



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
55th session
Agenda item 3

71FUND/EXC.55/9
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INCIDENTS INVOLVING THE 1971 FUND

NISSOS AMORGOS

Note by the Director

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 tanker sustained damage to three cargo tanks, and an estimated 3 600 tonnes of crude oil was subsequently spilled.

1.2 The tanker was refloated six hours after the grounding and proceeded under her own power towards Punta Cardon in the eastern part of the Gulf of Venezuela. Apart from the initial spill of oil at the grounding position, further small releases occurred over a period of several days at the anchorage off Punta Cardon, until temporary repair work on the damaged hull was completed. After a short delay, the cargo remaining on board the *Nissos Amorgos* was transhipped to another tanker.

1.3 The *Nissos Amorgos* is entered in Assuranceföreningen Gard (Gard Club).

1.4 Venezuela is Party to the 1969 Civil Liability Convention and the 1971 Fund Convention, but not to the 1992 Protocols thereto.

2 Clean-up operations

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



2.2 Maraven deployed a skimming vessel at the anchorage off Punta Cardon in response to the leakage of oil from the damaged tanker. No oil is reported to have come ashore in the eastern part of the Gulf of Venezuela.

2.3 A long sandy beach south-west of the grounding position was contaminated by oil, which later spread along a 45 kilometre coast. Some of the beached oil was quickly buried under fresh deposits of sand on successive tides, while some of the spilt oil sank in the surf zone, ie the sea adjacent to the intertidal zone, adjacent to the polluted beach.

2.4 Lagoven organised a beach cleaning operation comprising some 550 people recruited mostly from nearby fishing villages. Oil contaminated sand in the intertidal zone was removed manually. Collected oily beach material was deposited in dune areas adjacent to the beach. The clean-up operations were hampered by frequent re-distribution of stranded oil by tidal action, and by the fact that some oil became buried under layers of sand.

2.5 Lagoven estimated that there were approximately 1 360 tonnes of oil remaining buried in the beach and in the adjacent surf zone along a five kilometre stretch of coastline. By the beginning of August 1997, Lagoven had reportedly removed some 40 000 m³ of contaminated sand containing approximately 1 700 tonnes of oil. The main method employed by Lagoven was mechanical excavation using large trenching machines operating in depths of 0.5-1 metres, plus various loaders, graders and bulldozers for moving accumulated oily sand.

2.6 The clean-up operations are being monitored by a committee set up locally, comprising representatives from Lagoven, Maraven, the Instituto para el Control y la Conservación de la Cuenca del Lago de Maracaibo (ICLAM, a public research institute), the Ministry of the Environment and several local government departments. This committee determines the clean-up policy to be followed and when the clean-up operations should be terminated.

2.7 Lagoven has considered various disposal options for treating the collected oily sand, which has an average oil content of 4.6%. The method favoured by Lagoven is to use the material as an ingredient in a tar mix for repairing local roads. In view of the anticipated high cost associated with the road repair disposal option, the 1971 Fund has informed ICLAM and Lagoven that it would prefer a more cost-effective disposal method, for example by modifying the road repair proposal or by utilizing opportunities for co-disposal with mine spoil, domestic refuse or other waste.

3 Claims Agency

3.1 The Gard Club and the 1971 Fund have established a Claims Agency at Maracaibo. The Claims Agency opened on 4 April 1997.

3.2 The staff of the Claims Agency have visited the offices of Servicio Autonomo de Recursos Pesquero y Agrícola (SARPA), which is part of the Ministry of Agriculture and Fishery and is the licensing authority for fisheries. The Agency has been provided with a lists of fishermen operating in the area affected by the oil.

4 Claims presented to the Claims Agency

4.1 General situation

As at 19 September 1997, claims for compensation totalling Bolivar (Bs) 3 835 million (£4 788 000) had been presented to the Claims Agency. So far 62 claims have been approved for a total of Bs1 102 million (£1 376 000). Payments totalling Bs1 088 million (£1 358 000) had been made by the Gard Club, and cheques for Bs11 164 650 (£14 000) are awaiting collection. Approved claims totalling Bs 2.9 million (£4 000) will be paid when the claimants' representatives have presented the necessary powers of attorney.

4.2 Claims for clean-up operations

4.2.1 Lagoven has presented several claims to the Claims Agency totalling Bs2 613 million (£3 262 000) relating to the cost of the beach clean-up. Maraven has presented a series of claims totalling Bs644 million (£803 000) for the costs incurred for clean-up operations. Additional claims by Lagoven and Maraven are expected.

