



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1971

EXECUTIVE COMMITTEE  
63rd session  
Agenda item 3

71FUND/EXC.63/6  
7 March 2000  
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## INCIDENTS INVOLVING THE 1971 FUND

### NISSOS AMORGOS

#### Note by the Director

**Summary:**

Legal proceedings relating to claims for compensation have been brought in four courts, including the Supreme Court. A recent decision by the Supreme Court has the effect of staying all legal proceedings. A number of smaller claims have been settled and paid. Further claims are time-barred. Discussions are being held with groups of major claimants. 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:**

Review the level of the 1971 Fund's payments.

#### 1 **The incident**

- 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 3600 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, Assurance-föreningen 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, 71FUND/EXC.60/10 and 71FUND/EXC.61/9.

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

## **2 Claims presented to the Claims Agency**

### **2.1 General situation**

2.1.1 As at 7 March 2000, 214 claims for compensation totalling Bs 26 982 million (£27 million)<sup><1></sup> had been presented to the Claims Agency. These claims relate to the cost of clean-up operations, damage to property (nets, boats and outboard motors) and losses suffered by fishermen, fish transporters, fish processors and businesses with the tourism sector.

2.1.2 Claims have been approved for a total of Bs3 737 million (£3.7 million) plus US\$ 35 850 (£22 400). The Gard Club has paid 104 of these claims in full and made interim payments in respect of two claims relating to clean-up operations. The 1971 Fund has made an interim payment of Bs15.3 million (£15 000) in respect of a claim submitted by 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 (cf document 71FUND/EXC.62/9).

2.1.3 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 1969 Civil Liability Convention and the 1971 Fund Convention. 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 in the fishery sector**

2.2.1 A meeting was held in April 1999 with an association of fishermen's unions (FETRAPESCA), representing some 25 000 fishermen, which had filed a claim in court for some US\$130 million (£81 million) but had not presented any evidence in support of the claim. At that meeting FETRAPESCA expressed its intention to present its claim together with supporting documentation to the Claims Agency.

2.2.2 In October 1999, lawyers representing six shrimp processing companies in the Maracaibo area and some 5 000 fisherman supplying shrimps to these companies presented a claim in the amount of US\$25 million (£15.6 million). The claimants have maintained that the oil spill in the Gulf of Venezuela in 1997 caused a reduction in shrimp catches in Lake Maracaibo in 1998.

2.2.3 In January 2000, representatives of the Gard Club and of the 1971 Fund visited the processing plants operated by the six companies to discuss the basis of the claim and to examine the accounts and records of each claimant. The claimants explained that the shrimp processing industry in Maracaibo operated in the following manner:

- The processing plant provides fishing gear (boats, engines, nets, etc) and insulated trucks to intermediaries or funds the purchase and maintenance of such gear and trucks.
- The intermediaries, in turn, supply the equipment to individual fishermen. These fishermen become the registered owners of the fishing boats and gear without having to make any

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In this document the conversion of amounts in Venezuelan Bolivars into Pounds Sterling is made on the basis of the rate of exchange at 1 March 2000 (£1 = Bs 1 071), except in respect of the amounts paid by the Gard Club and the 1971 Fund where conversion has been made at the rate of the date of payment.

payments. In exchange, the fishermen undertake to sell all the shrimp they catch to the intermediaries who in turn undertake to deliver them to the processing plant.

- When delivering the shrimps the intermediaries are paid an agreed price by the processor. In practice, part of the money due to the intermediaries is set off against the debt in their accounts to the shrimp processing company.

2.2.4 A meeting took place in Maracaibo in January 2000 between the Club and Fund experts and the experts engaged by the claimants to review the available technical information. The claimants were invited to provide additional information linking the alleged losses to the oil spill.

2.2.5 The Fund and Club experts will visit the processing plants in the near future to complete the examination of the accounts and records of the six processing companies. The experts will then be able to give an opinion on the technical merits of the claim.

### 2.3 Claims relating to clean-up operations

#### *Claim by Lagoven and Maraven*

2.3.1 The claims relating to clean-up operations undertaken by Lagoven and Maraven (wholly owned subsidiaries of the national oil company, Petroleos de Venezuela – PDVSA) have been resolved. The total admissible amount of both claims was agreed at Bs 3 462 million (£3.7 million) plus US\$35 850 (£22 400). The Gard Club has made interim payments to PDVSA totalling Bs1 046 million (£1.2 million).

