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COMPENSATION
FUND 1971

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INCIDENTS INVOLVING THE 1971 FUND

NISSOS AMORGOS

Note by the Director

Summary:	There have been very limited developments in respect of the claims handling. No progress has been made in the court proceedings. A Venezuelan institute has requested that the 1971 Fund should contribute to the cost of an environmental study which it proposes to undertake. The Director has continued his examination of the cause of the incident and related issues.
Action to be taken:	Decide whether the 1971 Fund should contribute to the cost of the proposed environmental study.

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 (Assuranceforeningen Gard (Gard Club)) and the 1971 Fund and the court proceedings, reference is made to documents 71FUND/EXC.55/9, 71FUND/EXC.57/8 and 71FUND/EXC.58/8.

1.3 This document contains information on the disposal of the oily sand collected during the clean-up operations, on a proposed post-spill environmental study, 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) were 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 oil-contaminated sand was 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 appointed a team of three experts who, together with three experts appointed by the 1971 Fund and the Gard Club, are reviewing 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. It was decided that various samples of the oily sand would be taken at different locations, and a laboratory commissioned to carry out an analysis of the hydrocarbon content in the sand. A technical and financial assessment of the options for disposal of the contaminated material would then be carried out in the light of the results of this analysis, taking into account the quantity of collected oily sand.

2.4 Samples of the oily sand were collected from different locations in early June 1998 and were analysed by an independent laboratory. The results showed that the sand had total petroleum hydrocarbon content in the range of 0.27% to 0.44% by weight, the average being 0.36% by weight.

2.5 The disposal issue is at present being discussed with PDVSA.

3 Claims presented to the Claims Agency

3.1 General situation

3.1.1 As at 1 October 1998, 147 claims for compensation totalling Bs6 327 million (£6.9 million) had been presented to the Claims Agency. So far 91 claims have been approved for a total of Bs1 153 million (£1.26 million), and the Gard Club has paid the settlement amounts in full.

3.1.2 In respect of those claims which have been presented to the Claims Agency which are outstanding, only relatively few claimants have provided evidence indicating that the claims are admissible for compensation under the Conventions. Since the Claims Agency in Maracaibo closed on 30 April 1998, the remaining claims are being 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.

3.2 Claims relating to clean-up operations

3.2.1 Lagoven has presented several claims to the Claims Agency totalling Bs3 744 million (£4.2 million) relating to the cost of the beach clean-up. Maraven has presented a series of claims totalling Bs1 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. As a result agreement was reached on all issues discussed except two, namely the issue of the disposal of the oily sand (cf paragraphs 2.2 - 2.5) and the length of time it is considered reasonable for the clean-up operations to have continued. A further meeting has been suggested by the Gard Club and 1971 Fund, and a reply from PDVSA is awaited.

3.2.4 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 for Bs69 306 million (£121 000) relating to the cost of the analysis carried out and the expenses incurred by ICLAM in monitoring the clean-up operations. This claim has been approved at Bs61 075 million (£106 800) by the Gard Club and the 1971 Fund.

3.3 Property claims

The Claims Agency has received claims totalling Bs28.4 million (£31 000) from 16 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. Thirteen claims in this category have been approved for a total of Bs12 million (£13 400), and these claims have been paid in full by the Gard Club. The remaining three claims have not been supported by evidence of the alleged damage.

3.4 Fishery claims

3.4.1 One hundred and forty-six claims by fishermen and some fish transporters for loss of income, totalling Bs1 319 million (£1.4 million), have been presented to the Claims Agency. The Director and the Gard Club have approved 63 claims by owners of fishing boats, fishermen who fish on foot and clam harvesters for amounts totalling Bs62.4 million (£66 000). Twelve claims from fish, clam and shrimp transporters, totalling Bs12.7 million (£13 000), have also been approved. These claims have been paid in full by the Gard Club.

3.4.2 Sixty-four claims totalling Bs854 million (£948 000) submitted by other owners of fishing boats, fishermen who fish on foot, clam harvesters and fish transporters 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 losses. Seven claims by fishermen and fish transporters have been withdrawn.

3.5 Claims from fish processing plants

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

3.6 Claims from the tourism industry

Claims totalling Bs124 million (£127 000) have been submitted in the tourism sector. Of these, two claims have been approved for Bs21 million (£22 000). These claims have been paid by the Gard Club in full. Further information has been requested in respect of most of the remaining claims in this category.

