delegation stated that the Republic of Venezuela proposed that any claim by the Republic be dealt with after the victims had been fully indemnified so that the pending and settled

claims against the Fund were compensated to the benefit of the victims so that the Republic would stand 'last in the queue' and subject to the amount available for compensation from the Fund.

3.1.35 The delegation further stated that the proposal was submitted bearing in mind the precedents adopted in previous cases such as the *Braer* and *Erika*, by initiatives taken by the Governments of the United Kingdom and France respectively.

3.1.36 The Venezuelan delegation stated that the Government of Venezuela had responded very positively and proactively to the possibility of placing the Government's claim last in the queue in order to facilitate payment to the victims according to the settlements reached with the Fund. That delegation also stated that it had been informed that an official letter would be produced in this regard by the Venezuelan Ministry of Foreign Affairs and would be sent to the Fund within the next few days.

3.1.37 The Director welcomed the initiative by the Venezuelan Government but pointed out that it would be necessary for him to examine the text of the letter before he could express an opinion on whether the Government's undertaking fulfilled the requirements of the 1971 Fund.

3.1.38 Many delegations supported the initiative by the Venezuelan Government. Several delegations agreed with the Director that it was important for the Council to examine the text of the letter from the Venezuelan Ministry of Foreign Affairs before a decision could be taken on any increase in the level of payment of compensation.

3.1.39 Noting that there was a clear intention on the part of the Venezuelan delegation to resolve the payment situation in accordance with previous Fund practice in cases of pro-rating, the Administrative Council decided that an increase in the level of payments to the victims could only be approved if the Council was satisfied with the wording of the undertaking by the Venezuelan Government.

3.1.40 The Administrative Council noted that the Director had received a letter and a revised letter from the Vice-Minister of Foreign Affairs of Venezuela in response to his letter to the Minister of Foreign Affairs of 20 April 2004 in which the Director had set out the elements of a possible global solution of all outstanding significant issues (cf document 71FUND/AC.14/2, paragraph 7.13).

3.1.41 The Director drew attention to an important mistake in the translation of the letter from the Vice-Minister for Foreign Affairs reproduced in the Annex of document 71FUND/AC.14/2/Add.3 where in the fourth paragraph the word 'welcomes' should be substituted for 'accepts' which in the Director's view significantly clarified the position of the Republic of Venezuela.

3.1.42 The Council noted that in his response to the Director's letter, the Vice-Minister had welcomed the willingness of the 1971 Fund to settle the *Nissos Amorgos* case but had stated that the Republic of Venezuela had considered that the proposition was unfeasible, not for lack of interest on the part of the Republic of Venezuela, but because the conditions were impossible to fulfil given that they involved decisions which legitimately belonged to autonomous authorities. The Council also noted that in his letter the Vice-Minister, nevertheless, had stated that the Republic of Venezuela had accepted the proposals presented by the Administrative Council in documents 71FUND/AC.14/2, paragraph 6.4 and 71FUND/AC.11/3, paragraphs 3.30 and 3.31 that the claims by the Republic of Venezuela would be dealt with after the Fund had paid full compensation to claimants already recognised by it and those who would be recognised legally by a final court judgement, of course within the maximum amount available established by the Conventions.

3.1.43 The Director informed the Council that he had examined the letters from the Vice-Minister of Foreign Affairs and was very pleased to note that the Republic of Venezuela wished to take positive steps to enable the 1971 Fund to make full payment of the claims submitted by the victims of the *Nissos Amorgos* incident as soon as possible. The Director expressed the opinion

that it was clear from the letters that the intention of the Republic of Venezuela was that the claims submitted by Venezuela should 'stand last in the queue'.

3.1.44 The Council noted that the Vice-Minister in the revised letter stated that the Republic of Venezuela accepted certain proposals in the documents mentioned in paragraph 3.1.42. It was noted however that these documents did not contain any proposals by the Council but a suggestion made during the discussion that the Republic of Venezuela should consider *inter alia* not to pursue its claims unless this would not be detrimental to other claimants, ie to 'stand last in the queue' as some other governments had done in previous incidents, and that no precise indication was given as to the meaning of the expression 'standing last in the queue'.

