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INCIDENTS INVOLVING THE 1971 FUND

OTHER INCIDENTS

Note by the Director

Summary:	In this document developments are considered regarding the following incidents: *Vistabella, Braer, Iliad, Kriti Sea, Katja, Evoikos* and *Alambra*.
Action to be taken:	Information to be noted.

1 *Vistabella*

(Caribbean, 7 March 1991)

1.1 While being towed, the sea-going barge *Vistabella* (1 090 GRT), registered in Trinidad and Tobago, sank to a depth of over 600 metres, 15 miles southeast of Nevis. An unknown quantity of heavy fuel oil cargo was spilled as a result of the incident, and the quantity that remained in the barge is not known.

1.2 The *Vistabella* was not entered in any P&I Club but was covered by third party liability insurance with a Trinidad insurance company. The insurer argued that the insurance did not cover this incident. The limitation amount applicable to the ship was estimated at FFr2 354 000 or €359 000 (£254 000). No limitation fund was established. It was unlikely that the shipowner would be able to meet his obligations under the 1969 Civil Liability Convention without effective insurance cover. The shipowner and his insurer did not respond to invitations to co-operate in the claim settlement process.

1.3 The 1971 Fund paid compensation amounting to FFr8.2 million or €1.3 million (£890 000) to the French Government in respect of clean-up operations. Compensation was paid to private claimants in St Barthélemy and the British Virgin Islands and to the authorities of the British Virgin Islands for a total of some £14 250.

1.4 The French Government brought legal action against the owner of the *Vistabella* and his insurer in the Court of first instance in Basse-Terre (Guadeloupe), claiming compensation for clean-up operations carried out by the French Navy. The 1971 Fund intervened in the proceedings and acquired by subrogation the French Government's claim. The French Government withdrew from the proceedings.

1.5 In a judgement rendered in 1996 the Court of first instance accepted that, on the basis of subrogation, the 1971 Fund had a right of action against the shipowner and a right of direct action against his insurer and awarded the Fund the right to recover the total amount which it had paid for damage caused in the French territories. The insurer appealed against the judgement.

1.6 The Court of Appeal rendered its judgement in March 1998. The Court of Appeal held that the 1969 Civil Liability Convention applied to the incident and that the Convention applied to the direct action by the 1971 Fund against the insurer even though in this particular case the shipowner had not been obliged to take out insurance since the ship was carrying less than 2 000 tonnes of oil in bulk as cargo. The case was referred back to the Court of first instance.

1.7 In a judgement rendered in March 2000 the Court of first instance ordered the insurer to pay to the 1971 Fund FFr8.2 million or €1.3 million (£890 000) plus interest. The insurer appealed against the judgement.

1.8 The Court of Appeal rendered its judgement in February 2004 in which it confirmed the judgement of the Court of first instance in March 2000. The insurer has not appealed to the Court of Cassation.

1.9 The Director is considering, in consultation with the Fund's French lawyers, what steps, if any, can be taken to enforce the judgement.

2 *Braer*

(*United Kingdom, 5 January 1993*)

The incident

2.1 The Liberian tanker *Braer* (44 989 GRT) grounded south of the Shetland Islands (United Kingdom). The ship eventually broke up, and both the cargo and bunkers spilled into the sea. Due to the prevailing heavy weather, most of the spilt oil dispersed naturally, and the impact on the shoreline was limited. Oil spray blown ashore by strong winds affected farmland and houses close to the coast. The United Kingdom Government imposed a fishing exclusion zone covering an area along the west coast of Shetland which was affected by the oil, prohibiting the capture, harvest and sale of all fish and shellfish species from within the zone.

Claims for compensation

2.2 All claims but one have been settled and the total compensation paid amounted to some £51.9 million, of which the 1971 Fund paid £45.7 million and the shipowner's insurer, Assuranceföreningen Skuld (Skuld Club), £6.2 million.

2.3 The only remaining claim, by Shetland Sea Farms Ltd, a Shetland-based company, related to a contract to purchase smolt from a company on the mainland. The Executive Committee decided that in the assessment of the claim account should be taken of any benefits derived by other companies in the same group. Attempts to settle the claim out of court failed.

2.4 The company took legal action against the shipowner, the Skuld Club and the 1971 Fund. The question arose as to whether certain of the documents relied upon by the claimant were genuine.

2.5 The Court of first instance rendered its decision in July 2001. Having heard the evidence the Court concluded that responsible officers of the claimant had knowingly presented copies of fake letters in support of Shetland Sea Farms' claim for compensation. The Court held that these documents had been put forward with the intent to deceive the Claims Office established by the 1971 Fund and the Skuld Club into believing that the Shetland Sea Farms' alleged contractual commitments were based on correspondence setting out the terms of the contracts. The Court also held that they did so as part of a scheme to further a substantial claim for compensation.