4 Environmental study proposal

4.1 ICLAM (see paragraph 3.2.4) has proposed to undertake an environmental study entitled 'Evaluation of the environmental impact of the *Nissos Amorgos* oil spill on the west coast of the Gulf of Venezuela' (Evaluación del impacto ambiental ocasionado por el derrame petrolero del B/T *Nissos Amorgos* en la costa occidental del Golfo de Venezuela). The objectives of the proposed study include mapping oil pollutants (including heavy metals) in seawater, beach substrates and marine life, identifying oil biodegradation mechanisms, determining the diversity and abundance of commercially important shellfish, identifying oil pollution damage to shellfish reproductive functions and developing shellfish cultivation techniques. ICLAM has requested that the 1971 Fund and the Gard Club should contribute towards the cost of this study.

4.2 The question of whether, and, if so, to what extent the 1971 Fund should contribute to the cost of environmental studies was considered by the 7th Intersessional Working Group. The conclusions of the Group on this point were set out in its report to the Assembly as follows (document FUND/A.17/23):

9.1 It was recalled that, at the 5th Intersessional Working Group, established to consider the IOPC Fund's policy in respect of claims settlement procedures and the admissibility of claims, there had been agreement that expenses for research studies should be compensated under the Civil Liability Convention or the Fund Convention only if these studies were carried out as a direct consequence of a particular oil spill and as a part of the oil spill response (document FUND/A.4/10, Annex, page 7). It was noted that the Assembly had generally endorsed the results of the Working Group's discussions (document FUND/A.4/16, paragraph 13). The present Working Group also noted the policy applied by the IOPC Fund over the years as set out in paragraph 5.4.2 of document FUND/WGR.7/14.

9.2 It was recalled that the IOPC Fund had taken a restrictive position in respect of studies. It was noted that the Fund had in some cases agreed in principle to pay the costs of studies which were necessary for the effective carrying out of clean-up operations of preventive measures, or which facilitated such operations, whereas it had refused to pay for studies of a general or purely scientific character. It was also noted that the IOPC Fund had declined to contribute to the costs of studies relating to alleged damage to the marine environment as such, since in the IOPC Fund's view claims for such damage were not admissible under the Civil Liability Convention and the Fund Convention. It was also recognised that the IOPC Fund should in principle be prepared to pay reasonable costs for studies which were necessary for the preparation, or which would facilitate the Fund's examination of those parts of a claim which were admissible. It was pointed out that the IOPC Fund would be authorised to make payments only within the scope of the definitions of "pollution damage" and "preventive measures" laid down in the Civil Liability Convention and the Fund Convention.

9.3 The Working Group took note of the documents on this issue presented by ITOPF (document FUND/WGR.7/9/3) and the United Kingdom delegation (document FUND/WGR.7/20/3).

9.4 During the discussions most delegations stated that they agreed with the policy applied by the IOPC Fund so far. The question was raised, however, of whether and to what extent the IOPC Fund should pay compensation for the costs of studies relating to the need to reinstate the marine environment. Some delegations took the view that the IOPC Fund should in certain circumstances contribute to the funding of such studies. Some other delegations made the point, however, that the IOPC Fund should not become a research funding body.

9.5 In conclusion, the Working Group agreed in general to maintain the present policy applied by the IOPC Fund in respect of the funding of studies. As regards the situation when it was envisaged that measures should be taken to reinstate the contaminated environment, it was accepted by the Working Group that post-spill studies would sometimes be necessary and useful in order to establish the precise nature and extent of the pollution damage caused by an oil spill and/or the need for reinstatement measures, given the potential of the marine environment for natural recovery. In this situation, it would be appropriate, in the view of the Working Group, if the IOPC Fund were to contribute to the expenses of such studies, provided that the studies related to damage of a type which fell within the definition of "pollution damage" laid down in the Civil Liability Convention and the Fund Convention as interpreted by the IOPC Fund, or related to reasonable measures to reinstate the environment. If the claimant were to request that the IOPC Fund participated in the funding of such studies, it would in the Working Group's view be important that the Fund should be given the possibility of becoming involved at an early stage in the selection of the experts who would carry out the studies and in the determination of the mandate of these experts. The Working Group emphasised that it would be necessary to ensure that the scale of such studies was not out of proportion to the extent of the contamination and the predictable effects. It was also considered important that the studies should be practical and that they should be likely to deliver the required data. It was emphasised that the criterion of reasonableness would always be applied, ie that the extent of the study should be reasonable from an objective point of view and that the costs incurred should also be reasonable.

