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Agenda item 4

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INCIDENTS INVOLVING THE 1971 FUND

NISSOS AMORGOS

Note by the Director

Summary:	There have been a number of developments in the civil court proceedings. Further details are provided on a claim by ICLAM relating to the cost of monitoring clean-up operations. The shipowner intends to resist claims by the Republic of Venezuela under Article III.3, and also reserves the right to seek exoneration from liability under Article III.2(c) of the 1969 Civil Liability Convention. The documents available to the 1971 Fund indicate that negligence on the part of the Instituto Nacional de Canalizaciones may have contributed to the incident. The Director is not convinced, on the basis of the evidence available, that the shipowner would be wholly exonerated from liability pursuant to Article III.2(c).
Action to be taken:	Decide on the admissibility of the claim submitted by ICLAM, review the level of the 1971 Fund's payments and consider the 1971 Fund's position on the cause of the incident and related issues.

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, the clean-up operations and the establishment of a Claims Agency in Maracaibo by the shipowner's insurer (Assuranceföreningen Gard (Gard Club)) and the 1971 Fund, reference is made to documents 71FUND/EXC.55/9, 71FUND/EXC.57/8, 71FUND/EXC.58/8, 71FUND/EXC.59/10 and 71FUND/EXC.60/10.

1.3 This document contains information on the claims situation, on the developments in the legal proceedings before the Cabimas Court and on the cause of the incident.

2 Claims presented to the Claims Agency

2.1 General situation

2.1.1 As at 5 April 1999, 176 claims for compensation totalling Bs 6 372 million (£6.8 million) had been presented to the Claims Agency. So far 97 claims have been approved for a total of Bs 1 273 million (£1.4 million). The Gard Club has paid all these claims in full except those relating to clean-up operations undertaken by Lagoven and Maraven (wholly owned subsidiaries of the national oil company, Petroleos de Venezuela - PDVSA), for which only interim payments have been made (see section 2.2 below).

2.1.2 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.

2.2 Claims relating to clean-up operations by Lagoven and Maraven (PDVSA)

2.2.1 Lagoven presented several claims to the Claims Agency totalling Bs 3 744 million (£4.0 million) relating to the cost of the beach clean-up. Maraven presented a series of claims totalling Bs 1 041 million (£1.1 million) for the costs incurred for clean-up operations.

2.2.2 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, in September 1997 the Gard Club made interim payments to Lagoven and Maraven of Bs 775 million (£830 000) and Bs 271 million (£290 000) respectively. After a meeting held with the claimants in December 1998, the experts engaged by the Gard Club and the 1971 Fund made further assessments of the claims submitted by Lagoven and Maraven. These assessments gave admissible amounts of Bs 2 345 million (£2.5 million) and of Bs 742 million (£794 000) plus US$35 850 (£22 400), respectively.

2.2.3 A further meeting to discuss the claims will be held in Caracas in mid April 1999.

2.3 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 (£81 million), has contacted the 1971 Fund and requested a meeting to discuss its claim. A meeting between the experts engaged by the Gard Club and the 1971 Fund and representatives of FETRAPESCA is expected to take place in mid April 1999.

2.4 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 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. 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. A second meeting with this claimant is expected to be held in mid April 1999.

2.5 Claim by the Instituto para el Control y la Conservación de la Cuenca del Lago de Maracaibo

2.5.1 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 Resources, has presented a claim for

Bs 69.3 million (£74 000) relating to the cost of monitoring the clean-up operations, which included the sampling and analysis of water, sediment and marine life. The claim was assessed by the Club's and the 1971 Fund's experts at Bs 61.1 million (£65 000).

2.5.2 At its 60th session the Committee noted that the shipowner and his insurer had notified the Director that, whilst they agreed with the assessed amount, they intended to resist ICLAM's claim since they disputed liability on the grounds that ICLAM was an agency of the Republic of Venezuela (being part of a Ministry) and that the incident was substantially caused by negligence imputable to the Republic of Venezuela.

2.5.3 The Committee took note of the Director's analysis of the differences between the 1969 Civil Liability Convention and the 1971 Fund Convention as regards contributory negligence, as set out in paragraph 9.3 of document 71FUND/EXC.60/10. The Committee agreed with the Director that Article 4.3 of the 1971 Fund Convention prevented the 1971 Fund from invoking contributory negligence in respect of preventive measures (document 71FUND/EXC.60/17, paragraph 3.9.14).

2.5.4 The Committee considered that, if ICLAM's claim related to costs which fell within the definition of 'preventive measures', the 1971 Fund was not entitled to invoke contributory negligence in respect of that claim. A number of delegations expressed some doubts as to whether the claim submitted by ICLAM for the costs of the analysis carried out and the expenses incurred in monitoring the clean-up operations fell within the definition of 'preventive measures'. The Director was instructed to give more detailed information on the costs covered by ICLAM's claim so as to enable the Committee to determine whether they fell within the definition of 'preventive measures' (document 71FUND/EXC.60/17, paragraph 3.4.15).