4.2.2 On the basis of provisional assessments made by ITOPF, and after consultation with the Director, the Gard Club has made interim payments to Lagoven and Maraven of Bs775 million (£976 540) and Bs271 million (£338 000), respectively.

4.3 Property claims

4.3.1 The Claims Agency has received claims totalling Bs23 million (£28 800) from 14 individuals for damage to nets, boats and outboard motors. The local surveyor engaged by the Gard Club and the 1971 Fund has inspected some of the damaged items, and others will be inspected soon.

4.3.2 Two claims in this category have been approved for a total of Bs2 050 000 (£2 560). Payment of these claims in full will shortly be made by the Gard Club.

4.4 Fishery claims

4.4.1 A number of claims by fishermen and some fish transporters for loss of income totalling Bs508 million (£635 000) have been presented to the Claims Agency.

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

4.4.3 The Director and the Gard Club have approved claims by owners of 57 fishing boats for the amounts claimed, totalling Bs43 134 750 (£53 850). The Gard Club has paid Bs41.5 million (£51 900) to 55 owners of fishing boats, and cheques for the remaining boat owners are ready for collection.

4.4.4 Thirty-two claims totalling Bs252 280 305 (£314 956) by other fishermen are being examined by the experts appointed by the Gard Club and the 1971 Fund. Many of the fishermen involved have not provided evidence that they were licenced at the time of the incident.

4.4.5 Claims by 13 fish, clam and shrimp transporters totalling Bs52.8 million (£66 000) are being examined by the experts engaged by the Gard Club and the 1971 Fund.

4.5 Claims from fish processing plants

The Claims Agency has been informed by a lawyer representing a large number of fish processing plants in the Maracaibo area that his clients believe they will suffer losses from a long term reduction in catches as a result of the effects of the pollution on fish stocks. It has been stated that claims from this sector will be received shortly.

4.6 Claims from the tourism industry

4.6.1 A claim totalling Bs12 480 500 (£15 600) has been submitted on behalf of 96 owners of beach cabins for loss of income as a result of the closure of the beach during clean-up operations. The claim has been agreed for a total of Bs10 827 150 (£13 500) and has been paid in full by the Gard Club.

4.6.2 Another claim totalling Bs34 919 605 (£43 700) has been submitted by the owner of a restaurant in the affected area. The claimant has been asked to provide further evidence of his alleged losses.

4.6.3 A third claim is expected from the owner of a hotel for approximately Bs1.5 million (£1 900).

5 Court proceedings

5.1 Criminal Court of Cabimas

5.1.1 Immediately after the incident, the *Nissos Amorgos* was detained pursuant to an order rendered by a criminal first instance court in Cabimas which 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 offered a guarantee to the Cabimas Court for Bs3 473 million (£4.2 million), being the limitation amount applicable under the 1969 Civil Liability Convention. The Cabimas Court ordered the release of the *Nissos Amorgos* on 27 June 1997.

5.2 Civil Court of Caracas

Republic of Venezuela

5.2.1 On 2 April 1997, the Republic of Venezuela presented a claim against the shipowner, the master of the *Nissos Amorgos* and the Gard Club for an estimated amount of US\$20 million (£12.4 million) before a first instance civil court in Caracas. The 1971 Fund has not been notified of its action.

5.2.2 In its pleadings the Republic of Venezuela has maintained that it was a very significant incident which seriously affected the environment and the ecosystem in general, and which resulted in considerable expenditure being incurred in respect of "pollution damage" and "preventive measures". The Republic of Venezuela indicated that, for procedural reasons, a prudent estimate of US\$20 million had been made on the basis of information available at that time.

5.2.3 At the request of the Republic of Venezuela, on 4 April 1997 the Caracas Court ordered the arrest of the *Nissos Amorgos*. The Caracas Court also ordered the owner and the Gard Club to provide security for US\$40 million (£24.8 million) plus US\$6 million (£3.7 million) for legal costs and expenses.

FETRAPESCA

5.2.4 A fishermen's trade union (FETRAPESCA) has presented a claim against the shipowner, the Gard Club and the master of the *Nissos Amorgos* before the same first instance civil court in Caracas for an estimated amount of US\$130 million (£81 million) plus legal costs. The 1971 Fund's Venezuelan lawyer has been notified of this action.

5.2.5 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 (£182 million). This order is still in force.

5.2.6 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.

5.2.7 FETRAPESCA has also presented a claim in the Caracas civil court against the bank which provided a guarantee to the criminal court of Cabimas for the amount of Bs 3 473 million (£4.3 million) relating to the losses suffered by the trade union members.

Fish and shellfish processors

5.2.8 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 (£61 million) plus legal costs. The 1971 Fund's Venezuelan lawyer has been notified of this action.

