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OIL POLLUTION
COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
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Agenda item 3

71FUND/EXC.58/8
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INCIDENTS INVOLVING THE 1971 FUND

NISSOS AMORGOS

Note by the Director

Summary:	Discussions have taken place regarding how to dispose of the oily sand and regarding the claims for clean-up operations. Further claims have been presented. The shipowner has presented his views on the availability of defenses under Articles III.2(c) and III.3 of the 1969 Civil Liability Convention.
Action to be taken:	Decide on level of payments.

1 Introduction

1.1 The Greek tanker *Nissos Amorgos* (50 563 GRT), carrying approximately 75 000 tonnes of Venezuelan crude oil, ran aground whilst passing through the Maracaibo Channel in the Gulf of Venezuela on 28 February 1997. The Venezuelan authorities have maintained that the actual grounding occurred outside the Channel itself. An estimated 3 600 tonnes of crude oil was spilled.

1.2 With respect to the incident and the clean-up operations, the establishment of a Claims Agency in Maracaibo by the shipowner's insurer (Assuranceföreningen Gard (Gard Club)) and the 1971 Fund and the court proceedings, reference is made to documents 71FUND/EXC.55/9 and 71FUND/EXC.57/8.

1.3 This document contains information on recent clean-up operations and related issues, on the claims situation and on the situation in the court proceedings in Venezuela.

2 Clean-up operations and disposal of oily sand

2.1 Under the Venezuelan National Contingency Plan for Oil Pollution, Lagoven and Maraven (wholly owned subsidiaries of the national oil company, Petroleos de Venezuela SA - PDVSA) are responsible for implementing oil spill response measures in the Gulf of Venezuela. In the latter part of 1997, Lagoven and Maraven were merged into the holding company PDVSA.

2.2 During the clean-up operations, which were carried out by Lagoven, an estimated 40 000 m³ of contaminated oil were collected. The oily sand has been provisionally stored immediately inland of the affected beach. Lagoven, and later PDVSA, have considered various options for treating the oily sand. The main options are landfilling, landfarming, sand sieving and road paving.

2.3 In order to determine the best option for treating the oily sand, PDVSA has appointed a team of three experts who, together with three experts appointed by the 1971 Fund and the Gard Club, will review all the options available. The experts met in Maracaibo on 30 March and 1 April 1998. Since the oily sand had been stored provisionally for some seven months, the experts agreed as a preliminary step to establish the actual condition of the oily sand and to determine the quantity involved. Various samples of the oily sand will be taken at different locations, and a laboratory commissioned to carry out an analysis of the content of various hydrocarbons in the sand. A technical and financial assessment of the options for disposal of the contaminated material will be carried out in the light of the results of this analysis, taking into account the quantity of collected oily sand.

3 Claims presented to the Claims Agency

3.1 General situation

3.1.1 As at 20 April 1998, 163 claims for compensation totalling Bs 6 190 million (£7 million) had been presented to the Claims Agency. So far 87 claims have been approved for a total of Bs 1 133 million (£1.3 million) and the Gard Club has paid the settlement amounts in full.

3.1.2 Of those claims which have been presented to the Claims Agency only relatively few are outstanding. For this reason it was decided that the Claims Agency will close on 30 April 1998. The remaining claims will be dealt with either by the 1971 Fund from London and the Gard Club from Norway or by occasional visits to Maracaibo by staff of the former Claims Agency, as appropriate.

3.2 Claims relating to clean-up operations

3.2.1 Lagoven has presented several claims to the Claims Agency totalling Bs 3 744 million (£4.2 million) relating to the cost of the beach clean-up. Maraven has presented a series of claims totalling Bs 1 041 million (£1.2 million) for the costs incurred for clean-up operations.

3.2.2 On the basis of provisional assessments made by the International Tanker Owners Pollution Federation Ltd (ITOPF), and after consultation with the Director, the Gard Club has made interim payments to Lagoven and Maraven of Bs775 million (£900 000) and Bs271 million (£300 000), respectively.

3.2.3 With a view to speeding up the assessment of Lagoven's and Maraven's claims, the Gard Club and the 1971 Fund proposed that PDVSA should provide a team dedicated to the detailed presentation of the claims and with the knowledge, or immediate access to the knowledge, required to answer queries. A team of experts engaged by the Gard Club and the 1971 Fund would be available to work in close contact with Lagoven's and Maraven's teams. PDVSA agreed to the proposed procedure, and a successful two week meeting was held between the teams in mid-March 1998.

