



**INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971**

EXECUTIVE COMMITTEE
54th session
Agenda item 3

71FUND/EXC.54/2/Add.1
9 June 1997

Original: ENGLISH

INCIDENTS INVOLVING THE 1971 FUND

NISSOS AMORGOS

Note by the Director

1 Claims presented to the Claims Agency

1.1 General situation

As at 6 June 1997 claims for compensation totalling Bs 1 298 million and US\$ 1 117 915 (£2.3 million) had been presented to the Claims Agency in Maracaibo.

1.2 Recent developments

1.2.1 As indicated in paragraph 4.2 of document 71FUND/EXC.54/2, Lagoven and Maraven had presented claims for clean-up costs for Bs 548 688 655 (£693 000) and US\$ 1 117 915 (£683 000), respectively. After the experts of the 1971 Fund and the Gard Club had made a preliminary assessment of these claims, the Gard Club agreed to make provisional payments of Bs 275 million (£347 000) to Lagoven and of Bs 271 million (£342 000) to Maraven. The Gard Club's decision to make these payments was taken after consultation with the Director.

1.2.2 Lagoven has presented a second claim for clean-up costs for Bs 256 120 056 (£323 400).

1.2.3 A provisional claim totalling Bs 12 480 500 (£15 800) has been submitted on behalf of 108 owners of 576 beach cabins located at Caimare Chico. The beach remains closed, and further claims from these owners are anticipated.

1.2.4 On 4 June 1997, the Director and the Gard Club approved claims by owners of 23 fishing boats for the amounts claimed, totalling Bs 11 747 250 (£14 800). It is understood that these claims will be paid in full by the Gard Club shortly.

1.2.5 Claims totalling Bs 195 000 (£260) have been received from the owners of a further seven fishing boats.

2 Possible exoneration of the shipowner from liability

2.1 Article III.2 of the 1969 Civil Liability Convention, under which the shipowner is exonerated from liability in certain cases, reads as follows:

III.2 No liability for pollution damage shall attach to the owner if he proves that the damage:

- (a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
- (b) was wholly caused by an act or omission done with intent to cause damage by a third party, or
- (c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

2.2 The shipowner has notified the Director 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. He has stated that he reserves the right to argue that where a system has been established for maintaining and monitoring the depth of water available in a buoyed channel, and for providing ships with official advice concerning the permissible draught, such a system constitutes a "navigational aid" within the meaning of the Convention, and that the shipowner is exonerated if - due to the neglect or other wrongful act of the responsible governmental authority - the system is not properly maintained and a casualty results from wrong information supplied to the ship.

2.3 The shipowner and the Gard Club maintain that there is clear evidence that the shipowner is entitled to exoneration under Article III.2(c) of the 1969 Civil Liability Convention. They recognise, however, that it will take some time before this issue can be finally resolved. In the view of the shipowner and the Gard Club, this issue is not of any importance for claimants, since it only would affect the apportionment of payments of compensation between the shipowner/Gard Club and the 1971 Fund. The shipowner and the Gard Club have stated that, in order to ensure the prompt settlement of legitimate claims, they are prepared to make payments without invoking against the claimants this defence of exoneration from liability. They have stated that such payments would be made on the basis (a) that the shipowner acquires by subrogation the rights which the claimants would have had against the 1971 Fund if such payments had not been made, including the right to claim compensation from the 1971 Fund in the event of that shipowner being exonerated from liability under the 1969 Civil Liability Convention and (b) that the shipowner would therefore remain entitled to invoke this defence against the 1971 Fund. They maintain that they would be able to recover from the 1971 Fund the amounts paid to claimants if it is established that the shipowner is exonerated from liability under Article III.2(c). They have drawn attention to the fact that the 1969 Civil Liability Convention and the 1971 Fund Convention do not expressly confer a right of subrogation in such a case.

2.4 In the Director's view, the shipowner and the Gard Club would be entitled to subrogation with regard to the shipowner's limitation fund and the 1971 Fund in respect of any payment made to a claimant, if it

were established by a final judgement that the shipowner was exonerated from his liability under Article III.2(c) of the 1969 Civil Liability Convention. He considers that as a result of such subrogation, the shipowner/Gard Club would have the same rights against the 1971 Fund as the claimants whom the shipowner/Club had paid would have had if the payments to them by the shipowner/Club had not been made. This would mean, in the Director's view, that if the total amount of the established claims were to exceed the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention, and consequently all claims were reduced *pro rata*, the subrogated claims by the shipowner/Gard Club would be reduced correspondingly.

