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COMPENSATION
FUND 1971

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Agenda item 14

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INCIDENTS INVOLVING THE 1971 FUND

NISSOS AMORGOS

Note by the Director

Summary:

The total amount of settled and outstanding claims far exceeds the amount available for compensation under the Conventions. The largest claims were two duplicated claims by the Republic of Venezuela for US\$60 250 396 (£33.7 million). However, after the Republic of Venezuela had given an undertaking that its claims would stand last in the queue, the level of payments was increased to 100% of the proven loss or damage. As a result of this undertaking all the settled claims have been paid in full.

The incident gave rise to a number of legal proceedings in Criminal and Civil Courts.

Criminal proceedings were brought against the master. In February 2005, the Court of Appeal decided that it had been proved that the master had incurred criminal liability due to negligence causing pollution damage to the environment but that, in accordance with Venezuelan procedural law, the criminal action against the master was time-barred. The Court stated that this decision was without prejudice to the civil liabilities which could arise from the criminal act.

The claims by the Republic of Venezuela in the Civil and Criminal Courts are against the master, the shipowner and the Gard Club, but not against the 1971 Fund. In the Director's view, pursuant to Article 6.1 of the 1971 Fund Convention, both claims by the Republic of Venezuela are time-barred vis-à-vis the 1971 Fund, since no legal actions had been taken against the 1971 Fund before the expiry of six years from the date of the incident.

Action to be taken: Information to be noted

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 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.
- 2.3 In a decision rendered in September 2000 the Court of Appeal decided not to consider the appeal but ordered the Criminal Court of Cabimas to send the file to the Supreme Court 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 first instance Court is null and void.
- 2.4 On 4 August 2004 the Supreme Court decided to remit the file on the criminal action against the master to the Criminal Court of Appeal.
- 2.5 The 1971 Fund's Venezuelan lawyers have advised the Fund that in accordance with Venezuelan procedural law the criminal action against the master was 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 (document 71FUND/AC.15/14/3).
- 2.6 In a judgement rendered in February 2005, the Criminal Court of Appeal held that it had been proved that the master had incurred criminal liability due to negligence causing pollution damage to the environment. The Court decided, however, that in accordance with Venezuelan procedural law since more than four and a half years from the date of the criminal act had passed, the criminal action against the master was time-barred. In its judgement the Court stated that this decision was without prejudice to the civil liabilities which could arise from the criminal act dealt with in the judgement which was declared time-barred.

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.

| Claimant | Category | Claimed amount US\$ | Court | Fund's position |
|-----------------------|----------------------|--------------------------------------|------------------------------------|---------------------------------|
| Republic of Venezuela | Environmental damage | \$60 250 396 | Criminal court (see paragraph 3.2) | Time-barred (see paragraph 3.7) |
| Republic of Venezuela | Environmental damage | \$60 250 396 | Civil court (see paragraph 3.3) | Time-barred (see paragraph 3.7) |
| Three fish processors | Loss of income | \$ 30 000 000 | Civil court | No loss proven |
| Total | | \$150 500 792 | | |
| | | (£84.3 million) ^{<2>} | | |

Claims by the Republic of Venezuela

- 3.2 The Republic of Venezuela presented a claim for environmental damage for US\$60250 396 (£33.7 million) against the master, the shipowner and his insurer, Assuranceforeningen Gard (Gard Club), in the Criminal Court in Cabimas. The 1971 Fund was notified of the criminal action and submitted pleadings in the proceedings.
- 3.3 The Republic of Venezuela also presented a claim for environmental damage against the shipowner, the master of the *Nissos Amorgos* and the Gard Club before the Civil Court of Caracas for US\$60 250 396 (£33.7 million). The 1971 Fund was not notified of the civil action.
- 3.4 At its 11th session, held in July 2003, the Administrative Council 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, paragraph 3.33).
- 3.5 At that session the Administrative Council noted that the two claims presented by the Republic of Venezuela were duplications, since they were based on the same university report and related to the same items of damage. It was also noted that the Procuraduria General de la Republica (Attorney General) had accepted this duplication in a note submitted to the 1971 Fund's Venezuelan lawyers in August 2001 (document 71FUND/AC.11/3, paragraph 3.5).
- 3.6 Article 6.1 of the 1971 Fund Convention provides as follows:
- Rights to compensation under Article 4 or indemnification under Article 5 shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 7, paragraph 6, within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage.
- 3.7 The legal actions by the Republic of Venezuela in the Civil and Criminal Courts were brought against the shipowner and the Gard Club, not against the 1971 Fund. The Fund was therefore not a defendant in these actions, and although the Fund intervened in the proceedings brought before the Criminal Court in Cabimas, the actions could not have resulted in a judgement against the Fund. As set out above, Article 6.1 of the 1971 Fund Convention requires that in order to prevent a claim from becoming time-barred in respect of the 1971 Fund a legal action has to be brought against the Fund within six years of the date of the incident. No legal action had been brought against the 1971 Fund by the Republic of Venezuela within the six-year period, which expired in February 2003. The Director is of the view that therefore the claims by the Republic of Venezuela are time-barred vis-à-vis the 1971 Fund.