3.2.4 The experts employed by the Gard Club and the IOPC Fund are at present finalising assessments based on the information obtained at that meeting. This work is well advanced and a further meeting is expected to take place in Maracaibo in May to resolve outstanding issues.

3.2.5 The Instituto para el Control y la Conservacion de la Cuenca del Lago de Maracaibo (ICLAM), part of the Venezuelan Ministry of Environment and Renewable Natural Resources, has presented a claim relating to the costs of the analysis carried out and the expenses incurred by ICLAM in monitoring the clean-up operations. Further details of how costs were incurred are awaited.

3.3 Property claims

3.3.1 The Claims Agency has received claims totalling Bs 29 million (£33 000) from 15 individuals for damage to nets, boats and outboard motors. The local surveyor engaged by the Gard Club and the 1971 Fund has inspected the damaged items.

3.3.2 12 claims in this category have been approved for a total of Bs 12 million (£13 600), and these claims have been paid in full by the Gard Club.

3.4 Fishery claims

3.4.1 A number of claims by fishermen and some fish transporters for loss of income, totalling Bs 1 228 million (£14 million), have been presented to the Claims Agency.

3.4.2 At its 54th session the Executive Committee decided that compensation should not be payable in the *Nissos Amorgos* case to fishermen who, although required under Venezuelan law to hold a valid licence, did not do so. It was further decided that compensation should be payable to fishermen who were not subject to licence requirements under Venezuelan law, provided that the claimant showed that he had suffered an economic loss as a result of the incident (document 71FUND/EXC.54/10, paragraph 3.1.32).

3.4.3 The Director and the Gard Club have approved 61 claims by owners of fishing boats, fishermen who fish on foot and clam harvesters for amounts totalling Bs 52 656 750 (£60 000). These claims have been paid in full by the Gard Club.

3.4.4 Sixty-four claims totalling Bs 833 972 300 (£948 000) submitted by other owners of fishing boats, fishermen who fish on foot and clam harvesters are being examined by the experts appointed by the Gard Club and the 1971 Fund. These claimants have not yet provided sufficient evidence of their claim.

3.4.5 Claims by 15 fish, clam and shrimp transporters, totalling Bs 62 million (£70 400), have been received. Eleven of these claims have been approved for a total of Bs 12 million (£13 896), and this amount has been paid by the Gard Club.

3.5 Claims from fish processing plants

The Claims Agency had been informed by a lawyer representing a large number of fish processing plants in the Maracaibo area that his clients believe they will suffer losses from a long term reduction in catches as a result of the effects of the pollution on fish stocks. So far no claims have been submitted.

3.6 Claims from the tourism industry

3.6.1 A claim totalling Bs12 480 500 (£14 200) was submitted on behalf of 96 owners of beach cabins for loss of income as a result of the closure of the beach during clean-up operations. The claim was agreed for a total of Bs10 827 150 (£13 000) and was paid in full by the Gard Club.

3.6.2 A claim totalling Bs34 999 605 (£40 000) has been submitted by the owner of a restaurant in the affected area. The claimant has been asked to provide further evidence of his alleged losses.

3.6.3 A claim has been received from the owner of a hotel for approximately Bs1.5 million (£1 700). This claimant has been asked to provide further evidence to support his claim.

3.6.4 Two claims totalling Bs10.2 million (£11 600) have been received from CORPOZULIA (the State of Zulia tourism organisation) for loss of income suffered by hotels and restaurants owned by the organisation. The claimant has been asked to provide further evidence to support this claim.

3.6.5 Further claims are expected from tourism businesses in the area.

4 Court proceedings

4.1 Criminal Court of Cabimas

4.1.1 A criminal first instance court in Cabimas is carrying out an investigation into the cause of the incident. The Cabimas Court will determine whether anyone has incurred criminal liability as a result of the incident.

4.1.2 The shipowner has presented a guarantee to the Cabimas Court for Bs3 473 million (£3.9 million), being the limitation amount applicable under the 1969 Civil Liability Convention.

4.1.3 At a court hearing held in Cabimas on 12 March 1998 the master maintained that under Article III.4 of the 1969 Civil Liability Convention no claim for compensation for pollution damage could be made against the servants or agents of the owner, whether under the Convention or otherwise, and that since the master fell within this category, no claim could be made against him. The 1971 Fund intervened in the proceedings as an interested party and supported the master's position on this point.