3.1.45 The Director stated that in his opinion, and in view of the inter linkage between the 1969 Civil Liability Convention and the 1971 Fund Convention, and in accordance with long established practice within the 1971 and 1992 Funds, the expression 'standing last in the queue' meant that the government in question undertook not to pursue or seek payment for its claims for compensation under these Conventions, or under its national legislation implementing these Conventions, until all other admissible claims had been paid in full, either for the amount agreed in out-of-court settlement or decided by a competent court in a final judgement, or it was accepted by the Fund that all such claims would be paid in full.

3.1.46 The Director further stated that although the revised letter from the Vice-Minister indicated the willingness of the Republic of Venezuela to 'stand last in the queue', the text did not purely on the basis of this letter give the 1971 Fund sufficient legal certainty to enable him to recommend the Administrative Council to increase the level of payments.

3.1.47 The Venezuelan delegation drew attention to an important mistake in the translation of the revised letter from the Vice-Minister for Foreign Affairs referred to in paragraph 3.1.41. The delegation stated that there could be no misunderstanding as to the intention of the Republic of Venezuela's position as to the meaning of the term 'standing last in the queue'.

3.1.48 A number of delegations expressed their satisfaction with the efforts made by the Venezuelan delegation and the Director in order to enable the Fund to pay settled claims in full. Some delegations stated that it was important that the 1971 Fund obtained sufficient legal certainty but were prepared to leave it to the Director to seek the necessary assurances to this effect from the Republic of Venezuela. Other delegations considered that the revised letter by the Vice-Minister for Foreign Affairs was sufficient to give the Fund the necessary legal certainty.

3.1.49 Several delegations emphasised the importance of the Fund showing flexibility in situations of this kind in order to ensure prompt compensation to victims. Other delegations made the point that it was important that States were treated equally as regards the issue of 'standing last in the queue'.

3.1.50 Some delegations stated that it was difficult for them to express an opinion at this stage on the exact legal meaning of the concept of 'standing last in the queue'.

3.1.51 The Venezuelan delegation expressed his dissatisfaction with the Funds repeated requests for further clarification of the Republic of Venezuela's position, which in its view did not help to compensate victims in Venezuela.

3.1.52 The Council instructed the Director to seek the necessary assurance from the Republic of Venezuela as to whether its understanding of the meaning of the term 'standing last in the queue' coincided with his.

3.1.53 The Director indicated that he intended to write to the Republic of Venezuela asking whether the Republic, by agreeing to stand last in the queue, also agreed with his interpretation of the notion of 'standing last in the queue' set out in paragraph 3.1.45.

3.1.54 The Council authorised the Director to increase the level of payments to 100% of the established claims, when the Director had received the necessary assurance referred to in paragraph 3.1.52.

Possible recourse action against Instituto Nacional de Canalizaciones (INC)

3.1.55 The Council recalled that the policy of the IOPC Funds as regards recourse actions as laid down by the governing bodies could be summarised as follows:

> The policy of the Funds is to take recourse action whenever appropriate. The Funds should in each case consider whether it would be possible to recover any amounts paid by them to victims from the shipowner or from other parties on the basis of the applicable national law. If matters of principle are involved, the question of costs should not be the decisive factor for the Funds when considering whether to take legal action. The Funds' decision as to 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.

3.1.56 It was recalled that, in the criminal proceedings against the master of the *Nissos Amorgos*, the 1971 Fund had argued, based on the documentation available at that time, that the pollution damage had been principally caused by negligence imputable to the Republic of Venezuela. The Council noted that the Instituto Nacional de Canalizaciones (INC) had since made more documentation available which had enabled the Director to examine the cause of the incident in greater depth.

