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OIL POLLUTION  
COMPENSATION  
FUND 1971

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Agenda item 3

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## INCIDENTS INVOLVING THE 1971 FUND

### NISSOS AMORGOS

#### Note by the Director

**Summary:**

At the 13th session of the Administrative Council in February 2004, the Venezuelan delegation made a statement containing criticisms on a number of points of the 1971 Fund's handling of the legal actions pending before the Venezuelan courts. In view of this the Director instructed Dr Josefina Calcaño de Temeltas, a former Venezuelan Supreme Court judge, to investigate these criticisms. The report by Dr Calcaño concludes that the criticisms were absolutely unfounded and that the measures taken by the 1971 Fund had been correct and totally in accordance with the instruments which govern the Organisation and in strict compliance with the policy of compensation and recourse laid down by the Governments of the Member States.

**Action to be taken:** Information to be noted.

### **1 Statement by the Delegation of the Republic of Venezuela**

- 1.1 At the 13th session of the Administrative Council in February 2004, the Venezuelan delegation read out a statement in which were included criticisms on a number of points in respect of the 1971 Fund's handling of the legal actions pending before the Venezuelan courts in relation to the *Nissos Amorgos* incident. The statement by the Venezuelan delegation is reproduced in the Annex to the Record of Decisions of that session. The Director's observations on some of the points raised in the statement and the statements by some delegations are also reflected in the Record of Decisions (document 71FUND/AC.13/8).
- 1.2 The main points made in the statement by the Venezuelan delegation can be summarised as follows:
  - It was not true, as alleged by the 1971 Fund, that the delays in the payment of the compensation were attributable to the Venezuelan courts.

- The 1971 Fund had requested the 'avocamiento'<sup><1></sup> based on the consolidation of the actions in court and when the Supreme Court had decided in its favour in a judgement dated 20 November 2002, the Fund had appealed against the judgement on three occasions.
- An appeal lodged by the Fund in the Supreme Court on 26 March 2003 had been drafted in an impolite way against the judges of the Court and showed an obvious willingness to act in defence of other Venezuelan Public Institutions.
- There seemed to exist an attitude of threat from the Fund continuously intending to file pleadings against Venezuela.
- Although the criminal action against the master became time-barred on 28 August 2001, the Gard Club, as the party responsible for the master's defence, had not requested a declaration to that effect from the Venezuelan Courts even though more than two years had passed since that date. If the criminal case was time-barred, the subsidiary civil action, in which the 1971 Fund had been included as co-defendant, would be left without any legal effect.

## **2 Opinion by the former Venezuelan Supreme Court Judge, Dr Josefina Calcaño de Temeltas**

- 2.1 In view of the criticisms made in the statement by the Venezuelan delegation, the Director instructed a former Venezuelan Supreme Court Judge, Dr Josefina Calcaño de Temeltas, to review the legal proceedings that have taken place in the Venezuelan Courts since the incident and to give her opinion on the validity of the criticisms made by the Venezuelan delegation in that statement. Dr Calcaño has been given access to all the documents submitted by the parties before the Courts in Venezuela and a number of documents presented to the Administrative Council as well as the relevant IOPC Funds Annual Reports.
- 2.2 As a result of her examination, Dr Calcaño has submitted a report dated 18 May 2004 in which she has dealt with all the criticisms set out in the above-mentioned statement and has concluded that all criticisms are absolutely unfounded.
- 2.3 Dr Calcaño has concluded in particular that there is strong evidence in the court file that the main reason for the delays in the court proceedings is the repeated pleadings and appeals submitted by lawyers representing some of the claimants. She has also concluded that there has been a lack of speed in the Venezuelan courts, including the Supreme Court, dealing with the numerous proceedings. Dr Calcaño has further concluded that the measures taken by the 1971 Fund in relation to the *Nissos Amorgos* incident had been correct and totally in accordance with the instruments which govern the Organisation and its operations and in strict compliance with the policy of compensation and recourse laid down by the Governments of the Member States.
- 2.4 Dr Calcaño's opinion is attached as Annex I and a summary of her *curriculum vitae* is attached as Annex II.

