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COMPENSATION
FUND 1971**

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INCIDENTS INVOLVING THE 1971 FUND

**ILIAD, KIHNU, VISTABELLA and KRITI SEA incidents and
oil spill from an unknown source in Morocco**

Note by the Director

1 Introduction

This document sets out the situation in respect of the *Iliad*, *Kihnu*, *Vistabella* and *Kriti Sea* incidents and in respect of a spill from an unknown source in Morocco.

2 Vistabella

(Caribbean, 7 March 1991)

2.1 The sea-going barge *Vistabella* (1 090 GRT), registered in Trinidad and Tobago and carrying approximately 2 000 tonnes of heavy fuel oil, was being towed by a tug on a voyage from a storage facility in the Netherlands Antilles to Antigua. The tow line parted and the barge sank to a depth of over 600 metres, 15 miles south-east of Nevis. An unknown quantity of oil was spilled as a result of the incident, and the quantity which remained in the barge is not known.

2.2 In total five jurisdictions were affected as a result of this incident. However, only the pollution damage in the French Department of Guadeloupe and in the British Virgin Islands qualified for compensation from the 1971 Fund. The independent State of Saint Kitts and Nevis was not a Member of the 1971 Fund at the time of the incident. Puerto Rico and the United States Virgin Islands are not covered by the Fund Convention. The Kingdom of the Netherlands has not extended the application of the Fund Convention to the Netherlands Antilles.

2.3 The *Vistabella* was not entered in any P & I Club. The vessel was covered by a third party liability insurance with a Trinidad insurance company. The insurer has argued that the insurance does not cover this incident. The limitation amount applicable to the ship is estimated at FFr 2 354 000 (£291 000). No limitation fund has been established. It appears unlikely that the shipowner would be able to meet his obligations under the Civil Liability Convention unless there is an effective insurance

cover. The shipowner and his insurer did not respond to invitations to co-operated in the settlement procedure.

2.4 The 1971 Fund paid compensation amounting to FFr 8 127 519 (£986 500) to the French Government in respect of clean-up operations. Compensation was also paid to private claimants in St Barthélemy and the British Virgin Islands and to the authorities of the British Virgin Islands in the amounts of FFr 110 000 (£11 040), US\$6 100 (£3 200) and US\$2 000 (£1 000), respectively. Further claims against the IOPC Fund are time-barred.

2.5 The French Government brought legal action against the owner of the *Vistabella* and his insurer in the Court of first instance (Tribunal de Grande 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 has withdrawn from the proceedings.

2.6 In a judgement rendered on 4 July 1996, the Court of first instance held that the 1969 Civil Liability Convention was not applicable, since the *Vistabella* flew the flag of a State (Trinidad and Tobago) which was not Party to that Convention. Instead, the Court applied French law. It accepted that the 1971 Fund had, on the basis of subrogation, a right of action against the shipowner and a right of direct action against his insurer. The Court held that it was not competent to consider the 1971 Fund's recourse claim for the damage caused in the British Virgin Islands. The Court awarded the Fund the right to recover the total amount which it had paid for damage caused in the French territories, viz FFr 8 239 858.

2.7 The question arises whether the 1971 Fund should appeal against this judgement. In the Director's view, the judgement is wrong on two points. Firstly, the 1969 Civil Liability Convention which forms part of French law applies to damage caused in a State Party, and this is independent of the State of the ship's registry. Secondly, the French courts are, under Article IX.1 of the Convention, competent to consider claims for damage in any Contracting State. This has been accepted in Italy, where the claims for damage caused in France have been accepted by the Court of first instance in Genoa (Italy).

2.8 It could be questioned, however, whether it would be in the Fund's interest to appeal. The Court's decision as regards the applicability of the Conventions would hardly have any value as a precedent in other cases. As mentioned above, the Court has awarded the Fund the total amount paid for damage caused in the French territories. The amount of the subrogated claim for damage caused in the British Virgin Islands is very low (£4 200). If, however, any other party were to appeal, the Fund would be entitled to raise these points.

2.9 The Director submits to the Executive Committee for consideration whether the Fund should appeal against the judgement.

3 Kihnu

(Estonia, 16 January 1993)

The incident

3.1 The Estonian tanker *Kihnu* (949 GRT) grounded close to the port of Tallin (Estonia). The ship was carrying around 1 000 tonnes of heavy fuel oil and 460 tonnes of diesel oil. It is estimated that some 100 tonnes of heavy fuel oil and 40 tonnes of diesel oil were spilled as a result of the grounding.

3.2 The Estonian authorities carried out certain clean-up operations.

3.3 In response to a request of the Estonian authorities made under the Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention), the Finnish

Environment Agency despatched two oil combatting vessels and a helicopter to Estonia to assist the Estonian authorities in dealing with the spill.