4.3 At its 17th session, the Assembly endorsed the Working Group's Report (document FUND/A.17/35, paragraph 26.8)

4.4 Under the criteria laid down by the Assembly, the 1971 Fund may contribute to the cost of post-spill environmental studies if the studies relate to damage of the type which falls within the definition of pollution damage laid down in the Conventions as interpreted by the 1971 Fund, including reasonable measures to reinstate the environment. In addition, the studies should be practical and likely to deliver the required data. In the Director's opinion, the proposed post-spill study does not relate to pollution damage as defined in the Conventions but involves basic research into oil pollution effects which have already been the subject of extensive study world-wide. He considers that no restoration plan based on a realistic expectation of improving on the natural recovery of the environment has been presented, nor is there evidence to suggest that restoration is necessary. For these reasons, the Director takes the view that the proposed study does not satisfy the criteria for post-spill environmental studies laid down by the Assembly and that the Fund should therefore not contribute to the cost of the proposed study.

5 Court proceedings

5.1 Criminal Court of Cabimas

5.1.1 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.

5.1.2 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.

5.1.3 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. With respect to the intervention of the Venezuelan delegation at the Executive Committee's 57th session in this regard, reference is made to document 71FUND/EXC.58/8, paragraphs 4.1.4 - 4.1.8.

5.1.4 On 22 September 1998 the Court dismissed the master's defence referred to in paragraph 5.1.3.

Republic of Venezuela

5.1.5 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).

5.1.6 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.

ICLAM

5.1.7 On 12 March 1998, the Republic of Venezuela, on behalf of ICLAM, presented an additional claim for pollution damage in the amount of Bs57.7 million (£65 000). This claim corresponds to the claim presented to the Claims Agency in Maracaibo (cf paragraph 3.2.4 above).

FETRAPESCA

5.1.8 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

5.1.9 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. On 22 September 1998, this claim was declared inadmissible because it was not filed within the period laid down in the Venezuelan Civil Procedural Code.

5.2 Civil Court of Caracas

Republic of Venezuela

5.2.1 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 5.1.5. The 1971 Fund has not been notified of this action.

FETRAPESCA

5.2.2 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 5.1.8 above.

5.2.3 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.

5.2.4 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.

5.2.5 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 Bs3 473 million (£3.9 million) relating to the losses suffered by the trade union members.

Fish and shellfish processors

5.2.6 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 5.1.9 above, except that there is a difference in respect of the number of claimants.

Local fishermen's union

5.2.7 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.

5.3 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.

6 Level of payments

6.1 At its 58th session, the Executive Committee maintained the position taken at its 55th and 57th sessions that, due to the great uncertainty as to the total amount of the claims arising out of the *Nissos Amorgos* incident and the need to strike a balance between exercising caution in the payment of claims and the importance of paying claims at an early stage, the 1971 Fund's payments should 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 (document 71FUND/EXC.58/15, paragraphs 3.8.7 and 3.8.9).

6.2 Due to the continuing uncertainty as to the total amount of the claims arising out of the *Nissos Amorgos* incident, the Director is not able to recommend an increase in the level of the 1971 Fund's payments at this stage.

7 Cause of the incident and related issues

7.1 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.

7.2 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.

7.3 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.

7.4 In April 1998 the shipowner and the Gard Club also notified the 1971 Fund that, in the light of developments in the Venezuelan legal proceedings, they would not plead exoneration under Article III.2(c) of the 1969 Civil Liability Convention until a later date. The shipowner and the Gard Club also informed the 1971 Fund that as regards the cause of the incident they proposed 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).

7.5 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 the 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.

7.6 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.

7.7 When this issue was considered at the Executive Committee's 58th session, a number of delegations stated that in general the 1971 Fund should co-operate with the shipowner and the P & I Club concerned, but that in this case there would be a conflict of interest between the shipowner and the Gard Club on the one hand and the 1971 Fund on the other hand, if the shipowner and the Club were to invoke the exoneration under Article III.2(c) of the 1969 Civil Liability Convention. Some delegations stated that the 1971 Fund should pursue its investigation into the cause of the incident, since the Fund might have to take a position in the near future as to whether the shipowner would be exonerated under Article III.2(c) and whether Article III.3 could be invoked against the claim by the Republic of Venezuela. The Director stated that the legal issues involved were complex since the question was whether negligence, if any, on the part of INC could be attributable to the Republic of Venezuela.

7.8 At its 58th session, the Executive Committee instructed the Director to make all efforts to obtain further information as to the cause of the incident and to co-operate with the shipowner and the Gard Club, bearing in mind the possibility of a conflict of interest between the shipowner/Club and the 1971 Fund (document 71FUND/EXC.58/15, paragraph 3.8.19).

7.9 The Director is continuing his study of the various issues involved, with the assistance of the 1971 Fund's Venezuelan lawyers and other experts, and in co-operation with the shipowner and the Gard Club. He will report to the Executive Committee as soon as the necessary studies have been completed.

8 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 the 1971 Fund should contribute to the cost of the post-spill environmental study referred to in section 4 above;
 - (c) to review the level of the 1971 Fund's payments of claims arising from this incident (section 6); and
 - (d) 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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