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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.

In February 2004, the Administrative Council instructed the Director to approach, as a matter of urgency, the Venezuelan authorities and other interested parties to search for a global solution within the framework of the Conventions of all significant outstanding issues along the lines endorsed by the Council.

Representatives of the 1971 Fund visited Venezuela in March 2004 where they held discussions with the competent authorities. Subsequent to these discussions, the 1971 Fund has written to the authorities detailing the elements of a global solution. One key element relates to differences of opinion between the Republic of Venezuela, the 1971 Fund and the shipowner/insurer concerning the cause of the incident.

With the assistance of two experts, the Director has examined the available documentation in respect of the cause of the incident and assessed the likelihood of a successful recourse action by the Fund against the Instituto Nacional de Canalizaciones (INC), the agency responsible for the maintenance of the Maracaibo channel. In the light of this analysis he considers it on balance unlikely that a recourse action by the Fund against INC would be successful and proposes therefore that the Fund should not pursue such an action.

Action to be taken: To decide whether the 1971 Fund should take recourse action against INC.

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 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 A number of claims have been settled out of court and the corresponding legal actions have been withdrawn.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 Venezuelan lawyers have 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:

<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

| 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 (£83.3 million) | |

3.3 It will be recalled that at its 11th session, held in July 2003, the Administrative Council had reiterated the 1971 Fund's position that the components of the claims by the Republic of Venezuela did not relate to pollution damage falling within the scope of the 1969 Civil Liability Convention and the 1971 Fund Convention and that these claims should therefore be treated as not admissible (document 71FUND/AC.11/3, paragraphs 3.32 and 3.33).

3.4 Two claims submitted by ICLAM^{<2>} in the amount of \$36 000 (£20 000) each have been settled but have not been withdrawn from the Courts.

3.5 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 (£13.6 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).

<2> Instituto para el Control y la Conservación de la Cuenca del Lago de Maracaibo
<3> Paid in full by the shipowner's insurer.

- 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 (£46 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 decided to increase the 1971 Fund's level of payments from 40% to 65% of the loss or damage actually suffered by each claimant since the claims by the Republic of Venezuela were duplicated. The Council stated that, in the unlikely event that the Venezuelan Courts were to accept both claims submitted by the Republic, the 1971 Fund would nevertheless disregard one of them (document 71FUND/AC.11/3, paragraphs 3.25 and 3.26).
- 6.3 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.
- 6.4 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%.
- 6.5 Further to the Council's decision to increase the level of payments to 65%, 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

Consideration at the Administrative Council's February 2004 session

- 7.1 Representatives of some 2 000 shrimp fishermen of Lake Maracaibo had travelled to London to attend the 13th session of the Administrative Council in February 2004 with the intention to express to the Director their deep concern at the lack of progress in resolving the outstanding issues that were preventing the 1971 Fund from increasing the level of payments and thereby not allowing a payment in full of their settled claim.
- 7.2 Mindful that the level of payments would remain unchanged unless a solution could be found to the outstanding issues and of the lack of developments with regard to the withdrawal of the claims by the Republic of Venezuela, the Director proposed at the February 2004 session that the 1971 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 Council noted that a difference of opinion existed between the parties as to the cause of the incident. It was noted that the shipowner and his insurer, Assuranceforeningen Gard (Gard Club) had taken the position that the incident and the resulting pollution had been due to the fact that the Maracaibo Channel was in a dangerous condition due to poor maintenance. It was recalled that

the Fund had in the criminal proceedings provisionally taken the position that the damage had been principally caused by negligence imputable to the Republic of Venezuela. It was also noted that the Venezuelan authorities had indicated that the Maracaibo Channel had been in good condition and that there had been no contributory negligence on the part of INC, the agency of the Republic of Venezuela responsible for the maintenance of the channel.

7.4 It was noted that the Director had examined documentation concerning the cause of the incident provided by the shipowner and the Gard Club and by the Venezuelan authorities but that the 1971 Fund had not yet taken a final position. It was also noted that in the context of a global solution the cause of the incident had to be addressed.

7.5 The Council considered a proposal by the Director on a possible global solution which should 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 was 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 (£4.7 million); and
- Return of the guarantee provided by the shipowner to the Criminal Court in Cabimas (paragraph 5.1).

7.6 It was noted that a global solution might not include the claims by the three fish processors (paragraph 3.1) since the claimants had failed to demonstrate that they had 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 The Council noted that if a global solution incorporating the elements mentioned above were to be agreed, the total exposure of the 1971 Fund would be \$54.5 million (£30 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 It was also noted that the maximum amount available for compensation was Bs 39 738 million or \$83 221 800 (£46 million) and therefore payment in full of the settled claims would be possible.

7.9 The Administrative Council instructed the Director to approach, as a matter of urgency, the Venezuelan authorities and other interested parties to search for a global solution within the framework of the Conventions of all outstanding significant issues along the lines set out in paragraph 7.5 above (document 71FUND/AC.13/8, paragraph 3.5.38).