3.1.57 The Council noted that the Director had been assisted in his examination by Captain John Maxwell, LDM Consulting Ltd, formerly senior partner of Brookes Bell Jarrett Kirman, a master mariner with 13 years' sea-going experience and 25 years' experience of dealing with maritime casualties and by Mr M T Stevens, formerly a senior partner of Holman Fenwick & Willan, a firm of London solicitors, where he had dealt with shipping casualties for some 30 years; he was also a master mariner with 12 years' sea-going experience.

The Lake Maracaibo navigation channel

3.1.58 The Council noted that the Lake Maracaibo navigation channel comprised several sections and that the *Nissos Amorgos* had been sailing in the man-made 26.5 kilometres length, 300 metres overall width, external section, situated in the Gulf of Venezuela, immediately prior to the grounding.

3.1.59 The Council noted that information on the average depths in the channel was issued periodically by means of a 'Bulletin of Depths' published by INC and that a Bulletin published on 28 February 1997 (the date of the grounding of the *Nissos Amorgos*) had reported the average depth of the external section of the channel to be 12.8 metres (42 feet).

3.1.60 The Council also noted that the external section of the channel was marked by navigation buoys numbered from B1 at the northern, seaward, end to B28 at the southern, inward, end and that the bottom of the channel was covered by sediments in suspension known as 'fluff', particularly towards its southern end between buoys B25/B26 and B11/B12. It was noted that the depth of the fluff varied from place to place and was controlled by dredging.

3.1.61 The Council noted that the characteristics of the fluff were such that its density increased with depth and that fluff of density less than 1.2 grams per cubic centimetre was considered by experts to be safe for navigation although it was recognised that it had an effect on speed and handling. It was recalled that the depth of water in the channel quoted in the Bulletin of Depths was the depth measured from the sea surface down to the level in the fluff to which it was considered safe to navigate (the 'lower limit of the navigable fluff').

3.1.62 The Council noted that the problems produced by the fluff in the Maracaibo navigation channel were well known to users of the channel.

Summary of events

3.1.63 The Council noted that the *Nissos Amorgos* had departed Puerto Miranda on Lake Maracaibo on the evening of 28 February 1997 at a draft of 11.89 metres (39' 00") forward and aft, with a pilot on board who was very familiar with the Maracaibo channel and who the master had considered experienced and competent.

3.1.64 The Council further noted that the passage from the berth through Lake Maracaibo had been without problem but that, at 2300 hours, while in the external section of the channel, in gale force easterly winds of approximately 40 knots, the vessel had lost speed and control despite the use of the rudder and had come to rest aground at 2315 hours, just outside the western limit of the channel, north of channel marking buoy B22.

3.1.65 It was noted that, during the grounding, the bottom of the ship had been holed in six places as the result of running over an unidentified metal object and that some 3600 tonnes of the vessel's Bachaquero crude oil cargo had leaked into the sea through those holes.

3.1.66 The Council noted that surveys of the channel after the grounding had detected several magnetic anomalies, indicative of the presence of large metallic objects, but that surveys had shown that these objects were buried below the channel bottom and that the bed of the channel was clear of obstructions.

3.1.67 The Council noted that, in the criminal proceedings against the master of the *Nissos Amorgos*, the Public Prosecutor had alleged that the vessel grounded because the master had not made the necessary manoeuvres to maintain the vessel within the channel whereas the master had argued that the channel was in a dangerous condition due to poor maintenance and that this was the cause of the incident. The Council further noted that, in its judgement dated 3 May 2000, the Criminal Court in Cabimas had held that the Maracaibo channel was in perfect condition and that the master was liable for the damage arising from the incident. It was recalled that the Court sentenced the master to one year and four months in prison and that the master had appealed against the judgement. It was also recalled that the appeal had not yet been heard.

Positions of the parties as to the cause of the grounding

3.1.68 The Administrative Council noted that the master and the owner of the *Nissos Amorgos* had maintained:

- A loss of speed and control had occurred while the ship was in the centre of the buoyed channel as a result of insufficient depth of water, and that this loss of control had caused the ship to leave the channel.

- The lack of water depth had been caused by a failure to dredge the channel adequately.

