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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 limited developments in respect of the claims handling. No progress has been made in the court proceedings. The Venezuelan national oil company which carried out the clean-up operations has requested that the 1971 Fund should pay its claim in full against a bank guarantee in spite of the fact that payments for the time being are pro rated at 25% of the assessed amounts. The Director has continued his examination of the cause of the incident and related issues. The shipowner has supplied the Director detailed documentation concerning the cause of the incident. The shipowner has notified the Director of his intention to resist claims by the Republic of Venezuela under Article III.3 of the 1969 Civil Liability Convention. The shipowner has also reserved the right to seek exoneration from liability for oil pollution under Article III.2(c) of the 1969 Convention on the ground that the damage was wholly caused by the negligence of the National Canal Authority.
Action to be taken:	Decide a) whether the 1971 Fund should accept a bank guarantee by the national oil company and pay the assessed value of its claim in full and b) whether the 1971 Fund should pay a claim by a national research institute, in spite of the shipowner's statement as to contributory negligence on the part of the National Canal Authority.

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, 71FUND/EXC.57/8, 71FUND/EXC.58/8 and 71FUND/EXC.59/10.

1.3 This document contains information on the disposal of the oily sand collected during the clean-up operations, on a proposed environmental audit, on the claims situation and on the cause of the incident.

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.

Clean-up operations

2.2 Manual beach cleaning with a casual labour force of several hundred workers started on 2 March 1997 at the instigation of Lagoven and Maraven, but it was soon established that most of the stranded oil was buried under sand or had sunk in shallow water. Excavating machines deployed from 5 May 1997 were successful in recovering buried and sunken oil, but by the end of July their effectiveness had diminished in the opinion of the experts of the 1971 Fund and the Gard Club. By this time most of the accessible oil had been recovered and the appearance of the beach had greatly improved. The beach closure imposed by the Ministry of Environment and Renewable Resources was lifted on 15 August 1997.

2.3 On 1 August 1997 the experts engaged by the 1971 Fund and the Gard Club informed Lagoven that in their view further beach cleaning activity was not necessary or reasonable since any benefit gained from removing oil in ever diminishing quantities would be outweighed by the disruptive effect of beach excavation on natural recovery processes. The 1971 Fund and the Gard Club reviewed monitoring data supplied by Lagoven and on 3 September 1997 reaffirmed their opinion that continued beach cleaning could not be considered reasonable. Lagoven suspended mechanical beach cleaning activity between 7 and 22 September 1997 before finally terminating all clean-up activity on 31 October 1997.

2.4 There exist differences of opinion between Lagoven and the experts engaged by the Gard Club and the 1971 Fund as to the date beyond which it was not reasonable to continue the clean-up operations. This issue was discussed at a meeting held in Maracaibo in March 1998 between representatives of Lagoven and Maraven and the experts of the Gard Club and the 1971 Fund. A second meeting was held in December 1998 between the team of experts engaged by the Gard Club and the 1971 Fund and representatives of PDVSA. A further meeting is expected to be held in late February 1999, for the purpose of reaching agreement on this issue.

Disposal of oily sand

2.5 During the clean-up operations which were carried out by Lagoven an estimated 48 000 m^3 of contaminated sand was collected. The oily sand has been provisionally stored immediately inland of the affected beach.

2.6 In order to determine the best option for treating the oily sand, PDVSA appointed a team of experts who, together with three experts engaged by the Gard Club and the 1971 Fund, reviewed the options available, namely:

- direct spreading of the oily sand in situ
- return of the oily sand to the beach from where it came
- incineration of the oily sand
- using the oily sand for road paving
- treatment of the oily sand with organic material and spreading it in an area to be specified

2.7 On the basis of the environmental, legal and economic considerations the experts recommended in October 1998 that the oily sand should be treated with organic material in the dune system backing the shoreline, following which vegetation would be planted to stabilise the dunes. The cost of the project has been estimated at Bs1 000 million (£1.2 million). The Gard Club and the 1971 Fund have agreed that this is the preferred disposal option.

2.8 Under Venezuelan law, the disposal method referred to in paragraph 2.7 can be used only after a study has been carried out on the environmental impact of the disposal of the oily sand in the area. The estimated cost of this study is Bs100 million (£120 000). The Gard Club and the 1971 Fund have in principle agreed with PDVSA that this study should be carried out, but they have requested PDVSA to provide them with a detailed specification of the activities to be undertaken and a breakdown of the costs of the study.