3.4 It should be noted that the 1969 Civil Liability Convention and the 1971 Fund Convention entered into force for Estonia on 1 March 1993, ie after the *Kihnu* incident.

3.5 The owner of the *Kihnu* at the time of the incident was an Estonian company, AS PKL Ltd. The vessel had P & I insurance with Ocean Marine Mutual Protection and Indemnity Association Ltd which is registered in the Turk and Caicos Islands, British West Indies.

3.6 At its 49th session, the Executive Committee considered that, although the claim of the Finnish authorities related to activities undertaken within the territorial waters of a non-Member State, the measures were taken to prevent or minimise pollution damage within the territory or territorial sea of Finland, a 1971 Fund Member State. The Committee decided, therefore, that the measures taken by the Finnish authorities in principle fell within the scope of application of the Civil Liability Convention and Fund Convention (document FUND/EXC.49/14, paragraph 3.4.6).

Claims for compensation

3.7 In December 1995 the Finnish Environment Agency submitted a claim to the 1971 Fund for FM713 055 (£100 000). After having examined the claim, the 1971 Fund's experts requested further information from the Finnish authorities. The additional information given by the authorities is being examined.

3.8 At its 49th session, the Executive Committee instructed the Director to investigate whether, and if so, to what extent the Finnish authorities had taken the necessary steps to recover the costs incurred from the shipowner and his insurer or from the Estonian authorities, and to examine the reasonableness of the amount claimed. The Director was also instructed to examine the relationship between applicable regional agreements relating to co-operation in respect of oil spills and the compensation regime established by the Civil Liability Convention and the Fund Convention. These issues are being investigated.

Legal action

3.9 The State of Finland, through the Finnish Environment Agency, lodged a legal action against the 1971 Fund in the Helsinki District Court on 16 January 1996, ie on the last day of the three year time bar period provided in the 1969 Civil Liability Convention and the 1971 Fund Convention. Under Finnish law it is sufficient that the action is filed in the court before the expiry of that period. For this reason the State's claim is not time-barred. The writ was served on the 1971 Fund on 20 June 1996.

3.10 The Director has been informed that the State of Finland has taken legal action in the Helsinki District Court also against the shipowner's insurer (the Ocean Marine Mutual Protection and Indemnity Association Ltd).

3.11 The limitation amount applicable to the *Kihnu* calculated in accordance with the Civil Liability Convention is estimated at 113 000 Special Drawing Rights (£103 800).

3.12 Lawyers acting for the 1971 Fund are preparing pleadings which will be submitted to Court. It is expected however, that negotiations will take place between the Finnish authorities and the 1971 Fund in the near future.

4 Iliad

(Greece, 9 October 1993)

The incident

4.1 The Greek tanker *Iliad* (33 837 GRT) grounded on rocks close to Sfaktiria Island after leaving the port of Pylos (Greece). The *Iliad* was carrying about 80 000 tonnes of Syrian light crude oil, and some 200 tonnes were spilled. The Greek national contingency plan was activated, and the spill was soon brought under control.

4.2 By 22 October 1993 only sheens and traces of oil residues remained on the water surface, and the recovery at sea was terminated. The removal of oil from sandy beaches was completed by 29 October 1993. The final cleaning of sea-walls and selected areas of rocky shoreline in Pylos Bay was completed by the middle of January 1994.

4.3 Floating oil interrupted the fishing activities in Pylos Bay and along the coast for about two weeks. A fish farm at Pylos lost a small part of its stock and it appeared that the farm's normal selling pattern was interrupted. Tests on the stock showed that there was no residual contamination.

Limitation proceedings

4.4 In March 1994, the shipowner's P & I Insurers, the Newcastle Protection and Indemnity Association (the Newcastle Club) established a limitation fund amounting to Drs 1 496 533 000 (£4.2 million) with the competent court by the deposit of a bank guarantee. One claimant took legal action to challenge the shipowner's right to limit liability. The court of first instance has rejected this action, but the claimant is entitled to appeal against that decision.

4.5 The Court decided that the claims should be lodged by 20 January 1995. By that date, 527 claims had been presented, totalling Drs 3 071 175 610 (£8.3 million) plus Drs 377 800 000 (£1 million) for compensation of 'moral damage'.

4.6 The Court appointed a liquidator to examine the claims in the limitation proceedings. It is expected that this examination will begin in the near future.

Claims for compensation

Ministry of Merchant Marine

4.7 The Ministry of Merchant Marine has presented a claim for the cost of the clean-up operations for Drs 14 730 010 (£39 000). This claim is being examined by the lawyers and technical experts appointed by the shipowner, the Newcastle Club and the 1971 Fund.

Clean-up contractor

4.8 A clean-up contractor has submitted a claim for Drs 130 844 700 (£347 400). The Newcastle Club has made an advance payment of US\$350 000 (£224 400).