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<sup><1></sup> 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 Action to be taken by the Administrative Council**

The Administrative Council is invited:

- (a) to take note of the information contained in this document; and
- (b) to give the Director such instructions in respect of this matter as it may deem appropriate.

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## ANNEX I

### REPORT

#### Concerning the oil spill from the tanker *Nissos Amorgos* that occurred in Lake Maracaibo (Venezuela) on 28 February 1997

#### I. INTRODUCTION

This **report** was requested from me by Mr **Måns Jacobsson**, Director of the **International Oil Pollution Compensation Fund** (1971 Fund), for the purpose of obtaining my opinion regarding the details of a legal nature and the current status in the Venezuelan courts, arising from the MT **Nissos Amorgos** incident on the Venezuelan coasts.

For the preparation of my opinion in the light of my expertise gained from having been a member for a long time of the highest court in Venezuela, I have carefully examined all the documentation in four large files given to me by Mr **José Maura**, **Head of the Claims Department of the IOPC Fund**, as well as additional documents also provided by the said person, and I have personally reviewed the most recent pleadings presented to the Supreme Court.

Similarly, I have used as an important reference for the analysis requested, the "**Declaration of the Delegation of the Bolivarian Republic of Venezuela to the Honourable Members of the International Oil Pollution Compensation Fund, 1971**", (henceforth called "The Declaration"), read and inserted as an **Annex to the Record** of the Thirteenth Session of the Administrative Council of the Fund held on 27 February 2004.

It is this "Declaration" of the Venezuelan Delegation that I have used as a starting point, for the purpose of comparing its contents with the court files and to determine precisely the facts or circumstances that have caused the obvious delays in the definitive solution of the "Nissos Amorgos case".

After having carefully analysed all the documentation that I have been provided with, I have arrived at the following:

#### II CONCLUSIONS

1.- THAT ALL THE INCRIMINATING INSINUATIONS AND DIRECT ACCUSATIONS MADE AGAINST THE ACTIONS OF THE 1971 FUND IN THE DECLARATION BY THE VENEZUELAN DELEGATION READ AND SUBMITTED AT THE THIRTEENTH SESSION OF THE ADMINISTRATIVE COUNCIL ON 27 FEBRUARY 2004 ARE ABSOLUTELY UNFOUNDED.

**1.1 There is overwhelming evidence in the file that the fundamental reason for the procedural delays that have prevented the conclusion of the case in the courts arises from the repeated submissions and appeals presented by the plaintiffs** against the master, the owner and insurer of the *Nissos Amorgos*, and against the Fund (thirteen files in different court instances and places: Zulia, Caracas and the Supreme Court). Each one of these actions, of different types (criminal, civil, commercial and banking) gives rise to a series of procedural steps (summones, notifications, replies, evidence, reports and appeals), used excessively by the plaintiffs, which obstruct what would be the normal development of a legal process, even in a complex procedural system such as the Venezuelan.

1.1.1 Request for "**Avocamiento**". **Avocamiento** is an exceptional procedural device contemplated under Venezuelan law, that consists of empowering the Sections of the Supreme Court to request any court of a lower level to forward a particular file to it and, if it considers after perusing the file that there are reasons for doing so (e.g. procedural chaos, the importance of the matter, public scandal involving the case, etc), the Section decides the case itself. In the proceedings of the *Nissos Amorgos*, the **avocamiento** of all the cases dispersed in different courts to the Political-Administrative Section was requested by the plaintiffs and not – as stated in the Declaration – by the Fund. Nothing was decided by this Section. But

for almost three years, all pending cases in the lower courts were paralysed by order of the Political-Administrative Section.

1.1.2 The retention of all the files in the Political-Administrative Section without a decision on the avocamiento being rendered, has impeded, furthermore, consolidation by way of formal legal approval (homologación) of the withdrawal “of the actions, claims and litigation rights” of FETRAPESCA and the shrimp and crab companies AGRÍCOLA PESQUERA C.A. (AGRIPESCA), ALIMENTOS CONSERVADOS S.A, TROPICALMAR TRADING COMPANY, CANGREJOS AZULES DEL ZULIA and others, in the civil action for losses and damages brought on 12 March 1998 by these commercial firms against the master, the owner and the insurer of the *Nissos Amorgos*, notified to the Fund.