4.1.4 At the Executive Committee's 57th session, the Venezuelan delegation referred to a statement in paragraph 4.1.9 of document 71FUND/EXC.57/8 that the 1971 Fund would intervene in the proceedings before the Criminal Court of Cabimas in support of the master. The delegation stated that, in its view, it would be entirely inappropriate and unacceptable for an international organisation not only to intervene but to take sides in a criminal court within the jurisdiction of a Member State. The delegation referred to the text of the 1971 Fund Convention which provided that the 1971 Fund had the right to intervene as a party to any legal proceedings in accordance with Article IX of the 1969 Civil Liability Convention. That delegation stated that the Republic of Venezuela recognised the 1971 Fund's rights and obligations stemming from the 1971 Fund Convention, in particular Articles 2 and 7. It pointed out, however, that as the name of the 1969 Civil Liability Convention indicated, the treaty was an instrument of civil law, not of a criminal law (document 71FUND/EXC.57/15, paragraph 3.9.8).

4.1.5 In response the Director drew attention to the fact that the proceedings before the Criminal Court of Cabimas had two aspects, one relating to the criminal action against the master and one regarding compensation for pollution damage. He emphasised that the 1971 Fund would not intervene in the criminal aspects of the case, but that in his view the Fund was entitled to intervene in those aspects in the Criminal Court which related to civil liability and compensation. He stated that, as he saw it, the instructions he had been given by the Executive Committee were to make the Fund's position clear as to the correct interpretation and application of the 1969 Civil Liability Convention and the 1971 Fund Convention. In this context he referred to the very clear opinions in this regard expressed by a number of delegations in the context of the discussions relating to the *Aegean Sea* incident during that session of the Executive Committee. He also drew attention to the fact that Article III.4 of the 1969 Civil Liability Convention ruled out claims for pollution damage against the master, whether these claims were based on the Convention or on any other legal ground. In the light of the intervention by the Venezuelan observer delegation, the Director invited the Executive Committee to indicate whether or not his interpretation of the Fund's role was correct, and to give him instructions as to the manner in which the 1971 Fund should act in similar situations in the future (document 71FUND/EXC.57/15, paragraph 3.9.8).

4.1.6 The Executive Committee noted that the 1971 Fund had intervened in the criminal proceedings only in relation to aspects concerning civil liability, and that it was the duty of the Director to take any necessary action to protect the interests of the Fund and to promote the uniform application of the Conventions in matters relating to civil liability. The Committee therefore endorsed the Director's understanding of the role of the 1971 Fund (document 71FUND/EXC.57/15, paragraph 3.9.9).

4.1.7 The Venezuelan observer delegation stated that the criminal proceedings did not consider the question of compensation, but dealt with the imposition of fines. That delegation informed the Executive Committee that it was hoped that the criminal proceedings would be completed by the end of February 1998, after which the compensation issues would be addressed in the civil proceedings (document 71FUND/EXC.57/15, paragraph 3.9.10).

4.1.8 It was suggested by the Venezuelan observer delegation that the complex issues relating to criminal and civil proceedings which had arisen in the *Nissos Amorgos* and *Aegean Sea* incidents were not isolated cases, and that they represented a new variable which should be addressed by the Committee (document 71FUND/EXC.57/15, paragraph 3.9.11).

Republic of Venezuela

4.1.9 In October 1997, the Republic of Venezuela presented a claim for pollution damage against the Master, the shipowner and the Gard Club in the Cabimas Court for US\$60 250 369 (£36 million). The 1971 Fund has been notified of this claim. The claim is based on a letter to the Attorney General from the Venezuelan Ministry of Environment and Renewable Natural Resources, which gave details of the amount of compensation payable to the Republic of Venezuela in respect of oil pollution. The damage for which compensation is claimed is as follows:

- (a) damage to the communities of clams living in the intertidal zone affected by the spill, quantified at US\$37 301 942 (£22 million);
- (b) cost of restoring the quality of the water of the affected coasts, quantified at US\$5 million (£3 million);
- (c) cost of replacing damaged sand, quantified at US\$1 million (£600 000);
- (d) damage to the beach as a tourist resort, quantified at US\$16 948 454 (£10.1 million).

4.1.10 At its 55th session, the Executive Committee considered the claim presented by the Republic of Venezuela. The discussion is summarised in document 71FUND/EXC.55/19, paragraphs 3.12.5 - 3.12.11. The 1971 Fund's position in respect of the admissibility of claims relating to damage to the marine environment is summarised in document 71FUND/EXC.55/9/Add.1.

4.1.11 There have been no developments in respect of the claim by the Republic of Venezuela since the Executive Committee's 57th session.