- The vessel might inadvertently have been steaming closer to the edge of the channel than was safe, due to navigation buoys being out of position.

3.1.69 The Council also noted that the master and the shipowner had made the point that several vessels had run aground in the channel in 1996 and 1997 and, in particular, that two tankers had grounded in the same part of the channel a short while after the *Nissos Amorgos*, namely the *Olympic Sponsor* on 10 March 1997, at a draft on the loading berth of 11.58 metres (38 feet), and the *Corellis* on 10 April 1997, at a draft on the loading berth of 10.97 metres (36 feet).

3.1.70 It was noted that INC, a government agency under the Venezuelan Ministry of Transport and Communications responsible for the maintenance of the Maracaibo channel, had contended:

- The channel buoys had been in their correct positions.

- There had been sufficient depth of water in the channel.

- The grounding had been caused by imprudent or incorrect navigation. In particular the vessel had proceeded at too low a speed, had failed to use the navigation chart and had failed to take into account properly the strong wind, cross currents, tide and waves, all resulting in the vessel leaving the navigable section of the channel and grounding outside its limits.

3.1.71 It was noted by the Council that INC had pointed out that the tanker *Teseo*, with a slightly deeper draft than the *Nissos Amorgos*, had passed safely down the channel shortly before the *Nissos Amorgos*.

3.1.72 The Council noted that INC has maintained that the metallic object that caused the damage to the *Nissos Amorgos* was outside the navigable channel.

3.1.73 The Council also noted that there was no suggestion that the grounding had been due to a failure of the vessel's equipment.

Director's considerations

3.1.74 The Administrative Council noted that in the Director's view, in a recourse action taken by the 1971 Fund against INC, the Fund would have to prove that defects in the channel had caused or contributed to the grounding of the *Nissos Amorgos*, rather than negligence on the part of the master, the pilot or the crew. It was also noted that the Court would decide as to whether the Fund had fulfilled the burden of proof on the balance of probabilities.

3.1.75 The Council noted the Director's view that it was clear that INC had been aware of the problems with the channel and that emergency plans had been drawn up in October 1996 to resolve the serious problems in the channel, but had not been put into action before the grounding of the *Nissos Amorgos*. It was further noted that the bulletins issued by INC had appeared to indicate an average depth that was safe for navigation. It was also noted that a number of vessels, some of which had a draft equal to or slightly greater than the *Nissos Amorgos*, had encountered difficulties in passing through the external section of the channel.

3.1.76 The Council also noted the Director's view that the 1971 Fund would have to prove not only that there had been deficiencies in the channel, but also that these deficiencies had caused or contributed to the grounding of the *Nissos Amorgos*. It was noted that on this point Captain Maxwell and Mr Stevens had both accepted that there was no conclusive evidence as to the cause of the incident. It was further noted, however, that Captain Maxwell had concluded that the evidence available did not show that the grounding was caused, either in whole or in part, by the condition of the channel, whereas Mr Stevens had considered that, on the balance of probabilities, the vessel had grounded as a result of losing control having entered shallow ground while navigating in the channel.

3.1.77 The Council noted that, in the Director's view, there were facts in support of either view. It was noted that it had been well known that there were serious problems in respect of safety of navigation in the channel, that a number of ships had encountered serious difficulties and that the master and the pilot on board the *Nissos Amorgos* had been very experienced and had known the channel well. It was also noted that, on the other hand, other ships of the same or a slightly greater draft than the *Nissos Amorgos* had passed safely through the channel, one such ship only a few minutes before the *Nissos Amorgos*, and that there appeared to be a contradiction between various statements and depositions made by the master, the second officer and the pilot, in particular compared with statements by the master of dredger who had seen the *Nissos Amorgos* when it had grounded.

3.1.78 The Council further noted that the Criminal Court of Cabimas had found the master of the *Nissos Amorgos* liable for the incident and that the 1971 Fund's Venezuelan lawyers had advised that the

findings of a criminal court carry a considerable weight in a civil case dealing with the same events. It was also noted that the master had appealed against the judgement.