2.6 The Court then addressed the issue of whether as a result of this finding the claim should be refused without any further procedure. The Court acknowledged that it had an inherent power to dismiss the claim where a party was guilty of an abuse of process but stated that that was a drastic power. The Court resolved, however, that as Shetland Sea Farms was no longer going to base its claim on the false

letters, the company should be given the opportunity to present a revised case that should not depend on the false letters and that not allowing the claim to proceed in its revised version would be an excessive punishment.

2.7 The Court decided that the case should proceed to a hearing restricted to the question of whether Shetland Sea Farms could prove that a contract existed before the *Braer* incident occurred for the supply of smolt to Shetland Sea Farms without reference to false letters and invoices. Hearings were held in April and September 2002 and the Court rendered its decision in May 2003. The Court did not accept Shetland Sea Farms' evidence that there was a contract for the supply of smolt for which the company was legally obliged to pay independent of the false letters. The Court considered that the evidence disclosed that the management of the company had been involved in a fraudulent scheme and reported the matter to the Chief Prosecutor in Scotland to consider whether criminal proceedings should be brought against three of Shetland Sea Farms' witnesses. The Court allowed the case to proceed, however, restricting it to a claim for loss of profit by Shetland Sea Farms to the extent that the company could establish the probable number of smolt that would have been introduced to Shetland but for the *Braer* incident.

2.8 The shipowner, the Skuld Club and the 1971 Fund appealed against that part of the Court's decision on the grounds that the loss of profit claim was based on the numbers and the cost of smolt as set out in the claim which was based on the alleged contracts which had been shown to be false.

2.9 In January 2005, the Appellate Court issued a judgement confirming the decision of the Court of first instance. Accordingly, although Shetland Sea Farms cannot rely on the existence of the alleged contract, the company can proceed with the claim on the basis that, even if there was no pre-existing contract, it would have acquired, reared and sold smolt from which it would earn a profit. The claimant has not as yet quantified the claim in accordance with the criteria laid down by the Court. It is unlikely that a hearing will take place before the summer of 2006.

2.10 The Skuld Club has undertaken to pay any amount awarded by a final court decision.

3 *Iliad*

(Greece, 9 October 1993)

3.1 The Greek tanker *Iliad* (33 837 GRT) grounded on rocks close to Sfaktiria island after leaving the port of Pylos (Greece), resulting in a spill of some 300 tonnes of Syrian light crude oil. The Greek national contingency plan was activated and the spill was cleaned up relatively rapidly.

3.2 In March 1994 the shipowner's P&I insurer established a limitation fund amounting to Drs 1 497 million or €4.4 million (£3.1 million) with the competent court by the deposit of a bank guarantee.

3.3 The Court decided that claims should be lodged by 20 January 1995. By that date, 527 claims had been presented in the limitation proceedings, totalling Drs 3 071 million or €9 million (£6.4 million) plus Drs 378 million or €1.1 million (£780 000) for compensation of 'moral damage'.

3.4 In March 1994, the Court appointed a liquidator to examine the claims in the limitation proceedings. It was reported at the meeting of the Administrative Council in October 2004 (document 71FUND/AC.15/14/1) that the liquidator had submitted his report to the Court but that the report had not yet been made available to the 1971 Fund. However, the Fund's lawyers in Greece have subsequently informed the Director that this report has not been submitted. The claimants have submitted an official complaint against the liquidator for neglect of duty. An official inquiry has been launched and the Public Prosecutor has summoned the liquidator to explain the inordinate delay in submitting the report.

3.5 The shipowner and his insurer took legal action against the 1971 Fund in order to prevent their rights to reimbursement from the Fund for any compensation payments in excess of the shipowner's limitation

amount and to indemnification under Article 5.1 of the 1971 Fund Convention from becoming time-barred. The owner of a fish farm, whose claim is for Drs 1 044 million or €3 million (£2.1 million), also interrupted the time bar period by taking legal action against the 1971 Fund. All other claims have become time-barred *vis-à-vis* the Fund.

4 ***Kriti Sea***

(Greece, 9 August 1996)

4.1 The Greek tanker *Kriti Sea* (62 678 GRT) spilled 20 - 50 tonnes of Arabian light crude while discharging at an oil terminal in the port of Agioi Theodori (Greece) some 40 kilometres west of Piraeus, Greece. Rocky shores and stretches of beach were oiled, seven fish farms were affected and the hulls of pleasure craft and fishing vessels in the area sustained oiling.