1.2. That the petty legal arguments used by the said plaintiffs' lawyers with the clear intention of prolonging the litigation have not ceased, an intention which is demonstrated by:

1.2.1 A request for the disqualification of the judges of the Supreme Court, that is to say, a request that these high-level judges withdraw voluntarily from deciding the *Nissos Amorgos* case because, in the opinion of the requesting lawyer, there are one or several of the grounds provided for in the Venezuelan procedural law (22 grounds, art 82 CPC) that prevent them from deciding the case.

1.2.2 As the judges whose disqualification was requested did not accept, for good reasons, to disqualify themselves from hearing the case, on 15 April 2004 the same lawyer requested their disqualification, that is to say, he formally requested their disqualification, for the same reasons that he had invoked in his request to them to withdraw. This request was declared inadmissible by the President of the Political-Administrative Section of the Supreme Court.

1.2.3 Despite that the Venezuelan procedural code provides that “no appeal against the decisions or judgements that are pronounced in the matter of disqualification will be heard” (Art. 101 CPC), nonetheless, on 27 April 2004, the requesting lawyer appealed against the non-acceptance of the disqualification.

1.2.4 This inadmissible appeal again caused paralisation of the proceedings since , **on 6 May 2004**, a separate file to handle this appeal was opened.

1.2.5 All the appeals and measures referred to in this section (1.2) have been made by the lawyer for TROPICALMAR and CANGREJOS AZULES DEL ZULIA in the action brought before the Political-Administrative Section against the Fund and the INSTITUTO NACIONAL DE CANALIZACIONES (INC), and is an unheard of delaying tactic.

**1.3 That judgement No. 1,357 rendered by the Political-Administrative Section of the Supreme Court on 20 November 2002** regarding the inadmissibility of the claim presented by the lawyers for TROPICALMAR and CANGREJOS AZULES DEL ZULIA on 14 December 1999 against the Fund and the INSTITUTO NACIONAL DE CANALIZACIONES significantly complicated the case of the “*Nissos Amorgos*” because this judgement incorrectly interpreted the legal basis and the facts that supported the opposition of the Fund’s lawyers against this action.

1.4 In effect, judgement 1,357 starts from an incorrect premise in assuming that the lawyers of the Fund were requesting the consolidation of the files so that the final decision, that would encompass all the claims, would be issued by the Political-Administrative Section.

**1.5 But, the reality of the facts is different. In fact, as can be seen from the arguments in the pleadings opposing the procedural defence which maintained that the Political-Administrative Section did not have jurisdiction to hear the action against the IOPC Fund brought by TROPICALMAR and CANGREJOS AZULES DEL ZULIA, and from the request for consolidation of the files, as well as from the argument on exclusive jurisdictional competence raised, what was being requested by the Fund’s lawyers was precisely the opposite: that the final judgement be issued by the court which had dealt with this matter before namely, the forth Civil and Commercial Court of First Instance of the Metropolitan area of Caracas.**

1.6 Given the obvious discrepancy between the intention of those who requested the consolidation (the Fund) and what was decided in judgement 1,357, it can be seen, as a consequence, a defensive reaction by the defendants in this litigation, to introduce subsequently all appeals that they deemed appropriate to reverse the situation created.

1.7 One of these mechanisms was the request for reversal of the judgement of the said Political-Administrative Section, correctly declared inadmissible, in my opinion.

1.8 The other course of action chosen by the lawyers of the Fund, that of **constitutional review** of judgement 1,357 before the Constitutional Section of the Supreme Court, although worded in very harsh terms in questioning the judgement, was in my opinion a valid action taken because it is provided for in the Venezuelan Constitution for cases in which an individual considers that his or her constitutional rights or guarantees are violated by a court decision, even if that decision emanates from one of the Sections of the Supreme Court, as has been interpreted by the Constitutional Section.

1.9 In this sense, it should be clarified that, although the decision whose constitutional review was being requested was of an interlocutory nature and not final, this was the reason that the appeal was rejected by the Constitutional Section on the basis of its jurisprudence. However, the plaintiffs (the Fund) could reasonably expect a change of criterion regarding this aspect, given that it is not infrequent that the Venezuelan Constitutional Section modifies its precedents, sometimes even when there has been a short period between one decision and another.