Environmental audit

2.9 Samples of the oily sand were collected from different locations in early June 1998 and were analysed by two independent laboratories. The results showed that the sand had a total petroleum hydrocarbon content in the range of 0.27% to 0.44% by weight, the average being 0.36% by weight. These results were compared with analyses of samples of the oily sand taken shortly after the completion of clean-up operations which showed a petroleum content of 0.67% to 7.0% by weight, the average being 2.9% by weight. The Venezuelan Ministry of the Environment and of Renewable Natural Resources has expressed concern that the subsoil may have been contaminated and has therefore ordered that an environmental audit should be carried out to establish whether oil in the collected beach material had seeped into the subsoil and subterranean waters. The estimated cost of this audit is Bs150 million (£180 000).

2.10 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 (document FUND/A.17/23) which was reproduced in a document submitted to the Executive Committee's 59th session (document 71FUND/EXC.59/9, paragraph 4.2). At its 17th session, the Assembly endorsed the Working Group's Report (document FUND/A.17/35, paragraph 26.8).

2.11 Under the criteria laid down by the Assembly, the 1971 Fund may contribute to the cost of post environmental studies or audits, provided that the studies or audits relate to damage of the type which falls within the definition of pollution damage laid down in the 1969 Civil Liability Convention and 1971 Fund Convention as interpreted by the 1971 Fund, including reasonable measures to reinstate the marine environment. In addition these studies or audits should be practical and likely to deliver the required data and their scale should not be out of proportion to the extent of the contamination and the predictable effects. The extent of the audit or study and associated costs should be reasonable from an objective point of view and the costs incurred should also be reasonable.

2.12 The Director has considered that the audit which has been ordered did not satisfy the criteria for post-spill studies laid down by the 1971 Fund Assembly. Furthermore, the apparent decrease in oil content in the collected sand is, in his view, consistent with the expected biodegradation of oil over about one year and, in view of the low rainfall in the arid dune system, the oil would not have leached out of the sand into the subsoil. For this reason, the Director has informed the Venezuelan Ministry that the 1971 Fund was not prepared to contribute to the cost of the audit.

3 Claims presented to the Claims Agency

3.1 General situation

3.1.1 As at 25 January 1999, 175 claims for compensation totalling Bs6 371 million (£7.3 million) had been presented to the Claims Agency. So far 95 claims have been approved for a total of Bs1 243 million (£1.4 million). The Gard Club has paid all these claims in full except those of PDVSA/Lagoven and Maraven for which only provisional payments have been made.

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 by Lagoven and Maraven (PDVSA)

3.2.1 Lagoven presented several claims to the Claims Agency totalling Bs3 744 million (£4.2 million) relating to the cost of the beach clean-up. Maraven 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 experts engaged by the Gard Club and the 1971 Fund, and after consultation with the Director, the Gard Club made interim payments to Lagoven and Maraven of Bs775 million (£900 000) and Bs271 million (£300 000), respectively.

3.2.3 After the December 1998 meeting referred to in paragraph 2.4 above, the experts engaged by the Gard Club and the 1971 Fund made an interim assessment of the claims submitted by Lagoven and Maraven. These assessments gave admissible amounts of Bs2 345 million (£2.8 million) and of Bs742 million (£890 000) plus US$35 850 (£21 700), respectively.

3.3 Property claims and fishery claims

There have been virtually no developments in respect of these claims since the Executive Committee's 59th session (cf document 71FUND/EXC.59/10 paragraphs 3.3 and 3.4).

3.4 Claims from fish processing plants

3.4.1 The Claims Agency was informed by a lawyer representing a large number of fish processing plants in the Maracaibo area that his clients believed that 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 claims have been submitted.

3.4.2 A meeting took place in December 1998 between the experts engaged by the Gard Club and the 1971 Fund, and a claimant who owns a large number of fishing boats and a fish processing plant. The evidence required to substantiate the claim was discussed. It is expected that further meetings with this and other claimants in this category will be held in the future.

3.5 Claims from the tourism industry

Twelve claims totalling Bs168 million (£193 000) have been submitted in the tourism sector. Of these, three claims have been approved for Bs25 million (£29 000). Two of these claims have been paid in full by the Gard Club, and the third will be paid shortly. Further information has been requested in respect of most of the remaining claims in this category.