4.9 This amount claimed has been calculated by the claimant on the basis of rates allegedly agreed between the contractor and the shipowner, but there is no evidence of any such agreement. Further information has been requested in respect of various items of this claim, including the rates for certain types of clean-up equipment, materials and personnel, and the cost of waste disposal.

Shipowner's claim

4.10 The shipowner has submitted a claim for Drs 277 million (£735 400) for costs incurred during the clean-up operations. This amount has been paid by the Newcastle Club.

Messinia Fish Farm

4.11 A claim for Drs 993 million (£2 636 000) has been submitted by the owner of a fish farm who has alleged that he has lost both production and his fish cages as a result of the incident. It has been established, however, that the fish farmer's cages are still in the water, and there is circumstantial evidence that fish continued to be produced from the farm. The farmer has also maintained that he has suffered a loss of income as a result of reduced prices, although this has not been documented.

Sapienza Fish Farm

4.12 A claim for Drs 66 million (£175 000) has been presented by another fish farm which was not contaminated as a result of the incident. Oil sheens on the surface did, however, approach within one kilometre of the farm. Defensive booms were deployed, but they were removed after one week, once it was clear that oil would not reach the fish farm.

4.13 The owner of the fish farm has maintained that the booms (which have a depth of 50 cm) interfered with the water flow in the bay where the farm was located. He has further alleged that the access to the farm by farm workers was prevented because of the booms and that this caused operational difficulties which ultimately led to greater numbers of diseased fish and higher mortalities than would normally be expected. The preliminary opinion of experts employed by the Club and the 1971 Fund is that there are no grounds for these allegations. Documentary evidence to substantiate the losses claimed has been requested.

Fishermen's claims

4.14 Claims totalling Drs 40 345 750 (£107 000) have been submitted by fishermen working from Pylos and from the outer coastline. Little documentary evidence has been provided to substantiate the alleged losses. The preliminary view of the experts engaged by the Club and the 1971 Fund is that the claimed amounts are exaggerated. Further documentary evidence has been requested.

Claims of individuals and small businesses

4.15 There are a number of claims for loss of income allegedly suffered by fishermen and a large range of small businesses, such as hotel and restaurants, as well as taxi drivers, shopkeepers and estate agents. The quality and quantity of the documentation submitted in respect of these claims vary considerably, with some claimants having submitted no documents. Other claimants have provided copies of operating licences, sworn affidavits by the claimants themselves, booking and cancellation letters, and VAT returns.

4.16 Nine claimants have provided VAT returns for 1992 and 1993, allowing a comparison to be made between the income for the months of November and December in 1993 (allegedly when the damage was most severe) and that for the same months in the previous year. This comparison showed that in four cases the claimant's income had increased from 1992 to 1993 and that it had decreased in five cases, although the losses arrived at by this comparison did not correspond with the losses claimed.

4.17 It has become evident that most claimants complete annual VAT returns and have done so for the years 1992, 1993 and 1994. Lawyers acting for some of these claimants have indicated a reluctance to ask their clients to produce this documentation, and they have stated that they have no intention of submitting such documentation to the Court. The Director considers, however, that this documentation is vital to allow an assessment of these claims.

Moral damages

4.18 A number of claimants have submitted claims for various amounts in respect of moral damages totalling some £1 million. The claimants have submitted only sworn affidavits in support of this item of their claims, which in the claimants' view substantiates their loss.

4.19 A Court of first instance in Volos (Greece) has, in a judgement rendered in 1982, accepted a claim for compensation for moral damage because the plaintiff was prevented from swimming in the sea which was polluted by sewage from a factory owned by the defendant. In respect of the *Irene Serenade* incident which occurred in 1980 (also in Pylos), the liquidator appointed by the Court to assess the claims approved claims for moral damage, although these claims were not considered by a court as negotiated settlements were concluded.

4.20 Under Article 932 of the Greek Civil Code, the court has the discretion to award moral damages to the victim of an illegal act in addition to the sums for physical damage or economic loss. This type of compensation is awarded especially in the case of personal injury or where damage to reputation has been suffered. The amount of compensation payable is assessed by the court taking into consideration the financial situation of the parties, the gravity of the fault of the defendant, the circumstances in which the illegal act was committed, and the results of such an act.

4.21 The Assembly and the Executive Committee have taken the position that only a claimant who has suffered a quantifiable economic loss is entitled to compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention. For this reason, the Director takes the view that the claims for moral damages are inadmissible.

Time-bar

4.22 Claims against the 1971 Fund in respect of this incident became time-barred on or shortly after 9 October 1996.

4.23 With the exception of the Messinia fish farm, the shipowner and the Newcastle Club, the claimants have failed to take action against the 1971 Fund or notify the Fund formally of the action brought against the shipowner and his insurer.