Developments after the February 2004 session

- 7.10 Following the instructions of the Administrative Council, the Director wrote to the Venezuelan authorities, informing them of the decision taken by the Council and requesting the opportunity to meet and discuss the search for a global solution.
- 7.11 In March 2004 representatives of the 1971 Fund visited Caracas where meetings were held with senior staff from the Attorney General's office, the Public Prosecutor's office, the Ministry of Environment and the Ministry of Foreign Affairs. During these meetings the situation in respect of the claims arising out of the *Nissos Amorgos* incident and the instructions to search for a global solution, together with the various elements of such a solution, were outlined.
- 7.12 The representative of the Ministry of Environment stated that she was not in a position to agree a global solution on behalf of the Republic of Venezuela but that she would recommend the global solution outlined in paragraph 7.5 to the Attorney General, the Public Prosecutor and the Minister of Environment.
- 7.13 Subsequent to the meetings held in Caracas in March 2004, the Director wrote to the Attorney General, the Public Prosecutor, the Minister of Environment and the Minister of Foreign Affairs summarising the outcome of the meetings and requesting the views of the Venezuelan Government on the possible global solution referred to in paragraph 7.5.
- 7.14 In April 2004, a representative of the Ministry of Environment informed the 1971 Fund that, in her view, the possible solution would be acceptable to the Venezuelan authorities. It was pointed out, however, that such a solution required a declaration that the criminal action against the master was time-barred and, as a result, the subsidiary civil claim was of no effect, and that such declaration could only be made by the Venezuelan courts and not by the Government.

8 Possible recourse action against INC**8.1 Background**

- 8.1.1 The policy of the IOPC Funds as regards recourse actions as laid down by the governing bodies can be summarised as follows:

The policy of the Funds is to take recourse action whenever appropriate. The Funds should in each case consider whether it would be possible to recover any amounts paid by them to victims from the shipowner or from other parties on the basis of the applicable national law. If matters of principle are involved, the question of costs should not be the decisive factor for the Funds when considering whether to take legal action. The Funds' decision as to whether or not to take such action should be made on a case-by-case basis, in the light of the prospect of success within the legal system in question.

- 8.1.2 In the criminal proceedings against the master of the *Nissos Amorgos* referred to in section 2, the 1971 Fund argued, based on the documentation available at that time, that the pollution damage had been principally caused by negligence imputable to the Republic of Venezuela. More documentation has since been made available by the Instituto Nacional de Canalizaciones (INC) which has enabled the Director to examine the cause of the incident in greater depth. The following documentation has been made available:

- Introductory documents including a summary by INC of the case against the vessel and the pleadings in the criminal action brought against the master and owners of the *Nissos Amorgos*
- Contemporary records from the *Nissos Amorgos*
- Reports by parties involved in the incident, including the master of the *Nissos Amorgos*

- Statements and depositions from the crew and the pilot of the *Nissos Amorgos*, the Port Captain of Maracaibo and INC personnel
- Notices relating to depths and draft restrictions in the Maracaibo navigation channel
- Thirteen investigation reports relating to the cause of the incident
- Background documents including a report on the condition of the navigation channel prior to the incident (the 'Emergency Plan')
- Documents relating to other reported incidents of groundings in the navigation channel

8.1.3 In his examination the Director has been assisted by Captain John Maxwell, LDM Consulting Ltd, formerly senior partner of Brookes Bell Jarrett Kirman, a master mariner with 13 years' sea-going experience and 25 years' experience of dealing with maritime casualties. He also has been assisted by Mr M T Stevens, formerly a senior partner of Holman Fenwick & Willan, a firm of London solicitors, where he dealt with shipping casualties for some 30 years; he is also a master mariner with 12 years' sea-going experience.

