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COMPENSATION
FUND 1971

ADMINISTRATIVE COUNCIL
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Agenda item 3

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INCIDENTS INVOLVING THE 1971 FUND

NISSOS AMORGOS

Note by the Director

Summary:

Legal proceedings relating to claims for compensation for very high amounts have been brought in five Venezuelan courts, including the Supreme Court.

Representatives of some 2000 shrimp fishermen of Lake Maracaibo have travelled to London to express to the Director their deep concern at the lack of progress in resolving the outstanding issues that are preventing the 1971 Fund from increasing the level of payments and thereby allowing a payment in full of their settled claim. They have made the point to the Director that the current financial situation of the shrimp fishermen of Lake Maracaibo is very difficult.

A number of delegations have previously expressed concerns that the level of payments would remain at 65% for a considerable period of time unless a solution could be found to the outstanding claims. There have not been any developments with regard to the withdrawal of the claims by the Republic of Venezuela.

The Director is of the view that the Fund should approach the Venezuelan authorities and other interested parties to search for a global solution of all significant outstanding issues with a view to presenting a proposal to the Administrative Council at the earliest possible date for its consideration.

Action to be taken:

To decide whether to instruct the Director to approach the Venezuelan authorities and other interested parties to search for a global solution of all significant outstanding 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 3600 tonnes of crude oil was spilled.

1.2 The incident has given rise to legal proceedings in a Criminal Court in Cabimas, Civil Courts in Caracas and Maracaibo, the Criminal Court of Appeal in Maracaibo and the Supreme Court. A number of claims have been settled out of court and the corresponding legal actions have been withdrawn.

2 Criminal proceedings

2.1 Criminal proceedings were brought against the master. In his pleadings to the Criminal Court the master maintained that the damage was substantially caused by negligence imputable to the Republic of Venezuela.

2.2 The 1971 Fund submitted pleadings to the Court maintaining that the damage had been principally caused by negligence imputable to the Republic of Venezuela.

2.3 In a judgement rendered in May 2000, the Criminal Court dismissed the arguments made by the master and held him liable for the damage arising as a result of the incident and sentenced him to one year and four months in prison. The master appealed against the judgement before the Criminal Court of Appeal in Maracaibo.

2.4 The 1971 Fund presented pleadings to the Court of Appeal arguing that the evidence presented had not been sufficiently considered by the Court.

2.5 In a decision rendered in September 2000 the Court of Appeal decided not to consider the appeal and to order the Court of Cabimas to send the file to the Supreme Court (Sala Politico-Administrativa) due to the fact that the Supreme Court was considering a request for 'avocamiento'^{<1>}. The Court of Appeal's decision appears to imply that the judgement of the Criminal Court of Cabimas is null and void.

2.6 The criminal file remains before the Supreme Court. The master has submitted several requests to the Supreme Court for the file to be returned to the Maracaibo Court of Appeal to allow the proceedings to continue. There has been no response to these requests.

2.7 The 1971 Fund's lawyer has advised the Fund that in accordance with Venezuelan procedural law the criminal action against the master is time barred since under Venezuelan law a final sentence would have to be delivered within four and half years from the date of the criminal act.

3 Claims for compensation in court

3.1 The situation in respect of the significant claims for compensation pending before the Courts in Venezuela is as follows.

Claimant	Category	Claimed amount US\$	Status of claim
Republic of Venezuela	Environmental damage	\$60 250 396	Pending in criminal court
Republic of Venezuela	Environmental damage	\$60 250 396	Pending in civil court
Three fish processors	Loss of income	\$ 30 000 000	Pending in civil court No loss proven
Total		\$150 500 792 (£79.6 million)	

<1> 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.

- 3.2 Two claims submitted by ICLAM^{<2>} in the amount of \$36 000 (£19 000) each have been settled but have not been withdrawn from the Courts.
- 3.3 Two claims, one by the Republic of Venezuela's former lawyers for Bs440 million (\$275 344) and the other by experts engaged by fishermen's trade union (FETRAPESCA) for Bs100 million (\$62 578) have been submitted in the Supreme Court against parties other than the shipowner/the Gard Club and the 1971 Fund.