#### *Disposal of the oily sand*

2.3.2 During the clean-up operations an estimated 48 000 m<sup>3</sup> of contaminated sand was collected. The oily sand has been provisionally stored immediately inland of the affected beach. Following an investigation into various options for disposing of the oily sand, the Gard Club and the 1971 Fund agreed that land farming in the dunes adjacent to the beach was the most appropriate method. The estimated cost is Bs1 500 million (£1.4 million). The Gard Club and the 1971 Fund have informed PDVSA that they considered this estimate to be reasonable. The disposal of the oily sand has been delayed by local flooding but is expected to start in the near future.

### 2.4 Time bar

Claims against the 1971 Fund became time-barred on or shortly after 29 February 2000. Letters were sent to all the claimants who had presented claims in the Claims Handling Agency but with whom settlements had not been reached, drawing their attention to the time bar issue.

## 3 Court proceedings

3.1 The incident has given rise to legal proceedings in a Criminal Court in Cabimas, Civil Courts in Caracas and Maracaibo and the Supreme Court.

### 3.2 Criminal Court of Cabimas

3.2.1 The shipowner has presented a guarantee to the Criminal Court for Bs3 473 million (£3.3 million), being the limitation amount applicable under the 1969 Civil Liability Convention.

3.2.2 FETRAPESCA presented a claim for compensation for pollution damage for an estimated amount of US\$130 million (£81 million) plus legal costs. In addition, eight fish and shellfish processors presented a claim for compensation for an estimated amount of US\$100 million (£62 million) plus legal costs. However, in September 1998 these claims were declared inadmissible because they had not been filed within the period laid down in the Venezuelan Criminal Procedural Code.

- 3.2.3 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 for US\$60 million (£37 million). 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 allegedly payable to the Republic of Venezuela in respect of oil pollution. Compensation is claimed for damage to the communities of clams living in the intertidal zone affected by the spill, for the cost of restoring the quality of the water in the vicinity of the affected coasts, for the cost of replacing sand removed from the beach during the clean-up operations and for damage to the beach as a tourist resort.
- 3.2.4 In March 1999 the 1971 Fund, the shipowner and the Gard Club presented to the Court a report on the various items of the claim by the Republic prepared by experts appointed by them. The experts found that this claim had no merit.
- 3.2.5 At the request of the shipowner, the Gard Club and the 1971 Fund, the Criminal Court appointed a panel of three experts to advise the Court on the technical merits of the claim presented by the Republic of Venezuela. In its report presented on 15 July 1999, the panel unanimously agreed with the findings of the 1971 Fund's experts that the claim had no merit.
- 3.2.6 The Gard Club and the 1971 Fund are preparing pleadings in respect of this claim. The pleadings will deal *inter alia* with the criteria adopted by the 1971 Fund in respect of the admissibility of claims for compensation.
- 3.2.7 At a court hearing held in March 1998 the master of the *Nissos Amorgos* 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. The master's defence will be considered in the judgement on the merits of the case.
- 3.2.8 On 28 February 2000 the shipowner and the Gard Club took legal actions against the 1971 Fund before the Criminal Court in respect of two claims. One claim is in subrogation of the rights of the claimants to whom the shipowner and the Club have paid compensation. The other is to recover the amounts paid as a result of the incident if and to the extent that the shipowner is wholly exonerated from liability under Article III.2(c) of the 1969 Civil Liability Convention and, alternatively, a claim by the Club for indemnification under Article 5.1 of the 1971 Fund Convention. These actions have not been served on the 1971 Fund.
- 3.3 Civil Court of Caracas
- 3.3.1 The Republic of Venezuela has 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 million), later increased to US\$60 million (£37 million), before the Civil Court in Caracas. It appears that this claim relates to the same four items of damage as the claim in the Criminal Court.
- 3.3.2 FETRAPESCA has presented a claim against the shipowner, the Gard Club and the master of the *Nissos Amorgos* for an estimated amount of US\$130 million (£81 million).
- 3.3.3 At the request of FETRAPESCA the Civil Court appointed a committee composed of lawyers and technical experts to assess the value of the damage to the environment caused by the spill. The report of the committee, which was filed before the Court in October 1997, does not attempt to quantify the effects of the spill. However, the committee suggests that about 20 000 fishermen had seen their income reduced by approximately 80% as a consequence of the incident.