1.10 That also Venezuelan courts, including the Supreme Court, have been slow in resolving the many procedural questions arising in the “Nissos Amorgos” case.

1.11 That also, the successive replacements of judges in the Supreme Court beginning in 1999, which makes it necessary for the new judges assigned to the Political-Administrative Section to begin the examination of the file again, has affected the delay in reaching a final decision in the case.

2. That the accusations concerning the actions of the Fund in the case of the “*Nissos Amorgos*” expressed in “the Declaration” are vague, imprecise and spread out over several paragraphs (5, 7 and 9) without logic and without an indication of the documents or specific factual circumstances on which they are based, which makes it necessary to disentangle its meaning by assumptions, and I have proceeded thus in the examination of those accusations.

2.1 In this context when “the Declaration” accuses the Fund “of having alleged that the Bolivarian Republic of Venezuela was negligent in several official documents” (paragraph 5), **I assume** that this alludes to the pleadings submitted by the Fund on 20 March 2000 to the Sixth Criminal Court of Cabimas (Juzgado Sexto de Transición del Circuito Judicial Penal de la Circunscripción Judicial del Estado Zulia). Nonetheless, when examining the later procedural actions in this case, everything appears to indicate that the criticised expression originated from the initial information that the 1971 Fund received about the causes of the incident provided by the owner and the insurer of the ship (the Gard Club) that the cause of the spill was due primarily to the conditions in the Lake Maracaibo shipping channel, and it was on the basis of that information that the Fund attributed the incident to the negligence of the Republic of Venezuela.

2.2 The reproach that the Fund “demonstrated an open willingness to act in the defence of other public institutions” (paragraph 7), is completely groundless. The investigative work did not detect a single indication that supports such an assertion.

2.3 As for the existence of a threatening attitude on the part of the Fund “through the constant intention to take actions against Venezuela” (paragraph 9), if “the Declaration” alludes to the fact that the Fund has not ruled out that option, that, far from constituting a threat, reflects the adherence of the Fund to the policy of this institution as regards recovery actions in line with the norms adopted by the Governments of the Member States of the Fund.

2.4 The insinuation in “the Declaration” of not having attended to and resolved “with the greatest diligence, the claims of those who were affected by the **Nissos Amorgos** incident, who form a community

of hard-working artisanal fishermen who cannot wait to see their payment of compensation become illusory because of unnecessary delays...” (paragraph 5), **is unjust to the Fund and does not correspond to the reality of the facts.** In the first place, it has been demonstrated that **“the unnecessary delays” caused in this long process are not attributable to the Fund, but to the obstinate attitude in taking inappropriate actions and lodging inappropriate appeals by those who have taken actions against the Fund** (and the master, the shipowner and the insurer of the ship), **and to other circumstances outside the Fund’s control.** And then, because the official documents of the Fund show the efforts made by this institution to pay compensation to the shrimp fishermen of Lake Maracaibo and the increase in the level of those payments agreed at the Extraordinary Session of the of the Administrative Council of the Fund held in July 2003.

2.5 I share the concern of the Venezuelan delegation about the sub-judice situation of the master of the Nissos Amorgos, KOSTADINOS SPIROPOULOS, a Greek citizen. But several comments are appropriate in this respect.

2.6 In the first place, **it should be made clear** – and this is stated in the text of “the Declaration” – **that the request for declaration of time-bar in the action against of Captain Spiropoulos, is not the responsibility of the representatives of the Fund,** but of the lawyers who are defending the master, who are also are the special lawyers of the owner and the insurer of the tanker involved in the incident.

2.7 Secondly, it is stated in the legal files submitted for my examination that **the lawyers defending the master have indeed requested the Political-Administrative Section of the Supreme Court on several occasions to return the file of the master** (which was not consolidated by judgement 1,357) to the Criminal Court of Appeal in the State of Zulia, a request that has been repeated on three occasions during this year (11 February and 9 and 18 March 2004).