4.1.12 As set out in paragraph 4.1.7 above, the Venezuelan delegation stated at the Executive Committee's 57th session that the criminal proceedings did not consider the question of compensation, but dealt with the imposition of fines. The action by the Republic of Venezuela refers to the Articles of the Penal Environmental Law (Ley Penal del Ambiente) which relate to the imposition of fines. However, the action also refers to Articles of the 1969 Civil Liability Convention and the 1971 Fund Convention which relate to compensation. The Court should therefore consider not only the imposition of fines but also compensation issues. In this regard it should be noted that under the Penal Environmental Law fines are limited to a maximum amount of between 1 000 and 3 000 days of minimum wages (as defined). The daily minimum wage is at present Bs 2 500 (£3), and the maximum amount of fines under this law is therefore between Bs 2.5 million (£2 840) and Bs 7.5 million (£8 520). As set out in paragraph 4.1.9 above, the claim presented by the Republic of Venezuela in the Cabimas Court is for US\$60 250 369 (£36 million). It appears therefore that, in any event, the amount claimed by the Republic of Venezuela cannot be considered a fine.

ICLAM

4.1.13 On 12 March 1998, the Republic of Venezuela, on behalf of the Instituto para el Control y la Conservacion de la Cuenca del Lago de Maracaibo (ICLAM), presented an additional claim for pollution damage in the amount of Bs 57.7 million (£65 000). This claim corresponds to the one presented to the Claims Agency in Maracaibo (cf paragraph 3.2.5 above).

FETRAPESCA

4.1.14 At the court hearing held on 12 March 1998 a fishermen's trade union (FETRAPESCA) presented a claim for compensation for pollution damage for an estimated amount of US\$ 130 million (£78 million) plus legal costs.

Fish and shellfish processors

4.1.15 At the same court hearing eight fish and shellfish processors presented a claim for compensation for an estimated amount of US\$100 million (£60 million) plus legal costs.

4.2 Civil Court of Caracas*Republic of Venezuela*

4.2.1 In April 1997, the Republic of Venezuela presented a claim before a first instance civil court in Caracas against the shipowner, the master of the *Nissos Amorgos* and the Gard Club for an estimated amount of US\$20 million (£12 million), later increased to US\$60 248 701 (£36 million). It appears that this claim relates to the same items of damage as the claim in the Cabimas court referred to in paragraph 4.1.9. The 1971 Fund has not been notified of this action.

4.2.2 In its pleadings the Republic of Venezuela has maintained that it was a very significant incident which seriously affected the environment and the ecosystem in general, and which resulted in considerable expenditure being incurred in respect of "pollution damage" and "preventive measures".

FETRAPESCA

4.2.3 A fishermen's trade union (FETRAPESCA) has presented a claim against the shipowner, the Gard Club and the master of the *Nissos Amorgos* before the same first instance civil court in Caracas for an estimated amount of US\$130 million (£78 million) plus legal costs. The 1971 Fund's Venezuelan lawyer has been notified of this action. This claim corresponds to the one referred to in paragraph 4.1.17 above.

4.2.4 FETRAPESCA obtained an order by the Court in Caracas for the arrest of the shipowner's property, of vessels which are not his property but which are under associated management, and of assets belonging to the Gard Club, up to a total of US\$292.5 million (£175 million). This order is still in force.

4.2.5 At the request of FETRAPESCA the Court appointed a committee composed of lawyers and technical experts to assess the value of the damage to the environment caused by the spill.

4.2.6 FETRAPESCA has also presented a claim in the Caracas civil court against the bank which provided a guarantee to the criminal court of Cabimas for the amount of Bs 3 473 million (£3.9 million) relating to the losses suffered by the trade union members.

Fish and shellfish processors

4.2.7 Eleven fish and shellfish processors have presented a claim in the Caracas civil court against the shipowner, the Gard Club and the master of the *Nissos Amorgos* for an estimated amount of

US\$100 million (£60 million) plus legal costs. The 1971 Fund's Venezuelan lawyer has been notified of this action. This claim corresponds to the one referred to in paragraph 4.1.15 above, except that there is a difference in respect of the number of claimants.

Local fishermen's union

4.2.8 A local fishermen's union has presented a claim in the Caracas civil court against the shipowner and the Gard Club for an estimated US\$10 million (£6 million) plus legal costs. The 1971 Fund has not been notified of this action.

4.3 Conflict of jurisdiction

The master, the shipowner and the Gard Club have requested that the Civil Court of Caracas should declare that it does not have jurisdiction over actions brought as a result of the *Nissos Amorgos* incident and that the Criminal Court of Cabimas has exclusive jurisdiction over all such actions. They have also maintained that the action filed by the Republic of Venezuela in the Caracas Court should in any case be dismissed, since a corresponding action had been brought before the Cabimas Court. So far, no decision has been taken on the request.