4.2 In December 1996 the shipowner established a limitation fund amounting to Drs 2 241 million or €6.6 million (£4.7 million) by means of a bank guarantee.

4.3 Most claims have been settled, but some are the subject of legal proceedings in the Greek Supreme Court. The aggregate amount of the settled claims and the amount claimed in the Supreme Court is below the level at which the 1971 Fund would be called upon to make any payments in respect of compensation or indemnification. However, as the Fund is a defendant in the proceedings in the Supreme Court, the Fund's lawyers have attended the hearings to protect the Fund's position. The next hearing at the Supreme Court is scheduled for 9 November 2005.

5 ***Katja***

(France, 7 August 1997)

The incident

5.1 The Bahamas-registered tanker *Katja* (52 079 GRT) struck a quay while manoeuvring into a berth at the port of Le Havre (France) resulting in a spill of 190 tonnes of heavy fuel oil from a bunker tank. Beaches both to the north and to the south of Le Havre were affected and approximately 15 kilometres of quay and other structures within the port were contaminated. Oil also entered a marina at the entrance to the port and many pleasure boats were polluted.

5.2 The limitation amount applicable to the *Katja* in accordance with the 1969 Civil Liability Convention is estimated at €7.3 million (£4.9 million).

Claims for compensation

5.3 A claim presented by the French Government for clean-up costs was settled in July 2000 at €207 000 (£140 000). Other claims relating to clean-up, property damage and loss of income in the fisheries sector were settled at a total of €2.3 million (£1.6 million).

5.4 Legal actions were taken against the shipowner, his P&I insurer and the 1971 Fund relating to claims for the cost of clean-up operations incurred by the regional and local authorities, property damage and loss of income in the fisheries sector totalling €1.4 million (£950 000).

5.5 Only three claims totalling €976 000 (£660 000) remain pending in court, the largest of which is a claim by the Port Autonome du Havre (PAH) in respect of clean-up costs for €915 000 (£620 000).

5.6 It is virtually certain that all claims will be settled for an amount lower than the limitation amount applicable to the *Katja* under the 1969 Civil Liability Convention and that the 1971 Fund will not be called upon to make any payments in respect of this incident.

5.7 The shipowner and his insurer commenced proceedings against the PAH on 29 July 2002. The grounds for the action were that (a) the port had sent the *Katja* to an unsuitable berth and had thereby been wholly or partially responsible for the incident and (b) the port's inadequate counter-pollution response to the incident had increased the extent of the pollution damage caused. As the 1971 Fund is unlikely to be called upon to make payments in respect of this incident, the 1971 Fund has not participated actively in these proceedings.

5.8 The actions relating to the claim by PAH referred to in paragraph 5.5 and the actions against PAH referred to in paragraph 5.7 will be heard on 24 October 2005.

6 ***Evoikos***

(Singapore, 15 October 1997)

6.1 The Cypriot tanker *Evoikos* (80 823 GRT) collided with the Thai tanker *Orapin Global* (138 037 GRT) whilst passing through the Strait of Singapore. The *Evoikos*, which was carrying approximately 130 000 tonnes of heavy fuel oil, suffered damage to three cargo tanks, and an estimated 29 000 tonnes of its cargo were subsequently spilled. The *Orapin Global*, which was in ballast, did not spill any oil. The spilt oil initially affected the waters and some southern islands of Singapore, but later oil slicks drifted into the Malaysian and Indonesian waters of the Strait of Malacca. In December 1997 oil came ashore in places along a 40-kilometre length of the Malaysian coast in the Province of Selangor.

6.2 At the time of the incident, Singapore was Party to the 1969 Civil Liability Convention but not to the 1971 Fund Convention, whereas Malaysia and Indonesia were Parties to the 1969 Civil Liability Convention and the 1971 Fund Convention.

6.3 All known admissible claims for compensation in Malaysia, Singapore and Indonesia have been settled by the shipowner. The 1971 Fund is not aware of any outstanding claims.

6.4 In the limitation proceedings commenced by the shipowner in Singapore, the Court determined the limitation amount applicable to the *Evoikos* under the 1969 Civil Liability Convention at 8 846 942 SDR (£7.1 million).

6.5 The total compensation paid by the shipowner is below the level at which the 1971 Fund would make any payments in respect of compensation or indemnification.

6.6 The shipowner's insurer commenced legal actions against the 1971 Fund in London, Indonesia and Malaysia to protect its rights against the Fund. The Indonesian Court, at the request of the insurer and the Fund, discontinued the action in Indonesia. The actions in London and in Malaysia were stayed by mutual consent. Although any further claims are time-barred under the Conventions, the insurer has informed the Fund that it is not prepared to withdraw its actions against the Fund in Malaysia and London until it has had the opportunity to establish that there are no outstanding claims against the shipowner which might result in the Fund being liable to pay compensation or indemnification.