- 3.3.4 Eleven fish and shellfish processors have presented a claim against the shipowner, the Gard Club and the master of the *Nissos Amorgos* for an estimated amount of US\$100 million (£62 million) plus legal costs. This claim corresponds to the one filed in the Criminal Court, except that there is a difference in respect of the number of claimants.

### 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 Attorney General in the Caracas Civil Court should in any case be dismissed, since a corresponding action had been brought before the Cabimas Criminal Court. So far, no decision has been taken on the request.

### 3.5 Civil Court of Maracaibo

- 3.5.1 On 9 February 2000 a legal action was brought before a Civil Court in Maracaibo against the shipowner, the Gard Club and the 1971 Fund by six shrimp processing companies and by the fishermen supplying shrimps to these companies (cf paragraphs 2.2.2 – 2.2.5 above) in the amount of US\$25 million (£15.6 million). This claim has been served on the 1971 Fund. The 1971 Fund Venezuelan lawyers are examining the claim.
- 3.5.2 On 22 February 2000 PDVSA presented a claim to the Civil Court in Maracaibo to recover the costs of the disposal of the oily sand (cf paragraph 2.3.2 above). This action has not been served on the Fund.
- 3.5.3 On 13 March 2000 ICLAM presented a claim to the Civil Court in Maracaibo to recover the costs incurred during clean-up operations (cf paragraph 2.1.2). This action has not been served on the Fund.

### 3.6 Other court actions

It is possible that further legal actions have been brought by various other claimants before the Venezuelan Courts.

### 3.7 Supreme Court

#### *Civil action*

- 3.7.1 In December 1999 two fish processors presented a claim for US\$20 million (£13 million) in the Supreme Court against the 1971 Fund and, subsidiarily, against the Instituto Nacional de Canalizaciones (INC). This action has not been served on the Fund. The Supreme Court would in this case act as court of first and last instance.

#### *Request of 'avocamiento'*

- 3.7.2 In May 1999 two independent requests of 'avocamiento' were filed by two fish processors and by FETRAPESCA before the Supreme Court. Under Venezuelan law, in exceptional circumstances, the Supreme Court may assume jurisdiction, 'avocamiento', and decide on the merits of a case. Such exceptional circumstances are defined as those which directly affect the 'public interest and social order' or where it is necessary to re-establish order in the judicial process because of the great importance of the case. If the request of 'avocamiento' is granted, the Supreme Court would act as a court of first instance and its judgement would be final.
- 3.7.3 The shipowner and the Gard Club opposed these two requests. The 1971 Fund also opposed the requests on the grounds that the circumstances upon which the requests were based were not exceptional and that the reason for the requests was not the reinstatement of the environment but

the private interest of the plaintiffs. The 1971 Fund's opposition was also based on the grounds that public interest and social order had not been threatened by the *Nissos Amorgos* incident nor had it become necessary to re-establish order in the legal proceedings. In addition, the 1971 Fund maintained that justice had not been denied to the plaintiffs to whom the normal legal channels were open. The 1971 Fund also argued that to transfer proceedings to the Supreme Court would be to deprive the parties of the right of appeal.

- 3.7.4 In a decision dated 29 July 1999 the Supreme Court rejected one of the requests of 'avocamiento', namely that of the two fish processors.
- 3.7.5 In a decision, dated 17 February 2000, on the other request of 'avocamiento' filed by FETRAPESCA, the Supreme Court ordered the Criminal Court of Cabimas and the Civil Court of Caracas to send to the Supreme Court the entire court files.
- 3.7.6 Since the 'avocamiento' proceedings have two phases, namely the delivery of the court files to the Supreme Court and thereafter the decision to grant or to deny the 'avocamiento', the shipowner, the Gard Club and the 1971 Fund requested the Supreme Court to clarify whether the Supreme Court had in fact granted the 'avocamiento'.
- 3.7.7 In a decision dated 29 February 2000 the Supreme Court stated that in its previous decision the Court had considered the request admissible only from a procedural point of view and that the decision on the 'avocamiento' itself would be taken once the court files had been considered.
- 3.7.8 The Director is discussing with the 1971 Fund's Venezuelan lawyers the possibility of making a request to the Supreme Court to stay the civil proceedings brought before any court, including the Supreme Court itself, pending a decision on the 'avocamiento'.