5 Level of payments

5.1 At its 55th session, the Executive Committee noted that there was great uncertainty as to the total amount of the claims arising out of the *Nissos Amorgos* incident. The Committee endorsed the Director's view that it was necessary to strike a balance between the need to exercise caution in the payment of claims and the importance of the 1971 Fund being able to pay claims at an early stage. The Committee therefore decided that the 1971 Fund's payment should at this stage be limited to 25% of the loss or damage actually suffered by each claimant, as assessed by the experts of the Gard Club and the Fund at the time the payment was made (document 71FUND/EXC.55/19, paragraph 3.12.12). The Committee decided, at its 57th session, that the level of payments should be maintained at 25% (document 71FUND/EXC.57/15, paragraph 3.9.14).

5.2 As set out above, claims have been presented by the Republic of Venezuela for US\$60 million (£36 million), by FETRAPESCA for US\$130 million (£78 million), by fish and shellfish processors for US\$100 million (£60 million), and by a local fishermen's union for US\$10 million (£6 million). There is thus still great uncertainty as to the total amount of the claims arising out of the *Nissos Amorgos* incident. For this reason, the Director is not able to recommend an increase of the level in the 1971 Fund's payments at this stage.

6 Cause of the incident

6.1 Through the 1971 Fund's Venezuelan lawyer, the Director is following the investigation into the cause of the incident which is being carried out by the Venezuelan authorities. As instructed by the Executive Committee at its 54th session, the Director has engaged a technical expert to investigate the cause of the incident on behalf of the 1971 Fund, so as to enable the 1971 Fund to intervene in future legal proceedings, if appropriate.

6.2 The shipowner has notified the 1971 Fund that he reserves the right to seek exoneration from liability for pollution damage arising from the incident, under Article III.2(c) of the 1969 Civil Liability Convention, on the ground that the damage was caused wholly by the negligence or other wrongful act of a Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function. Due to lack of information as to the cause of the incident, it has not been possible for the 1971 Fund to take any position as to whether the shipowner would be exonerated from liability.

6.3 The shipowner and the Gard Club have informed the 1971 Fund that they intend for the time being to continue to pay claims, and to pursue the issue of exoneration at a later date by way of subrogation.

6.4 Recently the shipowner and the Gard Club have also notified the 1971 Fund that, in the light of developments in the Venezuelan legal proceedings, they will not plead exoneration under Article III.2(c) of the 1969 Civil Liability Convention until a later date. The shipowner and the Gard Club have also informed the 1971 Fund that as regards the cause of the incident they propose invoking a defence to the claim by the Republic of Venezuela as set out in Article III.3 of the 1969 Civil Liability Convention, on the basis that the incident was caused at least in part by the negligence of the Instituto Nacional de Canalizaciones (INC), a national body responsible for the maintenance of the channel, and/or by the harbour master (an employee of the Ministry of Transport).

6.5 The shipowner and the Gard Club have expressed the view that in principle the question of exoneration under Article III.2(c) should not affect the claimants in Venezuela. They have maintained that substantial claims have been made in the Venezuelan proceedings which raise important issues of common interest to the 1971 Fund and the Club. It would, in their view, be desirable to avoid conflicts of interest between the Club and the Fund in the proceedings, as might occur if the issue of exoneration were to be raised by the shipowner and Club. They have argued that it would be better for the Club and the 1971 Fund to collaborate in formulating a common defence under Article III.3 of the 1969 Civil Liability Convention and Article 4.3 of the 1971 Fund Convention on the basis that the damage was substantially caused by the negligence of INC, with the result that the claim by the Republic of Venezuela should be correspondingly reduced or rejected.

6.6 The shipowner and the Gard Club have notified the 1971 Fund that they propose to provide the Fund with a detailed statement of their position, together with supporting evidence, relating to the prospects of a joint defence. They have explained that their position has not yet been finalised pending receipt of further documentation which they are seeking to obtain from INC. They have stated that the documentation already obtained indicates that the channel was in an unsatisfactory condition. They have mentioned that the shipowner has brought proceedings against INC in order to compel it to disclose further relevant documents which are understood to exist. According to information received from the shipowner and the Gard Club, INC has not disputed the existence of these documents but has been resisting these proceedings, and has not complied with demands made by the Criminal Court in Maracaibo to hand over documents in its possession.

7 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document;
 - (b) to consider whether to increase the level of the 1971 Fund's payments of claims arising from this incident; and
 - (c) to give the Director such other instructions in respect of the handling of this incident and of claims arising therefrom as it may deem appropriate.
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