8.2 The Lake Maracaibo navigation channel

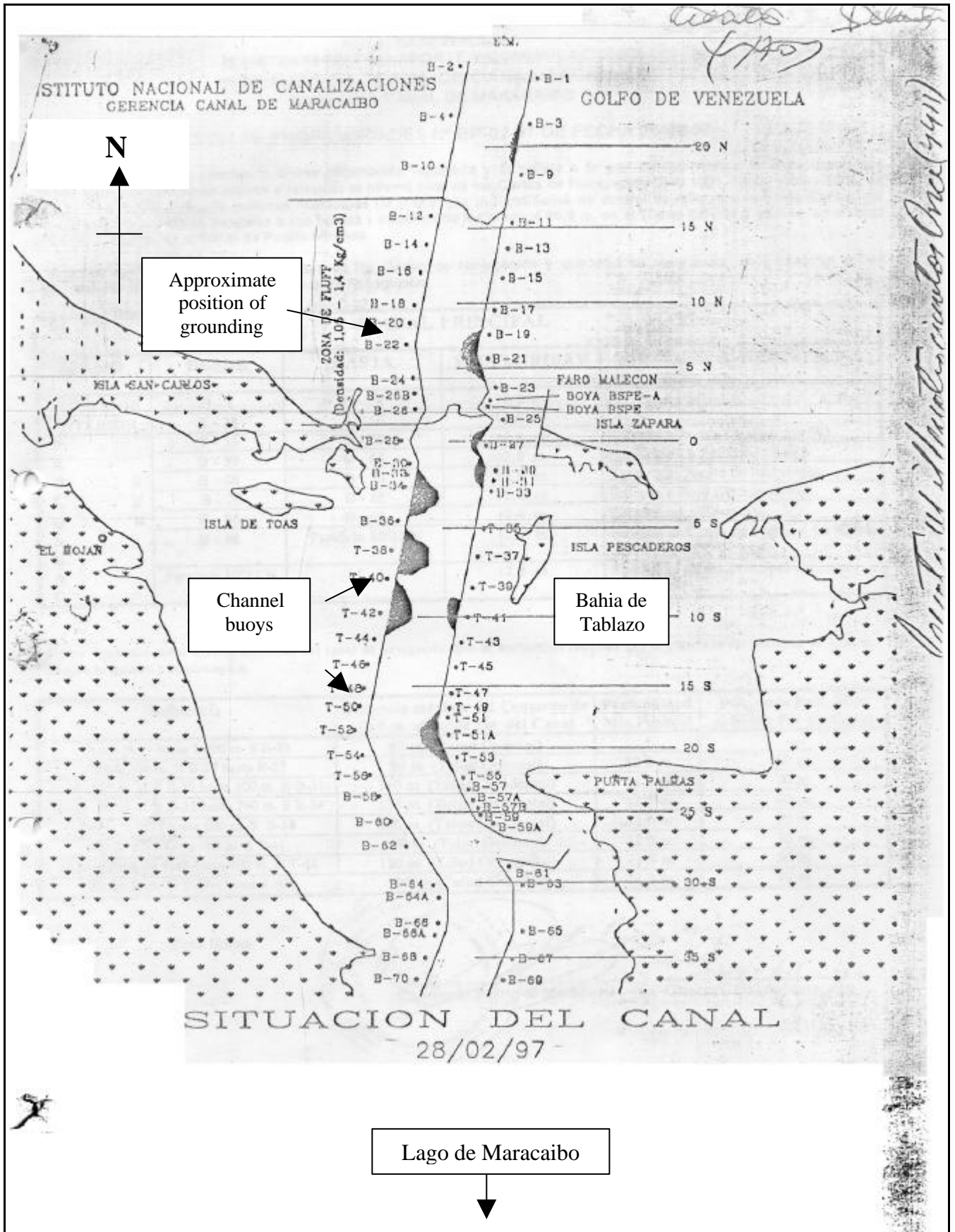
8.2.1 The Lake Maracaibo navigation channel comprises several sections, all but one of which are within the sheltered waters of Lake Maracaibo or its adjacent bays. The final section is situated in the Gulf of Venezuela and is known as the external section. The *Nissos Amorgos* was sailing in the external section immediately prior to the grounding.

8.2.2 The external section of the channel, which is man-made, is some 26.5 kilometres in length, 300 metres in overall width, has a minimum natural depth^{<4>} of 13.7 metres and, except for a small bend at its southern end, runs nearly north/south in a straight line.

8.2.3 Information on the average depths in the channel is issued periodically by means of a 'Bulletin of Depths' published by INC. A Bulletin published on 28 February 1997 (the date of the grounding of the *Nissos Amorgos*) reported the average depth of the external section of the channel to be 12.8 metres (42 feet). It appears that the Bulletins always reported this same depth.

8.2.4 The channel is marked by navigation buoys located 30 metres outside the borders of the channel. The buoys are numbered from B1 at the seaward end of the external section to B28 at the inward end. A schematic plan of the northern part of the Lake Maracaibo section and the external section of the channel is shown overleaf.

<4> The depth to the solid bottom of the channel.