3.1.79 It was noted that, ten days after the grounding of the *Nissos Amorgos*, the laden tanker *Olympic Sponsor* (which had a draft slightly less than that of the *Nissos Amorgos*) had run aground in the same place and that the incident had become the subject of arbitration in New York between the owner of the *Olympic Sponsor* and the charterer of the vessel. It was also noted that although the arbitration primarily had addressed the issue of whether the charterer had fulfilled his obligation to nominate a safe port, the arbitration award was nevertheless pertinent, in the Director's view, to the *Nissos Amorgos* case. It was further noted that the shipowner had maintained that the cause of the grounding was insufficient depth of water in the channel and that extensive evidence as to the condition of the channel had been available to the arbitrators. The Council noted that in November 2001, the arbitrators had found that the sole proximate cause of the grounding was the error in navigation on the part of the master and the pilot, by not properly taking into account the wind, sea, current and tidal conditions present at the time.

3.1.80 The Council noted that the Director had, in conclusion, considered in particular the following main factors:

(a) there were facts that spoke in favour of the incident having been caused by deficiencies of the channel and other facts that supported the view that the grounding had been caused by negligence on the part of the vessel;

(b) the 1971 Fund would have the burden of proof that the incident had been caused by or been contributed to by deficiencies in the channel;

(c) there was a risk element in any litigation and in this case the conflicting evidence mentioned above increased the difficulty in predicting the outcome;

(d) a very similar case had been dealt with in arbitration in New York and the arbitrators had concluded that the grounding was solely caused by error in navigation; and

(e) a Venezuelan criminal court had held the master of the *Nissos Amorgos* liable for the incident, although this judgement was the subject of appeal.

3.1.81 The Council noted that, having taken into account all available information, and in particular the factors set out in paragraph 3.1.80, the Director considered on balance that it was unlikely that a recourse action by the 1971 Fund against INC would succeed and that for this reason the Director had proposed that the Fund should not pursue such an action.

3.1.82 One delegation stated that a decision on whether to take a recourse action should be based on principle, not on cost. That delegation also stated that it appeared to be 50/50 as to whether the cause of the incident was the condition of the channel or an error in navigation on the part of the ship. That delegation raised the issue of the responsibility of the pilot but acknowledged that there were many parties involved and that there was a substantial risk that a recourse action would result in endless and entangled proceedings. That delegation suggested therefore that the correct decision was not to take recourse action.

3.1.83 A number of delegations made similar points but supported the Director's recommendation that the Fund should not pursue a recourse action.

3.1.84 One delegation recalled that the Gard Club had previously raised the issue of the part played in the grounding by navigation aids. That delegation pointed out that if the shipowner and P&I Club were not liable for that reason, the Fund would be liable to pay the total amount of the compensation and, in that event, the shipowner and P&I Club would be in conflict with the Fund.

3.1.85 The Director responded that, were the Council to decide not to take a recourse action, but the shipowner and P&I Club pursued a defence based on deficiency of navigation aids, the Fund should, in his view, oppose the position of the shipowner and P&I Club.

3.1.86 The representative of the Gard Club stated that the issues relating to the cause of the incident affected the Club, the shipowner and the master in a number of ways and, in particular, that recourse was being pursued by arbitration proceedings in London against the charterer in respect of a claim that the nominated loading port was unsafe. The representative stated that the shipowner could not expect to be indemnified in those proceedings for compensation which he was not legally liable to pay, and he had therefore had to consider whether the facts revealed grounds for exoneration under the Civil Liability Convention. The Gard Club representative further stated that the cause of the incident was also central to the criminal proceedings against the master.

3.1.87 The representative of the Gard Club also stated that, from the Club's perspective, the issues which needed to be considered were firstly the strength of the case for saying that the incident was caused by the condition of the channel, and secondly the best course of action with a view to promoting a global settlement.