2.5.5 The facts on which ICLAM's claim is based are as follows. Stranded oil was frequently re-distributed by tidal action, with the result that some oil became buried and some sank in the surf zone. The mechanical clean-up techniques which had to be employed to remove sunken oil inevitably led to elevated concentrations of water-borne oil. The costs incurred by ICLAM were primarily in relation to work undertaken to locate buried and sunken oil, to monitor the clean-up, to safeguard public health and to protect seafood markets. Samples of water, sediment and fish were taken at regular intervals and analysed for petroleum hydrocarbons and/or vanadium, a heavy metal present in high concentrations in Venezuelan crude oils.

2.5.6 Some of the work carried out by ICLAM involved scientific studies of shellfish, mangroves and migratory birds. These studies were considered by the Gard Club's and 1971 Fund's experts not to have contributed to the clean-up operation, and the costs associated with these studies, amounting to Bs 6.4 million (£7 000), were rejected by the Fund.

2.5.7 In the Director's view the results of the analyses referred to in paragraph 2.5.5 formed an essential part of the monitoring and control of the clean-up operations and in ensuring that the techniques employed resulted in a net environmental benefit.

2.5.8 The Director takes the view that except for the studies referred to in paragraph 2.5.6, the work undertaken by ICLAM formed an important part of prudent and reasonable preventive measures and that therefore the claim for costs in the amount of Bs 61.1 million (£65 000) is admissible for compensation.

3 Court proceedings

3.1 Criminal Court of Cabimas

3.1.1 A criminal first instance court in Cabimas is carrying out an investigation into the cause of the incident. The Cabimas Court will then make a finding as to who, if anyone, can be held criminally liable for the incident.

3.1.2 The shipowner has presented a guarantee to the Cabimas Court for Bs 3 473 million (£3.7 million), being the limitation amount applicable under the 1969 Civil Liability Convention.

3.2 Civil claims presented before the Criminal Court of Cabimas

Republic of Venezuela

3.2.1 In October 1997, the Republic of Venezuela presented a claim for pollution damage against the master, the shipowner and the Gard Club in the Criminal Court of Cabimas Court for US$60 250 396 (£37.6 million). The 1971 Fund has been notified of this claim. The claim is based on a letter to the Attorney General of Venezuela, 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 (£23.3 million);

(b) cost of restoring the quality of the water in the vicinity of the affected coasts, quantified at US$5 million (£3.1 million);

(c) cost of replacing sand removed from the beach during the clean-up operation, quantified at US$1 million (£625 000);

(d) damage to the beach as a tourist resort, quantified at US$16 948 454 (£10.6 million).

3.2.2 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.

Court hearing on 12 March 1998

3.2.3 At a court hearing held in Cabimas on 12 March 1998 the master, the shipowner and the Gard Club opposed the claim by the Republic of Venezuela, presenting the following defences:

(a) The defendants were not liable on the grounds that the incident had been caused by the poor condition of the channel.

(b) The claim failed to identify any respect in which those on board the ship had been at fault.

(c) Under Article III.4 of the 1969 Civil Liability Convention no claim for compensation for pollution damage may be made against the servants or agents of the owner. Since the master fell within this category, no claim could be made against him.

(d) The claim was inadmissible since it was based on an abstract quantification of the damage using a theoretical model.

(e) The claim was technically defective because the rate to be used to calculate interest on the claimed amount had not been specified.

3.2.4 The 1971 Fund, which had previously intervened in the proceedings as an interested party, supported the position taken by the shipowner and the Gard Club in respect of items (c) and (d).

3.2.5 At the Court hearing on 12 March 1998, three further claims were presented:

(a) The Republic of Venezuela, on behalf of ICLAM, presented an additional claim for pollution damage in the amount of Bs 57.7 million (£62 000). This claim corresponds to the claim presented earlier to the Claims Agency in Maracaibo (paragraph 2.5 above).

(b) A fishermen's trade union (FETRAPESCA) presented a claim for compensation for pollution damage for an estimated amount of US$130 million (£81 million) plus legal costs. This claim was declared inadmissible by the Court, since it was not filed within the period laid down in the Venezuelan Civil Procedural Code.

(c) Eight fish and shellfish processors presented a claim for compensation for an estimated amount of US$100 million (£62.5 million) plus legal costs. This claim was also declared inadmissible by the Court for the same reason as the FETRAPESCA claim.