3 Claims by unlicensed fishermen

3.1 Claims have been submitted by fishermen who do not hold proper licences. The question arises whether claims by such fishermen are admissible for compensation.

3.2 The Director has sought legal advice on this point from the 1971 Fund's Venezuelan lawyer. His opinion can be summarised as follows:

Under Venezuelan law (1944 Law on Fisheries), the permission of the Ministry of Agriculture and Cultivation is required in order to carry out commercial, scientific or sport fishing. Permanent fishing boats with more than three crew members must have such permits. Any person involved in fishing must provide the Ministry with whatever information regarding his activity the Ministry may request.

In 1975, a Regulation was issued under the 1944 Law defining commercial fisheries as those which carry out a permanent or temporary profitable fishing activity. Any person involved in commercial fishing needs a licence issued by Servicio Autonomo de Recursos Pesqueros Agrícola (SARPA). The licence indicates the area where the fishing activity may be carried out and the boat or vessel engaged in the activity.

A person who carries out fishing activities without a proper licence is subject to administrative sanctions in the form of fines of between Bs 50 (£0.06) and Bs 10 000 (£12.60), and subject to the confiscation of catches. The sanctions are imposed by an administrative authority under the Law on Administrative Procedure (and not by a court under criminal law).

More severe sanctions are imposed on a commercial fisherman who carries out fishing activities in areas where fishing is prohibited or during periods when fishing is not allowed. In this case, a master might be given a prison sentence of between four and eight months and a fine of 400 to 800 minimum daily salaries. These sanctions are imposed by a criminal court.

3.3 The 1971 Fund's Venezuelan lawyer has informed the Director that there is no legislation or jurisprudence in Venezuela as to whether unlicensed fishermen are entitled to compensation for loss of income. He has stated that the jurisprudence requires the claimant to prove that he is a fisherman and that he has suffered an economic loss.

3.4 The question of the admissibility of claims from unlicensed fishermen has been dealt with previously by the 1971 Fund in the *Aegean Sea*, *Braer* and *Sea Empress* cases.

3.5 In the *Aegean Sea* case, the Executive Committee considered whether fishermen, shellfish gatherers and operators of mussel rafts would be entitled to compensation only if they held a valid licence. The Committee took the position that, since the question of whether a claimant was entitled to compensation was governed by civil law, the decisive criteria should be whether the claimant had suffered an actual economic loss and that the right of compensation should not depend upon whether or not a licence was held (document FUND/EXC.36/10, paragraph 3.3.3).

3.6 In the United Kingdom it is a criminal offence to carry out fishing without a proper licence. The Executive Committee took the view that, as regards the *Braer* incident, claims for compensation presented by professional fishermen could be accepted only if the claimant held a licence, since the 1971 Fund should not pay compensation for the loss of proceeds from criminal activities. Some delegations, while agreeing with that position, questioned whether this would not lead to inconsistency in comparison with the position taken by the 1971 Fund in accepting claims from unlicensed fishermen and shellfish gatherers in the context of the *Aegean Sea* incident, since the admissibility of a claim should not, in their view, depend on the categorisation of the offence under national law, for example as a criminal offence or as a breach of administrative law (document FUND/EXC.39/8, paragraphs 3.3.12 and 3.3.13). In the light of this decision, the 1971 Fund has in the *Sea Empress* case rejected claims by fishermen who did not hold a proper licence.

3.7 The Director takes the view that the legal situation in Venezuela as regards unlicensed fishermen is similar to that in Spain, ie that fishing without a licence is considered as a breach of administrative law and not a criminal offence. For this reason, the Director proposes that in the *Nissos Amorgos* case the decisive criteria should be whether the claimant has suffered an actual economic loss and that the right to compensation should not depend on whether or not a licence is held.

4 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 note the position of the shipowner and the Gard Club as regards issues relating to the possible exoneration of the shipowner from liability and as regards their right of subrogation in respect of claims paid by them (paragraph 2); and
 - (c) to consider whether claims by fishermen who do not hold a proper licence are admissible for compensation (paragraph 3).
-