- 8.2.5 Between the northern, seaward, end of the external section of the navigation channel and buoys B23/B24, at the Lake Maracaibo end, the bottom of the channel is covered by sediments in suspension of variable density known as 'fluff'. The depth of the fluff varies from place to place and is concealed by dredging. The fluff is particularly prevalent at the southern end of the external section between buoys B25/B26 and B11/B12.
- 8.2.6 The characteristics of the fluff are such that its density increases with depth. Fluff of density less than 1.2 grams per cubic centimetre is considered by experts to be safe for navigation although it is recognised that it has an effect on speed and handling. The depth of water in the channel quoted in the Bulletin of Depths is the depth measured from the sea surface down to the level in the fluff to which it is considered safe to navigate (the 'lower limit of the navigable fluff').
- 8.2.7 The problems produced by the fluff in the Maracaibo navigation channel are well known to users of the channel.
- 8.3 Summary of events
- 8.3.1 On the evening of 28 February 1997 the 89 426 tonnes summer deadweight tanker *Nissos Amorgos* departed Puerto Miranda on Lake Maracaibo. The vessel was loaded to a draft on the loading berth of 11.89 metres (39' 00") forward and aft.
- 8.3.2 The master of the *Nissos Amorgos*, who was very familiar with the Maracaibo channel, was assisted by a pilot whom he knew from previous visits and whom he considered experienced and competent.
- 8.3.3 The passage from the berth through Lake Maracaibo was without problem. However, at 2300 hours, while proceeding north in the external section of the channel, the vessel lost speed and control despite the use of the rudder. At 2315 hours, the *Nissos Amorgos* came to rest aground just outside the western limit of the channel, north of channel marking buoy B22. The track followed by the vessel within the channel in reaching the final grounding position is a matter of dispute between the shipowner/Gard Club and INC. Weather conditions at the time of the incident were poor, with gale force easterly winds of approximate 40 knots.
- 8.3.4 During the grounding, the bottom of the ship was holed in six places as the result of the vessel running over an unidentified metal object. Some 3 600 tonnes of the vessel's Bachaquero crude oil cargo leaked into the sea through these holes. Some cargo was then transferred from the damaged tanks to other compartments to stop the egress. The *Nissos Amorgos* was refloated with tug assistance the following day and made its way to a safe anchorage off Punta Cardon in the Gulf of Venezuela.
- 8.3.5 Surveys of the channel after the grounding detected several magnetic anomalies, indicative of the presence of large metallic objects, but diving and sweep surveys showed that these objects were buried below the channel bottom and that the bed of the channel was clear of obstructions.
- 8.3.6 As mentioned in paragraph 2.1 above, the Venezuelan Public Prosecutor commenced criminal proceedings against the master of the *Nissos Amorgos*. The Public Prosecutor alleged that the vessel grounded because the master did not make the necessary manoeuvres to maintain the vessel within the channel. In his pleadings to the Criminal Court, the master argued that the channel was in a dangerous condition due to poor maintenance and that this was the cause of the incident. In its judgment dated 3 May 2000, the Criminal Court held that the Maracaibo channel was in perfect condition and that the master was liable for the damage arising from the incident. The Court also held the master liable for the crime of pollution since, in the view of the Court, he left the loading port knowing that the channel was difficult to navigate and that the weather was bad. The Court sentenced the master to one year and four months in prison. The master appealed against the judgment of the Criminal Court. The appeal has not yet been heard.

8.4 Positions of the parties as to the cause of the grounding

8.4.1 The master and the owner of the *Nissos Amorgos* have maintained:

- A loss of speed and control occurred while the ship was in the centre of the buoyed channel as a result of insufficient depth of water, and this loss of control caused the ship to leave the channel.
- The lack of water depth was caused by a failure to dredge the channel adequately.
- The vessel may inadvertently have been steaming closer to the edge of the channel than was safe, due to navigation buoys being out of position.

8.4.2 The master and the shipowner have made the point that several vessels had run aground in the channel in 1996 and 1997 and, in particular, that two tankers had grounded in the same part of the channel a short while after the *Nissos Amorgos*, namely the *Olympic Sponsor* on 10 March 1997, at a draft on the loading berth of 11.58 metres (38 feet), and the *Corellis* on 10 April 1997, at a draft on the loading berth of 10.97 metres (36 feet).

8.4.3 INC, a government agency under the Venezuelan Ministry of Transport and Communications responsible for the maintenance of the Maracaibo channel, has contended as follows:

- The channel buoys were in their correct positions.
- There was sufficient depth of water in the channel.
- The grounding was caused by imprudent or incorrect navigation. In particular the vessel proceeded at too low a speed, failed to use the navigation chart and failed to take into account properly the strong wind, cross currents, tide and waves, all resulting in the vessel leaving the navigable section of the channel and grounding outside its limits.

8.4.4 INC has pointed out that the tanker *Teseo*, with a draft of 12.04 metres (39.6 feet), 0.15 metres (6in) deeper than the *Nissos Amorgos*, had passed safely down the channel shortly before the *Nissos Amorgos*.

8.4.5 INC has maintained that the metallic object that caused the damage to the *Nissos Amorgos* was outside the navigable section of the channel.

8.4.6 There is no suggestion that the grounding was due to a failure of the vessel's equipment.

8.5 Captain Maxwell's analysis

8.5.1 Captain Maxwell's examination of the facts and the evidence can be summarised as follows:

- The information provided in relation to the condition of the channel, both by INC and by the shipowner, shows that the depth of the Maracaibo channel between buoys B23/B24 and B21/B22 was considerably less than the average depth of the channel as advertised by INC.
- The available survey reports appear to show that the bottom of the channel was uneven and that a ship proceeding along the channel would have encountered local charted depths of less than the advertised average 12.8 metres (42 feet) and possibly as little as 11 metres (36' 1"). It also appears that the channel was, in general terms, shallower at its sides than in the centre. Several of the surveys were, however, carried out months after the incident and the results obtained may not be representative of the situation at the time the *Nissos Amorgos* grounded,

both because dredging had taken place in the interim and because further sediment would have entered the channel.