4 Claim by a fishermen's trade union (FETRAPESCA)

A fishermen's trade union (FETRAPESCA), which has submitted a claim before the Venezuelan courts for some US$130 million (£78 million), has contacted the 1971 Fund and requested a meeting to discuss its claim. It is expected that a meeting will be held in the near future between the experts engaged by the Gard Club and the 1971 Fund and representatives of FETRAPESCA.

5 Court proceedings

5.1 There have been no developments in the court proceedings since the Executive Committee's 59th session (cf document 71FUND/EXC.59/10, section 5).

5.2 The claims presented in the court proceedings total some US$200 million (£121 million).

6 Level of payments

6.1 In view of the remaining uncertainty as to the total amount of the claims arising out of the *Nissos Amorgos* incident, the Executive Committee decided, at its 59th session, to maintain the limit of the 1971 Fund's payments at 25% of the loss or damage actually suffered by each claimant (document 71FUND/EXC.59/17, paragraph 3.9.9).

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 PDVSA's offer of a bank guarantee against full payment

7.1 The Gard Club has paid Bs1 046 million (£1.2 million) on the basis of provisional assessments of Lagoven's and Maraven's claims. In a letter to the Director, PDVSA has requested that the 1971 Fund should pay PDVSA the balance of the assessed amounts of its claim and of the amounts assessed in the future, and has offered the 1971 Fund a bank guarantee of Bs2 500 million (£3 million) to protect the Fund against overpayment. The balance stands at present at Bs2 042 million (£2.2 million).

7.2 The Executive Committee will recall that in the *Haven* case (document FUND/EXC.47/14, paragraphs 3.1.16 - 3.1.18) and in the *Aegean Sea* case (document 71FUND/EXC.57/15, paragraphs 3.2.44 - 3.2.55) the Committee decided that the 1971 Fund could pay certain claims in full if the claimant furnished the Fund with a bank guarantee against overpayment, in the event that the claims ultimately had to be pro rated, provided that the bank guarantee in the view of the Director and the Fund's legal advisers gave the Fund adequate protection.

7.3 It should be noted that in the *Haven* and *Aegean Sea* cases the question of payments by the 1971 Fund against a bank guarantee arose only after the P & I Club in question had made payments up to the shipowner's limitation amount. In the *Nissos Amorgos* case, the shipowner's limitation amount is approximately £4.4 million, whereas the shipowner/Gard Club has so far paid only Bs2 261 million (£2.6 million).

7.4 The Gard Club is considering this question.

7.5 In view of the Court's decisions in the *Haven* and *Aegean Sea* cases, the Director considers that the claim by PDVSA should be paid in full provided that the offered bank guarantee gives adequate protection against overpayment. If the Executive Committee were to accept PDVSA's request, the Director proposes to agree with the Gard Club on how the payment to PDVSA should be apportioned between the Club and the 1971 Fund.

7.6 The Executive Committee is invited to consider PDVSA's request that the 1971 Fund should pay the balance of PDVSA's claim in full against a bank guarantee.

8 Cause of the incident

8.1 The shipowner and the Gard Club have taken the position that the incident and resulting pollution were due to the fact that official information given to the ship regarding the safe depth of the Maracaibo Channel was incorrect. They have maintained that within that depth there were one or more hard (probably metallic) objects which could and did penetrate the ship's hull causing oil to escape.

8.2 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.

8.3 The shipowner has also notified the 1971 Fund that he intends to resist any claims for pollution damage by the Republic of Venezuela, on the basis of Article III.3 of the 1969 Civil Liability Convention, on the ground that the damage was substantially caused by negligence imputable to the claimant, namely negligence on the part of the Instituto Nacional de Canalizaciones (INC), a national body responsible for the maintenance of the channel, and/or of the harbour master (an employee of the Ministry of Transport).

8.4 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 non-government claimants in Venezuela. They have also maintained that substantial claims have been made in the Venezuelan court 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 Fund and the Club in the proceedings - particularly when these do not directly affect the compensation payable to the claimants - as might occur if the issue of exoneration under Article III.2(c) were raised for decision in those proceedings.

8.5 The shipowner and the Gard Club have informed the 1971 Fund that they intend, for these reasons, to continue until further notice to pay non-government claims without invoking against the claimants the ground of exoneration contained in Article III.2(c), and to pursue this issue at a later date by way of subrogation. They have requested that the 1971 Fund should not for the time being make any decision on the validity or otherwise of their potential subrogation claim.