Local fishermen's union

5.2.9 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 (£6.2 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 filed a motion before the Civil Court of Caracas requesting that the Court 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.

5.4 Detention of the *Nissos Amorgos*

5.4.1 The detention of the *Nissos Amorgos* was discussed at the Executive Committee's 54th session. The discussion is summarised in document 71FUND/EXC.54/10, paragraphs 3.1.2 - 3.1.6. Reference is also made to a document submitted by the delegation of Venezuela after that session which has been circulated to Member States (document 71FUND/EXC.54/INF.3).

5.4.2 The shipowner held negotiations with the Attorney General, who represented the Republic of Venezuela, in order to obtain the Attorney General's acceptance of a bank guarantee for the limitation amount applicable under the 1969 Civil Liability Convention and his agreement to the release of the vessel. Agreement on the text of the guarantee was reached on 16 June 1997, and the Court in Cabimas ordered the release of the vessel on 27 June 1997.

5.4.3 The Civil Court in Caracas requested the maritime authorities to prevent the vessel's departure until the vessel was also released by that court. On 21 July 1997, on the instructions of the Ministry of Transport, the marine authorities released the vessel.

5.4.4 In the document presented by the delegation of Venezuela referred to in paragraph 5.4.1 it was stated that the original bank guarantee was considered unacceptable by the Venezuelan authorities due to its conditional nature and that the Venezuelan authorities had requested that an unconditional guarantee should be provided by the shipowner and the P&I Club.

5.4.5 The shipowner and the Gard Club have stated that they disagree with the account of the incident and the causes of the detention of the vessel given in document 71FUND/EXC.54/INF.3. The shipowner and the Club have stated that they do not agree that there were any defects in the guarantee originally offered. They have also maintained that negotiations concerning the terms of the guarantee were not the cause of the delay in the ship being released. In their view the agreed changes made to the bank guarantee were cosmetic.

6 Consideration by the Executive Committee at its 54th session of the claims situation and level of payments

6.1 The Committee noted that the 1971 Fund had been given access to a study of the cost of the *Nissos Amorgos* incident, which had been carried out by a professor at the Simon Bolivar University in Caracas. The Committee also noted that the study set out a formula for assessing ecological damage

caused by the oil spill, which led to a total damage of Bs129 235 million (US\$267 million or £163 million) being calculated.

6.2 With reference to the claim presented by the Republic of Venezuela, a number of delegations referred to the policy of the 1971 Fund that claims for damage to the environment *per se* were not admissible under the Conventions. Reference was made to Resolution N°3, adopted by the 1971 Fund in 1980, which stated that the assessment of compensation to be paid by the 1971 Fund was "not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models". It was recalled that this policy on claims for environmental damage had been reaffirmed by the Assembly at its 17th session, when the latter endorsed the report of the 7th Intersessional Working Group. It was also recalled that the Assembly had decided that compensation could be granted only if a claimant had suffered a quantifiable economic loss (cf documents FUND/WGR.7/4, paragraph 7.1, FUND/A.17/23, paragraphs 7.3.5 and 7.3.6 and FUND/A.17/35, paragraph 26.8). Some delegations mentioned that a consequence of large claims for environmental damage being presented to court might be that the payment of compensation to other claimants, eg fishermen, would be delayed.

6.3 It was mentioned that some difficulties encountered by the authorities concerned might have been due to lack of experience in dealing with incidents falling within the scope of the Conventions. It was noted that, as instructed by the Committee at its 53rd session, the Director had provided the Venezuelan Ambassador in London with information on the functioning of the regime of liability and compensation established by the 1969 Civil Liability Convention and the 1971 Fund Convention. The Director was instructed to maintain his contacts with the Venezuelan authorities in order to provide further information on these issues.

6.4 In conclusion, the Executive Committee emphasised the importance of a uniform interpretation of the Conventions in accordance with the position taken by the Assembly at its 17th session when it endorsed the Report of the 7th Intersessional Working Group. The Committee also reiterated its position that claims for damage to the environment *per se* were not admissible (document 71FUND/EXC.54/10, paragraph 3.1.16).

6.5 The Executive Committee noted that the claims presented in court by the Republic of Venezuela and FETRAPESCA amounted to a provisional total of US\$150 million (£93 million). The Committee considered it necessary therefore to exercise caution in the payment of claims. In view of the great uncertainty as to the total amount of the claims, the Committee maintained the position it had adopted at its 53rd session that it was premature to take any decision authorising the Director to make payments (document 71FUND/EXC.54/10, paragraph 3.1.17).