- The potential inaccuracies in determining the depth to the lower limit of the navigable fluff are such, however, that it is not possible to be certain that the depths recorded during the various surveys carried out after the incident accurately defined the navigable depth of the channel. Nevertheless, the depth between buoys B23/B24 and B21/B22 was such that the *Nissos Amorgos* could have been navigating within the non-navigable layer of fluff present in that area.
- A consequence of navigating in the non-navigable layer of fluff could have been a loss of control such as that described by those on board the *Nissos Amorgos*, leading to grounding outside the channel. The cause of the vessel leaving the channel could, therefore, have been the failure of the INC to maintain the depth of the channel.
- A lack of care or attention on the part of the master or the pilot of the *Nissos Amorgos* could have allowed the vessel to drift to the west side of the channel under the influence of the gale force easterly wind blowing at the time and the heavy beam swell, but according to the statements and depositions given by the crew and the pilot of the *Nissos Amorgos* this did not happen and the vessel was under control and in the centre of the buoyed channel until it was between buoys B21/B22.
- However, these statements and depositions were in some respects not reliable in that they contained apparent inconsistencies with respect to the speed of the vessel during the material period and reported events relating to the use of the engine which, in the circumstances, were not what would have been expected from competent mariners.
- As regards the vessel's speed, in a deposition taken on 5 March 1997, the master said that the speed on arriving at buoys B21/B22 was between 9 and 10 knots. The following day he stated that it had reduced to 6 or 7 knots on passing the breakwater at the start of the external section of the channel and approximately 1 mile before the position where he reported difficulties started to be encountered due to the effects of wind and swell. In a deposition taken on 15 March he said that the speed when the impact was felt (ie at buoys B21/B22) was 9 knots. The second officer, on the other hand, reported that the average speed up to buoys B23/B24 was 9 knots but then decreased to 4 knots once those buoys had been passed. The positions marked on the vessel's chart, however, show that the speed was well below 9-10 knots before the *Nissos Amorgos* arrived at buoys B23/B24 and was less than 4.5 knots between the time of passing those buoys and the time at which control was lost in the area of buoys B21/B22.
- With regard to the use of the engines, the engine movement book shows that the vessel entered the external section of the channel with the engine at full maneuvering speed. The first change of engine speed was made some fourteen minutes after control of the vessel had been lost and just before it was judged that the ship was firmly aground. Since there are only two means of controlling the progress of the ship, the rudder and the engine, and the former had proved ineffective, it would have been an instinctive reaction to change the engine speed. This could have been increased or decreased. The absence of any reference to an engine manoeuvre during the period in which the ship was moving out of control does not fit well with the events described by the master and the pilot.
- Further, the master and the pilot must have appreciated that control depended on maintaining a reasonable speed. It was strange that no attempt was made to try to increase speed when this was found to be dropping after entering the external channel even if, in the event, that attempt had proved to be of no effect. This was particularly the case since the master and the pilot said that they believed that the speed reduction was due to the effect of wind and waves. While the master and the pilot might have considered that a speed reduction due to navigating

in fluff would not be altered by increasing engine speed, this would not be true if the speed reduction was due to the weather.

- According to depositions from the crew of the dredger *Catatumbo*, which was following the *Nissos Amorgos* down the channel, the vessel grounded on the west bank, south of buoy B22, but managed to continue for some distance thereafter before finally coming to rest north of the buoy. This directly contradicts the assertion of the pilot and crew of the *Nissos Amorgos* that their vessel was in the centre of the channel when it reached buoys B21/B22 at 2300 hours. Furthermore, a position plotted on the working chart at that time shows that the ship was on the west side of the channel.
- Both the shipowner and INC have presented arguments based on the experiences of other vessels using the channel. While there is the evidence that ships could transit the channel safely, it is clear that a vessel at or approaching the maximum draft specified by the Maracaibo Port Captain, could expect to experience problems when passing through the external section of the navigation channel. Those problems might be no more than a loss of speed due to sailing through the navigable fluff, however, 14 vessels with drafts ranging from 10.67 m (35ft) to 12.04m (39'6") reported difficulties in the channel between April 1996 and August 1997. Since it seemed unlikely that the vessels all experienced those difficulties as a result of failure to navigate properly, it did appear that a properly navigated vessel transiting the channel could lose control without any fault on its part. Nevertheless, although the depth of water in the area concerned was such that a loss of control could have occurred, this was not inevitable, as demonstrated by the deep drafted *Teseo* and most other ships that had passed down the channel safely. The fact that the depth appears to have been such that a ship using the channel could have suffered the problems reportedly experienced by the *Nissos Amorgos* does not therefore mean that the condition of the channel was the cause of the grounding in this instance.