8.6 The shipowner and the Gard Club have informed the 1971 Fund that in February 1998 the Court in Cabimas granted an application by the shipowner for a "nudo hecho" order to be made against INC. They have explained that this is a feature of Venezuelan procedural law which empowers the Court to require public authorities to disclose information or documents in order that they may be held accountable for their activities. The shipowner and the Club have mentioned that at the shipowner's request the Court ordered INC to disclose information and documents in its possession concerning the condition of the channel and that the Court served this order on INC in Maracaibo. The shipowner and the Gard Club have stated that INC refused to comply with the order, and that in June 1998 the Court repeated the order directly to the Minister of Transport. According to the shipowner and the Club, the order has not been complied with.

8.7 In December 1998 the shipowner and the Gard Club supplied the 1971 Fund with a detailed analysis of the evidence available to them concerning the cause of the incident, together with a substantial quantity of documentary material. They have supplied the material so that it may be considered by the Fund and its lawyers in connection with the legal proceedings which have been brought in Venezuela and to assist the Fund in deciding whether it wishes to rely on a similar defence under Article 4.3 of the 1971 Fund Convention.

8.8 The Director, with the assistance of the 1971 Fund's lawyers, is examining the documentation supplied by the shipowner and the Gard Club. The Director will report to the Executive Committee as soon as the examination has been completed.

9 Claim by ICLAM

9.1 The Instituto para el Control y la Conservación 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 cost of the analysis carried out and the expenses incurred by ICLAM in monitoring the clean-up operations in the amount of Bs69.3 million (£83 000). This claim has been assessed at Bs61 075 467 (£74 000) by the experts engaged by the Gard Club and the 1971 Fund.

9.2 The shipowner and the Gard Club have stated that they are not prepared to make any payment to ICLAM in respect of this claim. They agree with the amount assessed by the Club's and the 1971 Fund's experts, but they dispute liability towards ICLAM on the grounds that it is an agency of the Republic of Venezuela (being part of the Venezuelan Ministry of Environment and Renewable Natural Resources), and that the incident was substantially caused by negligence imputable to the Republic of Venezuela (cf paragraphs 8.1 - 8.5 above).

9.3 The Director would like to draw the Executive Committee's attention to the fact that there is a difference between the 1969 Civil Liability Convention and the 1971 Fund Convention as regards contributory negligence. Firstly, the shipowner is exonerated from any liability if he proves that the damage was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of the lights or other navigational aids in the exercise of that function (Article III.2(c) of the 1969 Civil Liability Convention), whereas there is no corresponding ground of exoneration for the 1971 Fund under the 1971 Fund Convention. Secondly, the general provisions on contributory negligence in the two Conventions differ as set out below:

> *Article III.3 of the 1969 Civil Liability Convention*
> If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person.
>
> *Article 4.3 of the 1971 Fund Convention*
> If the Fund proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the Fund may be exonerated wholly or partially from its obligation to pay compensation to such person provided, however, that there shall be no such exoneration with regard to such preventive measures which are compensated under paragraph 1. The Fund shall in any event be exonerated to the extent that the shipowner may have been exonerated under Article III, paragraph 3, of the Liability Convention.

9.4 In the Director's view, Article 4.3 prevents the 1971 Fund from invoking contributory negligence in respect of preventive measures. The Executive Committee agreed with this interpretation in respect of a claim by the Spanish Government in the *Aegean Sea* case (cf documents 71FUND/EXC.50/4, paragraph 6.9 and 71FUND/EXC.50/17, paragraphs 3.3.18 and 3.3.20).

9.5 The Director considers that ICLAM's claim relates to costs falling within the definition of "preventive measures". For this reason, he takes the view that the 1971 Fund is not entitled to invoke contributory negligence in respect of this claim. The 1971 Fund should therefore, in his view, pay that claim on the basis of the amount assessed by the Fund's and the Club's experts, subject to the same pro-rating as all other claims (at present 25%).

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 review the level of the 1971 Fund's payments of claims arising from this incident (section 6);

(c) to consider whether the 1971 Fund should accept to pay PDVSA's claim in full against a bank guarantee protecting the Fund against overpayment (section 7);

(d) to consider whether the 1971 Fund should pay the claim submitted by ICLAM (section 9); and

(e) 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.