4 Settled claims

The following claims have been settled out of court:

Claimant	Category	Settlement amount Bs	Settlement amount US\$
Petroleos de Venezuela S.A. (PDVSA)	Clean up		\$8 364 223
ICLAM	Preventive measures	Bs15 268 867	
Shrimp fishermen and processors	Loss of income		\$16 033 389
Other claims <3>	Property damage and loss of income	Bs289 000 000	
Total		Bs304 268 867 (£85 000)	\$24 397 612 (£12.9 million)

5 Maximum amount available for compensation

- 5.1 Immediately after the incident, the *Nissos Amorgos* was detained pursuant to an order rendered by the Criminal Court of first instance in Cabimas. The shipowner provided a guarantee to the Cabimas Court for Bs3 473 million (£1 million), being the limitation amount applicable to the *Nissos Amorgos* under the 1969 Civil Liability Convention. The Cabimas Court ordered the release of the ship on 27 June 1997 (document 71FUND/EXC.55/9, paragraphs 5.1.1 and 5.1.2).
- 5.2 On 27 June 1997 the Cabimas Court issued an order which provided that the maximum amount payable under the 1969 Civil Liability Convention and the 1971 Fund Convention, namely 60 million SDR, corresponded to Bs 39 738 million or \$ 83 221 800 (£44 million).

6 Level of payments

- 6.1 In view of the uncertainty as to the total amount of the claims arising from this incident, the Executive Committee decided at its 55th session held in October 1997 that the 1971 Fund's payments should be limited to 25% of the loss or damage actually suffered by each claimant (document 71FUND/AC.2/A.23/22, paragraph 17.9.17). At its 4th session held in March 2001, the Administrative Council increased the level of payments to 40%. It also authorised the Director to increase the level of the 1971 Fund's payments to 70% when the 1971 Fund's total exposure in respect of the incident fell below \$100 million. The Council further authorised the Director to increase the payments to between 40% and 70% if and to the extent that actions withdrawn from the courts would allow it (document 71FUND/AC.4/ES.7/6, paragraph 3.3.9).
- 6.2 The level of payments was again considered by the Administrative Council in July 2003. The Council noted that the maximum amount available for compensation, \$83.2 million, represented 47.5% of the 1971 Fund's exposure. It further noted the view expressed by the Director that,

<2> Instituto para el Control y la Conservación de la Cuenca del Lago de Maracaibo
<3> Paid in full by the Gard Club.

when considering the level at which payments could be made, account should be taken of the fact that the claims by the Republic of Venezuela were duplicated, that the Procuradora General de la Republica (Attorney General) had admitted this duplication in writing, and that the duplication had also been recognized by the Public Prosecutor of Venezuela to the Director at a meeting in Caracas in April 2001.

- 6.3 The Administrative Council noted the Director's view that, as regards the claims by the Republic of Venezuela, it appeared that the courts would not be able to hold the 1971 Fund liable to pay compensation twice for the same loss. The Council also noted that if the claims submitted by the Republic of Venezuela were considered as one single claim of \$60.3 million, the total exposure of the 1971 Fund would be \$114.9 million and the maximum amount available for compensation would represent 72.4% of the 1971 Fund's exposure. It was further noted that this level of exposure could enable the level of payments to be increased to 65%, which would give the 1971 Fund a margin of \$6.5 million against overpayment.
- 6.4 The Administrative Council decided that the 1971 Fund should maintain the policy that when considering the level of payments, all pending claims should be taken into account for the amount claimed, whether they, in the Fund's view, were admissible or not, and that pending claims should be disregarded only in exceptional circumstances.
- 6.5 The Administrative Council considered that, in the unlikely event that the Venezuelan Courts were to accept both claims submitted by the Republic of Venezuela, the 1971 Fund would nevertheless disregard one of them.
- 6.6 The Administrative Council, taking into account the exceptional circumstances in the *Nissos Amorgos* case, and in particular that the claims by the Republic of Venezuela were duplicated, decided to increase the 1971 Fund's level of payments from 40% to 65% of the loss or damage actually suffered by each claimant (document 71FUND/AC.11/3, paragraph 3.26).
- 6.7 The Council also decided that the authorisation given to the Director at its 4th session should be maintained, namely that the Director was authorised to increase the level of payments to 70% when the 1971 Fund's total exposure fell below \$100 million.
- 6.8 A number of delegations expressed concerns that the level of payments would remain at 65% for a considerable period of time unless a solution could be found to the outstanding claims. It was suggested that the 1971 Fund could not do more to assist claimants and that it was for the Venezuelan Government to take the necessary steps to resolve the problems. Fears were expressed that unless a solution was found, the *Nissos Amorgos* incident could prevent the 1971 Fund being wound up. It was suggested that the Venezuelan Government could consider *inter alia* to undertake not to pursue its claims unless this would not be detrimental to other claimants, ie to 'stand last in the queue' as some other Governments had done in previous incidents.
- 6.9 The Administrative Council noted that if both claims by the Republic of Venezuela were withdrawn or not pursued to the detriment of other claimants, the 1971 Fund would be able to increase its level of payments to 100%.
- 6.10 Further to the Council's decision to increase the level of payments, the 1971 Fund paid an additional \$4 008 347 (£2.1 million) in respect of the claim for loss of income of the shrimp fishermen and processors referred to in section 4 and \$2 091 056 (£1.1 million) to PDVSA.