8.5.2 On the basis of his examination of the information available, Captain Maxwell arrives at the following conclusions:

- The evidence as to the depths in the channel, although not completely clear, taken together with the history of difficulties experienced by other vessels using the waterway, indicates that the grounding of the *Nissos Amorgos* could have been caused by a lack of safe navigable depth in the channel caused by a build-up of fluff.
- The alternative is that the vessel was allowed to drift to the west side of the channel before buoys B21/B22 were reached, under the influence of the prevailing gale force winds and heavy seas, coming into contact with the shallows, and losing control on or near the west bank. Since neither the pilot nor the crew of the *Nissos Amorgos* reported any difficulty in controlling the course of the ship prior to reaching buoys B21/B22, such a drift to the west could presumably have been counteracted.
- The statements and depositions of the pilot and the crew is that the vessel remained under control in the centre of the channel up to the time it was between buoys B21/B22. This supports a conclusion that the cause of the grounding was a lack of navigable depth in the channel. However, the statements and depositions of the crew and the pilot of the *Nissos Amorgos* are contradicted by the testimony of the crew of the dredger following the *Nissos Amorgos* down the channel which, if correct, means that the *Nissos Amorgos* could not have been in the position claimed by the master and the pilot when control was lost. In addition, as set out above, there are several aspects of the testimony of the pilot and the crew of the *Nissos Amorgos* that are unsatisfactory.

8.5.3 In conclusion, Captain Maxwell has stated that, in view of the above, and bearing in mind that a vessel of deeper draft had passed safely down the channel shortly before the *Nissos Amorgos*, he

could not say that the evidence showed that the grounding was caused, either in whole or part, by the condition of the navigation channel.

8.6 Mr Stevens' analysis

8.6.1 Mr Stevens has stated that there was little doubt that INC and the Captain of the Port were jointly responsible to all users of the Maracaibo channel, including the *Nissos Amorgos*, to ensure that it was safe to use.

8.6.2 With regard to the question of the condition of the channel, Mr Stevens has stated that on the evidence there could be little doubt that not only was the depth of the channel much less than 12.8m (in places less than 11m) in substantial parts of it between buoys B23/24 and B21/22 but, of even more difficulty to those attempting to navigate it, the deepest part was not necessarily in the middle and did not follow a straight track. In consequence a ship seeking to maintain a position in the centre of the channel would not, in his view, avoid shallow ground.

8.6.3 Mr Stevens has pointed out that there was clear evidence (from the reports made to it by pilots and ships' masters during the course of 1996) that INC was aware of the deficiency in the channel despite its dredging programme and that in October 1996 an Emergency Plan was drawn up by INC to deal with what was seen as 'a serious problem with the navigation channels'. The Emergency Plan predicted that failure to implement the plan was likely to result in an 'increase in the risk of occurrence of accidents'. Mr Stevens has noted that despite this, the plan was not executed.

8.6.4 On this evidence, Mr Stevens has expressed the view that a court would be bound to find that INC was at fault for failing to take all reasonable steps to maintain a minimum depth of 12.8m, as advertised in the 'Bulletin of Depths' as described to shipping using the port.

8.6.5 Mr Stevens has further concluded that it was probable that a court would find that the Captain of the Port was at fault because although he was aware of the severe limitations of the channel he, inadvertently or otherwise, had issued misleading 'Draft Controls' or at best, turned a blind eye to the misinterpretation of his Circulars on draft and this failure put vessels at risk of grounding in the critical zone.

8.6.6 Mr Stevens has then considered whether the negligence of INC and the Captain of the Port caused the grounding of the *Nissos Amorgos*. His analysis can be summarised as follows:

- The evidence on the navigation of the *Nissos Amorgos* comes from the ship's witnesses, primarily its master and pilot, together with the deck log, bell book and chart. The vessel's course recorder was not switched on at the relevant time so no analysis of the ship's headings could be made. Apart from noting the time of passing buoys 25/26 and 23/24 together with two positions marked on the chart after the vessel had grounded, no contemporaneous observations of its precise position in the channel were made during the course of the vessel's passage. The court would have to determine, on the evidence available, whether those navigating the vessel allowed the ship by want of usual skill, to ground on the western bank of the channel or whether the ship grounded as a result of encountering shallow ground in the channel thereby losing control and was driven out of it by the easterly gale that was blowing at the time.
- The evidence about the navigation of the *Nissos Amorgos* and its apparent discrepancies were accurately summarised in the report by Captain Maxwell. Although there were clear discrepancies regarding the vessel's speed and position in the channel, this did not lead to the adverse conclusion drawn by Captain Maxwell.