Further claims

3.2.6 The claim by FETRAPESCA referred to in paragraph 3.2.5 (b) was resubmitted on 24 February 1999. Two new claims by fish and shellfish processors were submitted to the Court on the same day. The Court has not yet taken any decision on these claims.

Cabimas Court's decisions on evidence

3.2.7 On 12 February 1999, the Cabimas Court requested the parties to inform the Court, before the end of a period which expired on 15 March 1999, of the evidence which they intended to present in the proceedings.

3.2.8 The 1971 Fund, together with the master, the shipowner and the Gard Club, submitted a request to the Court that it should order the Republic of Venezuela to present a number of documents referred to in the claim, which relate to the environmental impact of the oil, which were not included within the court file. They also requested that the Court should hear a number of witnesses who had visited the area affected by the spill during the clean-up operations and thereafter. They further requested that the Court should appoint a panel of experts to advise it on the technical merits of the claim by the Republic of Venezuela.

3.2.9 The 1971 Fund, together with the master, the shipowner and the Gard Club, presented to the Court a report prepared on the various items of claim by the Republic of Venezuela by experts appointed by them of Venezuelan, American and Swedish nationality. The main points of this report are summarised below.

(a) Regarding the alleged damage to the communities of clams living in the intertidal zone, the claim is based on a theoretical population model. In the model it is assumed that the clam mortality ascribed to the oil spill corresponded to the pattern of oil distribution and that the losses due to mortality would last six years. The loss calculation rests on the assumption that each clam has a commercial value of Bs 2.50 (0.27p).

The 1971 Fund's experts focus on the false assumptions and speculative nature of the theoretical model which lead to an erroneous result of over 4 700 million dead clams, and the lack of evidence of clam mortality caused by the oil spill. The experts maintain that the assumption of mortality is not valid and is contradicted by data reported by the Instituto Oceanográfico de Venezuela, demonstrating the existence of large quantities of clams three months after the spill in areas where mortalities ranging from 50% to 75% were assumed by the claimant for the purpose of quantifying the claim.

(b) The claim item relating to the cost of restoring the quality of water is based on the alleged influence on water quality of residual oil pollutants in the form of buried and sunken oil. It is assumed that an economic value can be assigned to the natural degradation of such oil residues. The value chosen arbitrarily by the claimant is the approximate cost of the mechanical removal of oily sand from the surf zone. There is

no indication in the claim that any practical measures to restore the water quality would be undertaken.

The 1971 Fund's experts draw attention to the fact that the whole basis of the shoreline clean-up operation, including the removal of sunken oil, was to minimise damage to the environment and that once this operation was completed there was no possibility or reason for further restoration measures. The 1971 Fund accepts that costs for the clean-up operations are admissible in principle, and interim payments have been made in respect of these costs (see paragraph 2.2.2).

(c) The claim item regarding the replacement of sand removed from the beach during the clean-up operation is based on the theoretical cost of replacing 100 000 m^3 of sand.

The 1971 Fund's experts point out that only 48 000 m^3 of sand was removed from the beach during the clean-up operation. They maintain that the natural and constant replenishment of sand in the Gulf of Venezuela by currents and waves makes it unnecessary to replace any sand removed during the clean-up operations with sand brought in from other areas.

(d) The item relating to damage to the beach as a tourist resort is based upon an abstract quantification of the theoretical spending by 1 million visitors annually.

The 1971 Fund's experts point out that, as shown by actual surveys carried out by the Claims Agency in Maracaibo, the annual number of visitors to the beach is only about 33 000 and the assumed average spending per person used to calculate the claim is more than five times the actual amount spent. Moreover, the item duplicates claims made by cabin owners, shopkeepers and other persons in the tourist sector which have been accepted by the Gard Club and the 1971 Fund.

3.2.10 On 25 March 1999, the Cabimas Court accepted to consider all the evidence proposed by the parties and also accepted that a panel of experts should be appointed (cf paragraph 3.2.8). The Court fixed a date for the hearing of the witnesses and the experts and will in the near future decide on the composition of the panel of experts.

3.2.11 The legal arguments will be presented by the parties at a later stage.

3.3 Civil Court of Caracas

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

3.4 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.

4 Level of payments

4.1 In view of the uncertainty as to the total amount of the claims arising out of the *Nissos Amorgos* incident, the Executive Committee decided, at its 60th 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.60/17, paragraph 3.9.2).

4.2 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.

5 Cause of the incident

5.1 In December 1998 the shipowner and the Gard Club supplied the 1971 Fund with a substantial quantity of documentary evidence available to them concerning the cause of the incident, together with a detailed analysis of this material.