7 Search for a global solution

- 7.1 Representatives of some 2 000 shrimp fishermen of Lake Maracaibo have traveled to London to attend the 13th session of the 1971 Fund Administrative Council with the intention of expressing to the Director their deep concern at the lack of progress in resolving the outstanding issues that are preventing the 1971 Fund from increasing the level of payments and thereby not allowing a

payment in full of their settled claim. They have made the point to the Director that the current financial situation of the shrimp fishermen of Lake Maracaibo is very difficult.

- 7.2 The Director is mindful of the concerns expressed by a number of delegations that the level of payments would remain unchanged unless a solution could be found to the outstanding claims and of the lack developments with regard to the withdrawal of the claims by the Republic of Venezuela. The Director is, therefore, of the view that the Fund should approach the Venezuelan authorities and other interested parties to search for a global solution of all significant outstanding issues with a view to presenting a proposal to the Administrative Council at the earliest possible date.
- 7.3 The Director is aware that a difference of opinion exists between the parties as to the cause of the incident. The shipowner and the Gard Club have taken the position that the incident and the resulting pollution were due to the fact that the Maracaibo Channel was in a dangerous condition due to poor maintenance. The Fund has in the criminal proceedings provisionally taken the position that the damage had been principally caused by negligence imputable to the Republic of Venezuela. The Venezuelan authorities, for their part, have indicated that the Maracaibo Channel was in good condition and that there was no contributory negligence on the part of INC, the agency of the Republic of Venezuela responsible for the maintenance of the channel.
- 7.4 The Director has examined documentation concerning the cause of the incident provided by the shipowner and the Gard Club and by the Venezuelan authorities. The 1971 Fund has not yet taken a final position on the cause of the incident. The Director is conscious that in the context of a global solution the cause of the incident has to be addressed.
- 7.5 It is therefore envisaged that a possible global solution would include:
- Resolution of the difference of opinion between the parties concerning the cause of the incident,
 - Resolution of the claim submitted by the Republic of Venezuela in the Civil Court of Caracas,
 - Declaration by the Venezuelan Courts that the criminal action against the master is time barred and as a result the claim against the master, the shipowner and the Gard Club subsidiary to the criminal action is of no effect,
 - Payment of the balance of all outstanding settled claims, which would amount to some \$8.5 million (£4.5 million),
 - Return of the guarantee provided by the shipowner to the Criminal Court in Cabimas (paragraph 5.1).
- 7.6 It is recognised that a global solution might not include the claims by the three fish processors (paragraph 3.1) since the claimants have failed to demonstrate that they have suffered a loss as a result of the incident and that these claims might have to be opposed before the courts in the normal manner.
- 7.7 In the event that a global solution incorporating the elements mentioned above were to be agreed, the total exposure of the 1971 Fund would be \$54.5 million (£28.5 million), calculated as follows:

Claimant	Category	US\$	Status
Three fish processors	Loss of income	\$30 000 000	In court
PDVSA	Clean up	\$8 364 222	Settled
Fishermen / processors	Loss of income	\$16 033 389	Settled
Other claims	Property damage & income loss	\$181 000	Settled
Total		\$54 578 611	

- 7.8 The maximum amount available for compensation is Bs 39 738 million or \$ 83 221 800 (£44 million) and therefore payment in full of the settled claims would be possible.
- 7.9 In September 2001 the Procuradora General de la Republica (Attorney General) in a letter to the Director offered to withdraw the claim submitted by the Republic of Venezuela in the Civil Court of Caracas (paragraph 3.1) subject to the master, the shipowner and the Gard Club renouncing to take recourse action against the Republic of Venezuela. This seems to indicate that the Republic of Venezuela is prepared to search for a global solution of all outstanding issues arising from this incident.
- 7.10 The Director proposes that he should be instructed to approach, as a matter of urgency, the Venezuelan authorities and other interested parties to search for a global solution of all outstanding significant issues along the lines set out in paragraph 7.5.

8 Action to be taken by the Administrative Council

The Administrative Council is invited:

- (a) to take note of the information contained in this document;
 - (b) to instruct the Director to approach, as a matter of urgency, the Venezuelan authorities and other interested parties to search for a global solution of all significant outstanding issues, with a view to presenting a proposal to the Administrative Council at the earliest possible date; and
 - (c) to give the Director such instructions in respect of this incident as it may deem appropriate.
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