- As far as the figures for speed are concerned it was very clear that the ship did not make the speed over the ground stated by the master, but it was much more likely that the differences arise out of the fact that the master was giving estimates. In any event the average speed between buoy B26 and buoy B24, calculated by Captain Maxwell as 6.93 knots, could be consistent with a speed of about 9 knots at buoy B26 and about 5 knots at buoy B24. Between buoys B24 and B22 the average might represent about 5 knots at buoy B24 reducing to less than 3 knots at buoy B22 (on the evidence of the vessel's chart the ship was aground before reaching buoy B22 – see below). There was no suggestion that the vessel suffered engine problems but, as stated by Captain Maxwell, it was remarkable that no comment was made by the witnesses about trying to gain extra speed by increasing the revolutions to full sea speed once they experienced a decrease in speed.
- It appears that the fix on the vessel's chart just south of buoy B22 was a very strong indication that the ship grounded there. If so, this was at odds with the master's evidence that the *Nissos Amorgos* hit shallow ground when between the buoys but was entirely consistent with the thrust of the pilot's evidence that the ship experienced 'problems (details of which were not given) some 10 to 15 minutes before' reaching buoy B22 and grounded on the western side of the channel (rather than 'over the western bank' as described by those on the dredger some distance away). The 2315 fix showed that the ship was then able, with the engine still at full ahead, to proceed past buoy 22 until the ship finally ran out of the channel north of it. The earlier fix, south of the buoy 22, was consistent with the ship being further to the east, ie in the centre of the channel prior to reaching that position, then losing steerage in the shallowest part of the channel and being blown onto the western side of the channel by the easterly gale.
- There was sufficient evidence to prove a case against the port authorities (INC and the Captain of the Port) but there was no incontrovertible, documentary evidence (independent of the witness statements) better than the point made above (effectively, that if the ship first went aground close westward of the centre of the channel when just south of buoys 21/22, then, because of the easterly gale that was blowing, it was probable that the vessel was in the centre or eastern part of the channel beforehand) that showed conclusively that the *Nissos Amorgos* had maintained its position in the middle of the channel until it lost control over shallow ground. In a case such as this, of a vessel navigating within a channel, it would be remarkable if there were such evidence.
- A court would weigh in the balance all the evidence not only from the ship's witnesses, but on the actual depth of the channel, the number of other vessels that have passed safely through it and the incidence of grounding reports. The witness evidence was entirely consistent with the classic consequences of touching the bottom - drastic reduction in speed and loss of control. This coupled with the evidence of reduction in the depth of the channel to 11 metres over most of the channel between buoys B24 and B22 and the frequent reports of vessels touching bottom in this area leads to the firm conclusion that a court would find, on a balance of probabilities, that the ship grounded as a direct result of the condition of the channel.
- INC would allege that the pilot and master negligently allowed the ship to wander, under the effect only of 'navigable fluff' and the easterly gale, onto the western bank of the channel. This was unlikely given that the two officers were very experienced, they were very aware of the fact that the ship was entering the most dangerous part of the passage and the visibility was very clear so that it would have quickly become apparent, from the observation of the channel-markers, if the ship had been moving off the centre of the channel. It would be a remarkable coincidence if the pilots and masters of the *Nissos Amorgos*, *Olympic Sponsor* and *Corelli* which grounded in this area within the space of six weeks, were *all* guilty of careless navigation.
- INC apparently placed great reliance on the fact that the vessel *Teseo* had succeeded in negotiating the channel shortly before the *Nissos Amorgos* attempted her transit. Given the

vagaries of the channel, both as to depth and the position and track of the deepest part, a court would not find this persuasive evidence that the *Nissos Amorgos* had every opportunity to pass through the channel subject only to the normal navigation skills of those piloting her. There was no evidence as to whether the *Teseo* had maintained a position in the middle of the channel. Further it was admitted by INC that the passage of large vessels were, in effect, used to keep the channel clear, i.e. to stir up the bottom. On the logic of this *Teseo* argument, if four out of ten vessels navigating the channel got through the remaining six would all be guilty of negligent navigation.

- Quite apart from the fact that it was obvious that if there was insufficient water in the channel, vessels would lose control with the attendant probability that they would run out of the channel. INC produced a memorandum to this effect in October 1996 and clearly anticipated the problem.
- INC was also aware of the loss of a dredger arm in the vicinity of buoy B22 so it ought to have known of the risk that a vessel might collide with it.

8.6.7 The conclusions drawn by Mr Stevens are as follows:

- There is sufficient evidence to prove the grounding was caused by the negligence of INC and/or the Captain of the Port and that consequently the 1971 Fund would make a recovery in a recourse action against those parties, for the following reasons:
 - On a balance of probabilities, taking into account all the evidence, the *Nissos Amorgos* grounded as a result of losing control having encountered shallow ground while navigating in the channel.
 - INC failed to maintain a minimum depth of 12.8m in the channel by dredging.
 - INC knew (by its own surveys and the reports of numerous vessels) that the depth was not 12.8 metres but failed to warn mariners of this.
 - INC was fully aware that the risk of failing to dredge the channel to its advertised depth was that vessels might collide or run out of the channel and cause oil pollution – but still did not dredge.
 - The Captain of the Port, knowing the limitations of the channel, set draft restrictions that were unrealistic for the channel and unsafe.