6.7 The Director has held discussions with the shipowner's insurer with a view to resolving outstanding issues.

7 ***Alambra***

(Estonia, 17 September 2000)

The incident

7.1 The Maltese tanker *Alambra* (75 366 GT) was loading a cargo of heavy fuel oil in the Port of Muuga, Tallinn (Estonia), when an alleged 300 tonnes of cargo escaped from a crack in the vessel's bottom plating. The *Alambra* was detained by the Estonian authorities pending a decision by the Tallinn Port Authority to allow the remaining 80 000 tonnes of cargo on board to be removed. The cargo transfer was eventually undertaken in February 2001, and in May 2001 the vessel finally left Estonia for scrapping.

Limitation of liability

7.2 The limitation amount applicable to the *Alambra* under the 1969 Civil Liability Convention is estimated at 7.6 million SDR (£6.3 million).

Claims for compensation

7.3 The shipowner and his insurer, the London Steam-Ship Owners Mutual Insurance Association Ltd (London Club), have settled claims for clean-up costs for a total of US$620 000 (£323 000). The Estonian Court of first instance approved this settlement in March 2004, and all court actions against the shipowner and the Club in relation to claims in respect of clean-up were terminated.

7.4 A claim by the Estonian State for EEK 45.1 million (£2 million), which had the character of a fine or charge, was settled by the shipowner and the London Club at US$655 000 (£340 000). The Court approved this settlement in March 2004, and the proceedings against the shipowner and the Club in relation to this claim were terminated.

7.5 A claim for US$100 000 (£52 000) has 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.

7.6 The owner of the berth in the Port of Muuga from which the *Alambra* was 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, have submitted claims to the shipowner and the London Club for EEK 29.1 million (£1.3 million) and EEK 9.7 million (£439 000) respectively for loss of income due to the unavailability of the berth whilst clean-up operations were being undertaken.

Legal actions

7.7 In November 2000 the owner of the berth in the Port of Muuga and the company it had contracted to carry out oil-loading operations took legal action in the Court of first instance in Tallinn against the shipowner and the London Club and requested the Court to notify the 1971 Fund of the proceedings in accordance with Article 7.6 of the 1971 Fund Convention. Having been notified of the actions, the 1971 Fund intervened in the proceedings.

7.8 In the context of these legal actions, the question has arisen as to whether the 1969 Civil Liability Convention and the 1971 Fund Convention have been correctly implemented into Estonian national law.

The constitutional issue

7.9 On 1 December 1992 Estonia deposited its instruments of ratification of the 1969 Civil Liability Convention and the 1971 Fund Convention with the International Maritime Organization. As a result, the Conventions entered into force for Estonia on 1 March 1993. However, the lawyers acting for the shipowner and the London Club, as well as the Estonian lawyers acting for the 1971 Fund, drew their

clients' attention to the fact that, in their view, under the Estonian Constitution, ratification of the Conventions should not have taken place before the Estonian Parliament had given its approval and adopted the necessary amendments to the national legislation. The Conventions were not submitted to Parliament and the necessary amendments to national law were not made. The Conventions have not been published in the Official Gazette. For these reasons these Conventions did not, in the view of these lawyers, form part of national law and could not be applied by the Estonian courts.

7.10 The shipowner and the London Club raised this issue in their pleadings in the Court of first instance, as did the 1971 Fund in order to protect its position.

7.11 In December 2003 the Court of first instance rendered its decision on the constitutional issue. The Court 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. For this reason the Court decided that the Convention could not be applied in the case under consideration and should be declared in conflict with the Constitution. The Court therefore ordered that constitutional review proceedings should be initiated before the Supreme Court.

Constitutional review

7.12 In a decision issued on 1 April 2004, the Supreme Court held that it would not carry out the constitutional review requested by the Court of first instance. The reasons for the Supreme Court's decision can be summarised 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

7.13 In September 2002 the London Club 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.

7.14 The 1971 Fund filed pleadings arguing that under Estonian law the concept of willful 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 deliberately caused pollution damage. The Fund maintained that the evidence presented regarding the condition of the *Alambra* did not establish that the shipowner was guilty of wilful misconduct and that the insurer was therefore not exonerated from its liability for pollution damage.

7.15 The proceedings are ongoing in the Court of first instance. No date has been fixed for the next hearing.

8 Action to be taken by the Administrative Council

The Administrative Council is invited to take note of the information contained in this document.