5 Spill from unknown source

(Morocco, 30 November 1994)

5.1 In March 1995 the 1971 Fund was informed of an oil spill which had occurred on 30 November 1994 in the port of Mohammedia (Morocco). The Moroccan authorities claimed compensation for clean-up costs totalling Dhr 2.6 million (£196 900). The authorities did not give any indication as to the source of the spill but stated that the oil could only have come from the sea, either as a result of the escape of ballast water, the cleaning of tanks, or accidental pollution.

5.2 The Director drew the attention of the Moroccan authorities to Article 4.1 of the 1971 Fund Convention. Under that Article, the 1971 Fund is obliged to pay compensation for pollution damage where the victim is unable to obtain compensation because "no liability arises under the Civil Liability Convention". One of the situations in which no liability would arise under the Civil Liability Convention is where the identity of the ship which caused the damage is not known, since in that case no shipowner can be held liable under that Convention. Article 4.2(b) of the Fund Convention provides that in such cases the 1971 Fund is not obliged to pay compensation if "the claimant cannot prove that the damage resulted from an incident involving one or more ships".

5.3 The Moroccan authorities maintained that in all probability, in view of the quantity involved, the oil originated from a laden tanker. The authorities referred to a survey report in which it was stated that the results of laboratory tests, the colour of the oil and its smell showed that it was a crude oil.

5.4 The 1971 Fund's experts examined the documentation presented by the Moroccan authorities. The experts expressed the opinion that the investigation carried out to determine the oil type was not adequate to establish whether the oil in question was a crude oil or a fuel oil. They stated that the main argument invoked by the Moroccan authorities as evidence that the pollutant was a crude oil appeared to be the odour and the size of the spill, but that no attempt was made to estimate the

quantity spilled. The experts agreed that crude oils have distinctive smells, and noted that a strong odour associated with the spill was reported both by the Port Authority and its surveyor. They maintained, however, that smell was a very subjective test. The experts also stated that it was not possible, on the basis of the information available, to determine the source of the pollution.

5.5 On the basis of the opinion of its experts, the 1971 Fund informed the Moroccan authorities in December 1995 that it had not been established that the oil originated from a ship as defined in the 1971 Fund Convention (ie a laden tanker) and that for this reason the 1971 Fund could not accept the claim for compensation.

5.6 The Moroccan delegation informed the Executive Committee, at its 48th session, that the Government had set up a committee to investigate this oil spill in order to try to establish the source of the oil. For this reason, the Moroccan delegation requested that consideration of this incident should be postponed to a later session.

5.7 The Executive Committee decided to postpone consideration of this case to its 50th session (document FUND/EXC.49/12, paragraph 3.6.3).

5.8 The Director has invited the Moroccan authorities to inform him of the progress of the Moroccan committee's investigations, but so far no such information has been received.

6 Kriti Sea

(Greece, 9 August 1996)

6.1 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 Piræus.

6.2 Rocky shores and stretches of beach to the west, south and east of this terminal were oiled, seven fish farms were affected and the hulls of pleasure craft and fishing vessels in the area sustained oiling.

6.3 Clean-up operations were undertaken by the staff of the terminal, and contractors were engaged by the shipowner, the Ministry of Merchant Marine and the local authorities. The clean-up operations at sea were continued to 17 August and the shoreline clean-up was largely completed by the end of the month.

6.4 The ship is entered in the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd (UK Club).

6.5 Thirteen claims totalling Drs 1 645 113 737 (£4 367 404) have been notified to the shipowner and the UK Club. These claims include Drs 11 567 843 (£30 710) for the cleaning of fishing boats and boat owners' loss of earnings, Drs 726 298 932 (£1 928 159) for claims from fish farm owners, Drs 10 901 872 (£28 942) from hotel and campsite owners, Drs 753 518 205 (£2 000 420) from clean-up contractors and Drs 142 826 885 (£379 173) from various other claimants.

6.6 The shipowner and the UK Club have been informed of a further 13 claims were the claimants have not yet provided details of their alleged losses. In particular, the final claim from the principal clean-up contractor has yet to be received. It is estimated that this claim will be for approximately £2 million.

6.7 It is estimated that limitation amount applicable to the *Kriti Sea*, is £6 million.

6.8 The UK P & I Club is of the view that it is likely that the claims will be settled at an amount lower than the limitation amount of the ship.

7 Action to be taken by the Executive Committee

The Executive Committee is invited to:

- (a) take note of the information contained in this document;
 - (b) consider the position to be taken by the 1971 Fund in the court proceedings in the *Vistabella* case; and
 - (c) give the Director such instructions as it may deem appropriate in respect of the incidents dealt with in this document.
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