5.2 The conclusion drawn by the shipowner and the Gard Club from the documents made available to the 1971 Fund is that the incident and resulting pollution were due to the fact that the Maracaibo Channel was in a dangerous condition due to poor maintenance, that this was known by the Venezuelan authorities, but that its full extent was concealed and that the arrangements for alerting mariners to the dangers which existed were unreliable. They have maintained that the depth of the channel was less than that stated in official information given to the ship and that within that depth there were one or more hard (probably metallic) objects which could cause damage to shipping. They have maintained that the escape of oil from the *Nissos Amorgos* was the result of holes punctured in the vessel's bottom plating sustained by contact with a sharp metal object. They have referred to other vessels which encountered difficulties in the same part of the channel and, in particular, to the vessel *Olympic Sponsor,* which grounded ten days after, and at almost the same place as the *Nissos Amorgos*, and suffered similar bottom damage, with a metal object later retrieved from her bottom plating.

5.3 The Director, with the assistance of the 1971 Fund's lawyers, has examined the documentation supplied by the shipowner and the Gard Club. In the Director's view, the documentation appears to support the shipowner's/Gard Club's position that the channel had deteriorated as a result of poor maintenance on the part of 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). There is also evidence to suggest that the poor condition of the channel was known to a number of parties, particularly to the Venezuelan government and INC, and that the extent of the deficiency of the channel specification had not been made public.

5.4 The shipowner and the Gard Club have notified the 1971 Fund that they intend 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 INC.

5.5 The shipowner and the Gard Club have notified the 1971 Fund that they reserve 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. In their view, in principle, the question of exoneration under Article III.2(c) should not affect non-government claimants in Venezuela in that, if the shipowner is exonerated, the claims will be paid by the 1971 Fund. The shipowner and the Gard Club have stated that they have therefore made compensation payments without invoking against the claimants the ground of exoneration contained in Article III.2(c), whilst reserving the right to pursue this issue with the 1971 Fund at a later date by way of subrogation.

5.6 As regards the defence by the shipowner under Article III.2(c) there is obviously a conflict of interest between the shipowner/Gard Club and the 1971 Fund, since if that defence were to be successful, the shipowner would be exonerated from liability in respect of all claims arising out of the incident and the 1971 Fund would have to pay all these claims. On the other hand the shipowner/Gard Club and the 1971 Fund would have the same interest to establish whether there was contributory negligence on the part of INC.

5.7 The shipowner/Gard Club have pointed out that substantial claims have been made in the Venezuelan court proceedings which raise important issues of common interest between the 1971 Fund

and the Club in the proceedings, and they have suggested that it would be unfortunate if a common approach were to be undermined by any conflict of interest. For these reasons, they are not pressing the 1971 Fund to take any position at this stage on the validity or otherwise of their potential subrogation claim. When supplying to the 1971 Fund the material referred to in paragraph 5.1 above, the shipowner/Gard Club stated that they did so in order that this material may be considered by the 1971 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 defence of contributory negligence under Article 4.3 of the 1971 Fund Convention, similar to that relied upon by the shipowner under Article III.3 of the 1969 Convention.

5.8 The documents made available to the 1971 Fund indicate in the Director's view that negligence on the part of INC may have been a factor which contributed to the incident and the ensuing pollution damage and that therefore the shipowner/Gard Club might be partially exonerated from liability to the Venezuelan Government and to other government bodies. If there was such contributory negligence, the 1971 Fund would also be partially exonerated in respect of claims by the Venezuelan Government, except to the extent that the claims relate to the cost of preventive measures (see document 71FUND/EXC.60/17, paragraph 3.9.15).

5.9 However, the Director is not convinced that, on the basis of the evidence made available to the 1971 Fund so far, the damage was caused wholly by the negligence or other wrongful act of the INC, and he considers therefore that the shipowner may not be wholly exonerated from liability in respect of this incident pursuant to Article III.2 (c) of the 1969 Civil Liability Convention.

5.10 In the light of what is set out above, the Director proposes that the 1971 Fund should invoke contributory negligence as a defence to the claim submitted by the Venezuelan Government, since its claim does not relate to the cost of preventive measures.

5.11 The Director will invite the shipowner/Gard Club to provide further information and documentation on a number of points.

5.12 The Director proposes that he should be instructed to investigate further the issues relating to the cause of the incident and contributory negligence, and that this investigation should be carried out in co-operation with the shipowner/Gard Club to the extent that there is no conflict of interest between them.

5.13 If the evidence were to establish contributory negligence on the part of INC, the Executive Committee would in the Director's view have to consider whether the 1971 Fund should take recourse action against the Republic of Venezuela for the purpose of recovering any amount paid by the Fund in compensation.

6 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 claim submitted by ICLAM is admissible (section 2.5);

(c) to review the level of the 1971 Fund's payments of claims arising from this incident (section 4);

(d) to consider the position to be taken by the 1971 Fund in respect of the cause of the incident (section 5) ; 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.