8.7 Director's considerations

8.7.1 In a recourse action taken by the 1971 Fund against INC the Fund would have to prove that defects in the channel caused or contributed to the grounding of the *Nissos Amorgos*, rather than negligence on the part of the master, the pilot or the crew. It appears that the Court will decide as to whether the Fund has fulfilled the burden of proof on the balance of probabilities.

8.7.2 In the Director's view it is clear that INC was aware of the problems with the channel. Emergency plans had been drawn up in October 1996 to resolve the serious problems in the channel, but this plan had not been put into action before the grounding of the *Nissos Amorgos*. The bulletins issued by INC appear to have indicated an average depth that was safe for navigation. A number of vessels, some of which had a draft equal to or slightly greater than the *Nissos Amorgos*, had encountered difficulties in passing through the external section of the channel. The Director agrees with Mr Stevens that INC had the responsibility to maintain a safe channel and that in some respects INC had not fulfilled that responsibility.

- 8.7.3 As stated above, in the Director's view, the 1971 Fund would have to prove not only that there were deficiencies in the channel, but also that these deficiencies caused or contributed to the grounding of the *Nissos Amorgos*. On this point Captain Maxwell and Mr Stevens both accept that there is no conclusive evidence as to the cause of the incident. However, Captain Maxwell has concluded that the evidence available does not show that the grounding was caused, either in whole or in part, by the condition of the channel, whereas Mr Stevens has considered that, on the balance of probabilities, taking into account all the evidence, the vessel grounded as a result of losing control having entered shallow ground while navigating in the channel.
- 8.7.4 In the Director's view there are facts in support of either view. It was well known that there were serious problems in respect of safety of navigation in the channel. A number of ships had encountered serious difficulties. The master and the pilot on board the *Nissos Amorgos* were very experienced and knew the channel well. On the other hand other ships of the same or a slightly greater draft than the *Nissos Amorgos* had passed safely through the channel, one such ship only a few minutes before the *Nissos Amorgos*. There appears to be a contradiction between various statements and depositions made by the master, the second officer and the pilot, in particular compared with statement by the master of dredger who saw the *Nissos Amorgos* when it had grounded.
- 8.7.5 It is also worth noting that, as mentioned above, the Criminal Court of Cabimas had found the master of the *Nissos Amorgos* liable for the incident. The 1971 Fund's Venezuelan lawyers have advised that the findings of a criminal court carry a considerable weight in a civil case dealing with the same events. However, as pointed out above, the master has appealed against the judgement.
- 8.7.6 Ten days after the grounding of the *Nissos Amorgos*, the laden tanker *Olympic Sponsor* (which had a draft slightly less than that of the *Nissos Amorgos*) ran aground in the same place. The incident became the subject of arbitration in New York between the owner of the *Olympic Sponsor* and the charterer of the vessel. Although the arbitration primarily addressed the issue of whether the charterer had fulfilled his obligation to nominate a safe port, the arbitration award is nevertheless pertinent to the *Nissos Amorgos* case. In the arbitration proceedings the shipowner maintained that the cause of the grounding was insufficient depth of water in the channel. It appears that extensive evidence as to the condition of the channel was available to the arbitrators. In November 2001, the arbitrators found that the sole proximate cause of the grounding was the error in navigation on the part of the master and the pilot, by not properly taking into account the wind, sea, current and tidal conditions present at the time.
- 8.7.7 In conclusion, the Director has considered in particular the following main factors:
- (a) there are facts that speak in favour of the incident being caused by deficiencies of the channel and other facts supporting the view that the grounding was caused by negligence on the part of the vessel;
 - (b) the 1971 Fund would have the burden of proof that the incident was caused by or contributed to by deficiencies in the channel;
 - (c) there is a risk element in any litigation and in this case the conflicting evidence mentioned above increases the difficulty in predicting the outcome;
 - (d) a very similar case was dealt with in arbitration in New York and the arbitrators concluded that the grounding was solely caused by error in navigation; and
 - (e) a Venezuelan criminal court has held the master of the *Nissos Amorgos* liable for the incident, although this judgement is the subject of appeal.

8.7.8 Having taken into account all available information and in particular the factors set out in paragraph 8.7.7, the Director considers on balance that it is unlikely that a recourse action by the 1971 Fund against INC would succeed. For this reason he proposes that the Fund should not pursue such an action.

9 Action to be taken

The Administrative Council is invited

- (a) to take note of the information contained in this document;
 - (b) to consider what further steps could be taken to arrive at a global solution of all outstanding issues; and
 - (c) to decide whether the 1971 Fund should take recourse action against INC.
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