3.1.88 The representative of the Gard Club stated further that, so far as a recourse action against INC was concerned, the considerable public impact, resulting in a high level of public sentiment against the shipowner and the master, and the adverse first instance judgement, whilst unjustified, could not be ignored as factors potentially affecting the climate in which any litigation would have to take place. The Gard Club's representative futher stated that notwithstanding those considerations, the Club and the shipowner believed that they had a strong potential claim against INC and wished to reserve all their rights of recourse.

3.1.89 The representative of the Gard Club concluded by stating that the Club did not exclude the possibility of a claim against the Venezuelan State being withdrawn or compromised at a later date, either because it had become unnecessary as a result of damages being recovered from the charterer, or in the context of a global settlement. The representative stated, however, that a global solution would necessarily involve various steps by the Venezuelan authorities including the withdrawal of duplicate and inadmissible claims, discontinuance of proceedings against the master, and return of a bank guarantee provided at the outset of the case. The representative stated that it was appropriate for the shipowner and the Club to maintain every incentive for these issues to be addressed, and in the meantime to reserve all their rights.

3.1.90 One delegation stated that there was clear evidence that the channel was not safe and that it was not acceptable to argue to the contrary simply because some ships had passed without problems. That delegation also referred to the possible responsibility of the pilot and to the dilemma faced by the master because of the conflicting requirements of the necessity to proceed at speed in order to maintain control and the need to restrict speed in order to minimise squat. That delegation stated that it recognised that, in commercial terms, a recourse action could be a waste of money but that a matter of principle was involved. That delegation further stated that it was not sure that a decision at this stage not to take a recourse action was correct and recommended that the Fund should postpone a decision on the issue.

3.1.91 Another delegation pointed out that the resolution of the difference of opinion between the parties concerning the cause of the incident was one part of the possible global solution proposed at the 13th session of the Administrative Council (document 71FUND/AC.13/8, paragraph 3.5.38) and that, since there had been no developments in this regard, it would be unwise to take a decision on whether or not the Fund should pursue a recourse action at this stage. A number of delegations supported that view.

3.1.92 In summing up the discussion the Chairman stated that it was important that there should be a wide consensus for a decision not to take recourse action against INC and that, since a slight majority of those delegations that had expressed a view had been in favour of postponing a

decision and that even some of those delegations supporting the Director's proposal had been very hesitant, such consensus did not exist.

3.1.93 The Administrative Council decided that the 1971 Fund should postpone taking a position as to whether or not the Fund should take recourse action against INC.

3.2 *Alambra*

3.2.1 The Administrative Council took note of the information contained in document 71FUND/AC.14/3 in respect of the *Alambra* incident.

Claims for compensation

3.2.2 The Council noted that the shipowner and his insurer, the London Steam-Ship Owners' Mutual Insurance Association Ltd (London Club), had settled claims for clean-up costs at US$620 000 (£340 000). It was noted that the Estonian Court of first instance had approved this settlement in March 2004, and that all court actions against the shipowner and the Club in relation to claims in respect of clean-up had been terminated.

3.2.3 The Council noted that a claim by the Estonian State for EEK 45.1 million (£2 million), which had the character of a fine or charge, had been settled by the shipowner and the London Club at US$655 000 (£365 000). It was noted that the Court had approved this settlement in March 2004, and that the proceedings against the shipowner and the Club in relation to this claim had been terminated.

3.2.4 The Council recalled that a claim for US$100 000 (£55 000) had been presented to the shipowner and the London Club by a charterer of a vessel said to have been delayed whilst clean-up operations were being undertaken.

3.2.5 The Council recalled that the owner of the berth in the Port of Muuga from which the *Alambra* had been loading cargo at the time of the incident, and a company contracted by the owner of the berth to carry out oil-loading activities on its behalf, had submitted claims to the shipowner and the London Club for EEK 29.1 million (£1.3 million) and EEK 9.7 million (£440 000) respectively for loss of income due to the unavailability of the berth whilst clean-up operations were being undertaken.