#### **4 Level of payments**

- 4.1 In view of the uncertainty as to the total amount of the claims arising out of the incident, the Executive Committee decided, at its 62nd 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.62/14, paragraph 3.8.5).
- 4.2 Due to the continuing uncertainty as to the total amount of the claims arising out of the 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 The Criminal Court in Cabimas is carrying out an investigation into the cause of the incident. The Court will determine whether anyone has incurred criminal liability as a result of the incident.
- 5.2 The 1971 Fund is following the investigation into the cause of the incident which is being carried out by the Venezuelan authorities. The Fund has also engaged a technical expert to investigate the cause of the incident.
- 5.3 The shipowner and the Gard Club have provided the 1971 Fund with a substantial quantity of documentary evidence concerning the cause of the incident, together with a detailed analysis of this evidence.
- 5.4 The shipowner and the Gard Club have taken the position 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 later at almost the same place as the *Nissos Amorgos*, and which suffered similar bottom damage, with a metal object later retrieved from her bottom plating.

- 5.5 The shipowner and the Gard Club have notified the 1971 Fund that in their view they are entitled 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.
- 5.6 The shipowner and the Gard Club have also expressed the view that in principle the question of exoneration under Article III.2(c) should not affect the 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 therefore agreed to make 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. However, 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 Instituto Nacional de Canalizaciones (INC).
- 5.7 The Director, with the assistance of the 1971 Fund's lawyers and its technical experts, 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 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 in his view 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.
- 5.8 When the Executive Committee considered these issues in October 1999, the Director's view was that the documents made available to the 1971 Fund indicated that negligence on the part of INC might 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. In that event, the 1971 Fund would, in the Director's view, also be partially exonerated in respect of claims by the Venezuelan Government, except to the extent that the claims related to the cost of preventive measures. However, on the basis of the evidence made available to the 1971 Fund so far, the Director is not convinced that the damage was caused wholly by the negligence or other wrongful act of INC and that for this reason the shipowner might not be wholly exonerated from liability in respect of this incident pursuant to Article III.2(c) of the 1969 Civil Liability Convention.
- 5.9 In October 1999, the Executive Committee considered it premature to take a decision on the issues relating to the cause of the incident and contributory negligence, since not all the evidence on the cause of the incident had been made available to the 1971 Fund, the Committee.
- 5.10 The Director was instructed to investigate these issues further in co-operation with the shipowner/Gard Club to the extent that there was no conflict of interest between them and the Fund.

- 5.11 The Executive Committee also instructed the Director to raise the defence of contributory negligence against the claim submitted by the Venezuelan Government, if this became necessary to protect the interests of the 1971 Fund. However, the Venezuelan observer delegation expressed the view that the 1971 Fund should not take any position on the cause of the incident until this issue had been decided by the Venezuelan courts.
- 5.12 The Director has continued the discussions on the cause of the incident with the shipowner and the Gard Club. On the basis of the evidence now available to the 1971 Fund, the Director remains unconvinced that the damage was wholly caused by the negligence or other wrongful act on INC, and for this reason he considers 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. However, he considers that the evidence indicates that negligence attributable to the Venezuelan State, though not the sole cause, was nevertheless a substantial cause of the incident and the ensuing pollution damage, with the result that the shipowner/Gard Club would be partly exonerated from liability to the Venezuelan Government and to other government bodies. In that event, in the Director's view the 1971 Fund would, also be exonerated to the same extent in respect of claims by the Venezuelan Government, except to the extent that the claim related to the cost of preventive measures.
- 5.13 If contributory negligence on the part of INC were to be established, the issue of 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 would need to be considered.

**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 review the level of the 1971 Fund's payments of claims arising from this incident (section 4);
  - (c) to consider the position to be taken by the 1971 Fund in respect of the cause of the incident (section 5); 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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