2.8 As a result of the above, it is obvious that as long as the case remains in the Political-Administrative Section of the Supreme Court it is impossible to invoke time-bar, because this must be done before the Maracaibo Court. Consequently, the responsibility for this delay lies with that Section which did not proceed to return the file, and which should have acted **motu proprio** immediately after having pronounced judgement 1,357 on 20 November 2002, when it decided not to consolidate this file.

2.9 Finally, I agree with the Declaration in that, effectively, the case against the master is time-barred, taking into account the date of the occurrence of the incident (28 February 1997), the crime for which he was sentenced (negligent pollution from an oil spill – Articles 38 and 9 of the Environmental Penal Law) and the sentence handed down (one year and four months of prison). I also opine that, if the criminal action is time-barred as a result of the passage of time, the subsidiary civil action by the Attorney General against the master, the owner and the insurer of the ship Nissos Amorgos is of no effect.

**III. AS A FINAL CONCLUSION, BASED ON THE PROCEDURAL TRUTH CONTAINED IN THE DOCUMENTS IN THE COURT FILES AND FROM THE OFFICIAL DOCUMENTATION OF THE FUND, I EXPRESS MY CONVICTION THAT THE MEASURES TAKEN BY THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND 1971 IN RELATION TO THE INCIDENT INVOLVING THE TANKER NISSOS AMORGOS, HAVE BEEN CORRECT AND TOTALLY IN ACCORDANCE WITH THE INSTRUMENTS THAT GOVERN THE ORGANISATION AND THE FUNCTIONING OF THAT INSTITUTION AND IN STRICT COMPLIANCE WITH THE POLICIES FOR RECOURSE AND COMPENSATION LAID DOWN BY THE GOVERNMENTS OF THE MEMBER STATES OF THE FUND.**

Caracas, the eighteenth day of the month of May 2004

Josefina Calcaño de Temeltas  
Judge Emeritus  
Supreme Court of Justice of Venezuela  
Professor of Constitutional and Administrative Law

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## ANNEX II

### *CURRICULUM VITAE SUMMARY*

#### JOSEFINA CALCAÑO DE TEMELTAS

##### **A Studies**

- 1 Graduated from the “Andrés Bello” Catholic University, Caracas, Venezuela (1967)
- 2 Postgraduate degree in Administrative Law at the University of Paris, France (1967-1969)
- 3 Specialised in Administrative Sciences at the International Institute of Administration of Paris (IIAP), France (1968-1969)

##### **B Court and academic activities**

- 1 Supreme Court judge for two consecutive constitutional periods (1979-1998)
- 2 Founding judge of the First Administrative Section of the Supreme Court (1977-1978)
- 3 Life member of the Academy of Political and Social Sciences, Caracas, Venezuela
- 4 Special assessor to the Venezuelan delegation to the General Assembly of United Nations, New York (40th session, 1 November to 15 December 1986)

##### **C Teaching, investigation and representation activities**

- 1 Professor at the “Andrés Bello” Catholic University, Caracas, Venezuela (1984-2004) for undergraduates and post-graduates. Subjects: Practice of Administrative Law, Administrative Proceedings and Constitutional Law.
- 2 Investigator at the Centre of Legal Investigations of the “Andrés Bello” Catholic University, Caracas, Venezuela. Project funded by the Polar Foundation on the “Law of the Environment” (1977-1978)
- 3 Speaker at Congresses, Forums and Conferences on legal and judicial subjects held in Spain, Portugal, Colombia and the United States of America.

##### **D Distinctions**

- 1 Order of “Libertador”, ‘Gran Oficial’ grade (1985)
- 2 Order “Andrés Bello” (Second Class, 1978; First Class, 1982)
- 3 Order “Merito al Trabajo”, First Class (1980)
- 4 Order “Francisco de Miranda”, First Class (1988)
- 5 Order “Merito de la Defensa Nacional, ‘Caballero’ grade (1995)
- 6 Decoration of the Federation of Bar Associations of Venezuela, First Class (1995).
- 7 Order “Leonidas Monasterios”, First Class (1993)
- 8 Orders of the Federation of Venezuelan Female Lawyers as a result of becoming the first female judge in the Supreme Court in Venezuela (1979).