Legal actions

3.2.6 The Council recalled that the claimants referred to in paragraph 3.2.5 had commenced legal proceedings against the shipowner and the Club and had requested the Court to notify the 1971 Fund in accordance with Article 7.6 of the 1971 Fund Convention.

3.2.7 The Council recalled that the shipowner, the London Club and the 1971 Fund had in their pleadings to the Court raised the issue of whether ratification of the 1969 Civil Liability Convention and the 1971 Fund Convention had been made in breach of the Estonian Constitution.

Constitutional review

3.2.8 The Council recalled that in December 2003 the Estonian Court of first instance had rendered its decision on the constitutional issue in relation to the proceedings commenced by the owner of the berth in the Port of Muuga. It was recalled that the Court had held that, since the Government had ratified the 1969 Civil Liability Convention without prior approval by Parliament, the ratification procedure had been a breach of the Estonian Constitution. It was further recalled that, for that reason, the Court had decided that the Convention could not be applied in the case under consideration and should be declared in conflict with the Constitution. It was also recalled that the Court of first instance had therefore decided that constitutional review proceedings should be initiated before the Supreme Court.

3.2.9 The Council noted that a hearing had been held on 3 March 2004 before the Constitutional Review Chamber of the Supreme Court and that, in a decision issued on 1 April 2004, the Supreme Court had held that it would not carry out the constitutional review requested by the Court of first instance.

3.2.10 The Council noted that the reasons for the Supreme Court's decision could be summarized as follows:

> The Supreme Court referred to the fact that the Court of first instance had initiated constitutional review proceedings without making a substantial decision in the case. In earlier decisions the Supreme Court had held that when carrying out a constitutional review, it had first verified whether the provision declared contrary to the Constitution was relevant in resolving the case before the courts, because under the Code of Constitutional Review the Supreme Court should only declare provisions relevant in that sense contrary to the Constitution or invalid. The Supreme Court stated that the decisive factor in determining the issue of relevance was whether the provision in question was of decisive importance in the case, namely whether the case would be decided differently if the provision was considered contrary to the Constitution than if this were not to be the case. The Supreme Court noted that the Court of first instance had issued its decision without determining the facts of material importance to the case. The Supreme Court stated that the Court of first instance could not have been sure at the time of issuing its decision which regulation was applicable and of decisive importance in the case. The Supreme Court held that it could not assess which legal norm was relevant in solving the case and whether that norm was in accordance with the Constitution.

Other issues raised in the legal proceedings

3.2.11 The Council recalled that in September 2002 the London Club had filed pleadings in court in respect of the claims presented by the Port of Muuga and the contractor for the loading operations, maintaining that the shipowner had deliberately failed to make the necessary repairs to the *Alambra* resulting in the ship becoming unseaworthy and that therefore under the insurance contract as well as under the Merchant Shipping Act, the Club was not liable to pay compensation for the damage resulting from the incident.

3.2.12 The Council noted that the 1971 Fund had filed further pleadings arguing that under Estonian law the concept of wilful misconduct was to be interpreted as an intentional act, not only in respect of the incident but also in respect of the effect thereof, ie that the shipowner had deliberately caused pollution damage. It was also noted that the Fund had maintained that the evidence presented regarding the condition of the *Alambra* did not establish that the shipowner had been guilty of wilful misconduct and that the insurer was therefore not exonerated from its liability for pollution damage.

3.2.13 The Council noted that, in view of the decision by the Supreme Court, the Court of first instance would consider the merits of the legal actions.

3.2.14 One delegation expressed disappointment that the London Club had invoked the argument of wilful misconduct of the shipowner in order to be exonerated from its liability for pollution damage. That delegation recalled the statement of the observer delegation from the International Group of P&I Clubs at the February 2004 session of the Administrative Council that, on the basis of the information available, it did not appear that the case was one of wilful misconduct on the part of the shipowner (document 71FUND/AC.13/8, paragraph 3.4.10). That delegation also made the point that since the London Club had adopted such a defence, the issue might take longer to resolve and the victims might have to wait for 10 years or more to receive compensation. That delegation stated that if there was no liability for the Club, the 1971 Fund would have to satisfy the outstanding claims. That delegation also pointed out that, if the Conventions did not apply in

Estonia, the 1971 Fund would have to refund all contributions it had collected from oil receivers in Estonia.