7 Director's assessment of the claims situation

7.1 It is not clear what types of damage are covered by the claim presented by the Republic of Venezuela, nor how the amount claimed has been calculated. In the pleadings presented to the Court in Caracas, the State has maintained that it was a very significant incident which seriously affected the environment and the ecosystem in general, and which resulted in considerable expenditure being incurred in respect of "pollution damage" and "preventive measures". The State has indicated that, for procedural reasons, a prudent estimate of US\$20 million has been made on the basis of information available at present. For this reason, the Director maintains the position he took at the Executive Committee's 53rd session that it is not possible for him to express an opinion on the admissibility of the claim submitted by the Venezuelan State.

7.2 In order to enable the 1971 Fund to take a position as to the admissibility of the Republic of Venezuela's claim, it would be useful if the State could indicate in some detail the basis of the claim, the various elements comprising the claim and how the amount claimed has been calculated.

7.3 As regards the claim presented by FETRAPESCA referred to in paragraphs 5.2.4-5.2.7 above, the situation is also unclear. In the pleadings presented to the Court, FETRAPESCA has maintained that the oil spill prevented the fishermen from fishing thereby causing loss of earnings. It is not known what types

of damage are covered by the claim, nor how the amount claimed has been calculated. It has been stated by FETRAPESCA that the amount claimed, US\$130 million (£81 million), is a prudent estimate.

7.4 As set out above, claims have been presented in court by the Republic of Venezuela for US\$20 million (£12.4 million), by FETRAPESCA for US\$130 million (£81 million), by fish and shellfish processors for US\$100 million (£61 million) and by a local fishermen's union for \$10 million (£6.2 million). The figures have been indicated as provisional. There is thus great uncertainty as to the total amount of the claims arising out of the *Nissos Amorgos* incident. In this situation it is, in the Director's view, necessary to strike a balance between the need to exercise caution in the payment of claims and the importance of the 1971 Fund being able to pay claims at an early stage. The Director takes the view that he would not be able to recommend at this stage payment of more than 25% of the loss or damage actually suffered by each claimant, as assessed by the experts of the Gard Club and the Fund at the time the payment is made.

8 Cause of the incident

8.1 At its 54th session, the Executive Committee instructed the Director to make an independent investigation into the cause of the incident by using suitable experts (document 71FUND/EXC.54/10, paragraph 3.1.24).

8.2 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. 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.

8.3 At its 54th session the Executive Committee noted that the shipowner had notified the Director that he reserved 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 had been 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.

8.4 It was noted at that session that the shipowner and the Gard Club maintained that there was clear evidence that the shipowner was entitled to exoneration under Article III.2(c) of the 1969 Civil Liability Convention, although they recognised that it would take some time before this issue could be finally resolved. The Committee noted that the shipowner/Gard Club had stated that, in order to ensure the prompt settlement of legitimate claims, they were prepared to make payments without invoking against the claimants this defence of exoneration from liability. It was noted that they had stated that such payments would be made on the basis (a) that the shipowner acquired 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 the shipowner being exonerated from liability under the 1969 Civil Liability Convention and (b) that the shipowner would remain entitled to invoke this defence against the 1971 Fund. It was further noted that the shipowner and the Gard Club maintained that they would be able to recover from the 1971 Fund the amounts paid to claimants if it were established that the shipowner was exonerated from liability under Article III.2(c).

8.5 The Executive Committee held a session in private, pursuant to Rule 12 of the Rules of Procedure, to discuss this issue. During the closed session only the representatives of 1971 Fund Member States were present.

8.6 The Committee noted that, due to lack of information as to the cause of the incident, it was not possible to take any position as to whether the shipowner would be exonerated from liability. A number of delegations pointed out that it would generally be difficult to prove that the incident was wholly caused by the negligence of an authority.

8.7 The Executive Committee shared the Director's view that 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. The Committee also considered 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. The Committee agreed with the Director that this would mean 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 (document 71FUND/EXC.54/10, paragraph 3.1.22).

8.8 The shipowner and the Gard Club have informed the 1971 Fund that they intend to submit a detailed statement of their position with respect to the cause of the incident, together with supporting evidence, for consideration by the 1971 Fund and its experts. They have stated that it is their intention to continue for the time being to pay claims on the basis set out in paragraph 8.4 above. The shipowner and the Club have requested that in the meantime the 1971 Fund should refrain from taking any position as to whether the shipowner should be exonerated from liability.

9 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document;
 - (b) to consider whether to authorise the Director to make payments of claims arising from this incident and, if so, to what level; and
 - (c) to give the Director such other instructions in respect of the handling of this incident and of claims arising therefrom as it may deem appropriate.
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