3.2.15 The representative of the London Club stated that the Club's objective had always been to settle the Estonian claims for a reasonable amount, but that the claims submitted by the Estonian Government had included a claim that had the character of a fine or charge which included a penalty interest increasing the claim to US$11 million (£6.1 million), which had been pursued by the Estonian State under the Civil Liability Convention. The delegation stated that the Club had employed all means to oppose this claim, including the defence of wilful misconduct by the shipowner. The delegation further stated that as this claim had now been settled, it would re-consider its pleaded defence of unconstitutionality of the implementation of the Conventions in Estonia and the defence of wilful misconduct in its attempt to reach a final settlement of the remaining two claims.

3.2.16 In summing up the discussion the Chairman stated that if it was determined that the London Club were not liable, the Council would have to resolve the issue as to whether the Fund would be liable to pay compensation.

4 Any other business

Keumdong N°5

4.1.1 The Administrative Council recalled that the Yosu Fishery Co-operative and some 900 of its members had taken legal action against the 1971 Fund in May 1996 and that the total amount claimed was Won 18 803 million (£8.8 million). It was recalled that the 1971 Fund's experts had considered that the claims were exaggerated and poorly documented and that the 1971 Fund had rejected a number of claims by owners of fishing boats due to the fact that they had not been in possession of valid fishing licenses at the time of the incident.

4.1.2 The Council also recalled that the Court of first instance had rendered a judgement in January 1999 and found that the claimants, including those who were unregistered and unlicensed, had suffered pollution damage, but had rejected their calculations due to the unreliability of their evidence and the lack of a link of causation between the alleged losses and the contamination. The Council recalled that in determining the amount of damages the Court had awarded compensation for both loss of earnings and pain and suffering and that the total amount awarded by the Court was Won 1 571 million (£740 000).

4.1.3 The Council recalled that the 1971 Fund had lodged an appeal against the decision to award compensation to unlicensed fishermen and to grant compensation for pain and suffering in lieu of economic losses. It was recalled that the Appellate Court had overturned the judgement of the first instance Court. It was also recalled that the Appellate Court had taken the view that there should not be a difference in the application of the Conventions among Contracting States and that the Korean Act implementing the Conventions should include only losses in respect of economic losses and property damage. The Council further recalled that the Appellate Court had decided that the income of claimants who did not have the licenses, permits or registrations required under the Korean Fisheries Act to carry out their activities should be regarded as illegal income, which could not be included in the calculation of compensation.

4.1.4 It was recalled that since the Fund's position on matters of principle had been accepted, the Fund did not appeal against the decision of the Appellate Court. It was also recalled that although the individual members of the co-operative did not appeal against the decision, 36 village fishery associations appealed to the Supreme Court in respect of the issue of pain and suffering, claiming Won 2 756 million (£1.3 million).

4.1.5 The Administrative Council noted that the Supreme Court had rendered its judgement on 28 April 2004 rejecting the appeal. The Council noted that the Supreme Court, in its judgement, had decided that, as a matter of Korean law, oil pollution damage under the 1969 Civil Liability

and the 1971 Fund Conventions should be interpreted as including pain and suffering but that, in the present case, the claims for compensation could not be accepted on the grounds that the claimants were not natural persons but fishery associations. It was noted that as a result of the judgement, the Fund would be able to recover its deposit from the Court, Won 1 571 million (£740 000), and that contributors to the *Keumdong N°5* Major Claims Fund would be entitled to a reimbursement of approximately £7.5 million.

5 Adoption of the Record of Decisions

The draft Record of Decisions of the Administrative Council, as contained in documents 71FUND/AC.14/WP.1 and 71FUND/AC.14/WP.1/Add.1, was adopted, subject to certain amendments.