^{<2>} Conversion of currencies in this document has been made on the basis of exchange rates as at 30 August 2004 except in respect of payments made by the 1971 Fund where the conversion has been made at the rate on the date of payment.

Claims by fish processors

- 3.8 Three fish processors presented claims totalling US\$30 million (£16.8 million) in the Supreme Court against the 1971 Fund and the Instituto Nacional de Canalizaciones (INC). The Supreme Court would in this case act as court of first and last instance. At its July 2003 session, the Administrative Council noted that the claims had not been substantiated by supporting documentation and that they should therefore be treated as not admissible.
- 3.9 In August 2003 the 1971 Fund submitted pleadings to the Supreme Court arguing that, as the claimants had submitted and subsequently renounced claims in the Criminal Court in Cabimas and the Civil Court in Caracas against the master, the shipowner and the Gard Club for the same damage, they had implicitly renounced any claim against the 1971 Fund. The 1971 Fund also argued that not only had the claimants failed to demonstrate the extent of their loss but the evidence they had submitted indicated that the cause of any loss was not related to the pollution. There have been no developments in respect of these claims.

'Avocamiento'

- 3.10 In a judgement rendered in July 2005, the Supreme Court decided to accept the withdrawal of claims by a group of eleven fish and shellfish processors and the fishermen's union FETRAPESCA following the settlement reached by the six shrimp processors and the two thousand fishermen with the 1971 Fund in December 2000 (71FUND/A/ES.7/4, paragraph 3.3.1). In its judgement, the Supreme Court also rejected the request for 'avocamiento'. The 1971 Fund's Venezuelan lawyers are examining this decision.

4 Maximum amount available for compensation

- 4.1 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 (£766 171), 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).
- 4.2 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 (£46.6 million).

5 Level of payments*Consideration of the issue up to July 2003*

- 5.1 In view of the uncertainty as to the total amount of the claims arising from this incident, the Executive Committee and later the Administrative Council decided to limit payments to a percentage of the loss or damage actually suffered by each claimant.
- 5.2 At the Administrative Council's 14th session held in May 2004, the Venezuelan delegation stated that the Republic of Venezuela had proposed that any claim by the Republic be dealt with after the victims had been fully indemnified so that the pending and settled claims against the Fund were compensated to the benefit of the victims and that the Republic would stand 'last in the queue' and subject to the amount available for compensation from the Fund. The Council noted that the Vice-Minister of Foreign Affairs, in a letter to the Director, had stated that the Republic of Venezuela accepted that the claims by the Republic of Venezuela would be dealt with after the Fund had paid full compensation to claimants already recognised by it and those who would be recognised legally by a final court judgement, within the maximum amount available established by the Conventions (document 71FUND/AC.14/4, paragraphs 3.1.34 and 3.1.42).

- 5.3 The Council instructed the Director to seek the necessary assurance from the Republic of Venezuela as to whether its understanding of the meaning of the term 'standing last in the queue' coincided with his and authorised the Director to increase the level of payments to 100% of the established claims, when he had received the necessary assurance (document 71FUND/AC.14/4, paragraphs 3.1.53 and 3.1.54).
- 5.4 A letter from the Minister of Foreign Affairs of Venezuela received on 13 August 2004 gave, in the Director's opinion, the necessary assurance that the Republic agreed with his interpretation of that notion. As a result, the Director decided to increase the level of payments to 100%.

6 Settled claims

- 6.1 The table below summarises the settled claims:

| Claimant | Category | Settlement amount Bs | Settlement amount US\$ |
|-------------------------------------|------------------------------------|----------------------------|---|
| Petroleos de Venezuela S.A. (PDVSA) | Clean up | | \$8 364 223 |
| ICLAM ^{<3>} | Preventive measures | Bs61 075 468 | |
| Shrimp fishermen and processors | Loss of income | | \$16 033 389 |
| Other claims ^{<4>} | Property damage and loss of income | Bs289 000 000 | |
| Total | | Bs350 075 468 (£77 229) | \$24 397 612 (£13.7 million) |

- 6.2 After the Republic of Venezuela had given the undertaking to stand last in the queue the following payments were made.

US\$5 611 686 (£3 092 039 million) to the shrimp fishermen and processors in the Lake Maracaibo,

US\$2 927 478 (£1 595 476) to PDVSA,

Bs 1 953 190 (£540) to Corpozulia ^{<4>},

Bs55 406 601 (£ 15 332.86) to ICLAM^{<3>}.

- 6.3 All settled claims have been paid in full.
- 6.4 As a result of the payment to ICLAM the two claims submitted by it before the courts were withdrawn.

7 Possible recourse action against Instituto Nacional de Canalizaciones (INC)

- 7.1 At its 14th session, held in May 2004, the Administrative Council considered the issue of whether the 1971 Fund should take recourse action against the Instituto Nacional de Canalizaciones (INC), the agency responsible for the maintenance of the Lake Maracaibo navigation channel (cf document 71FUND/AC.14/2, section 8).

- 7.2 The Council noted that, having taken into account all available information, the Director had considered on balance that it was unlikely that a recourse action by the 1971 Fund against INC

^{<3>} Instituto para el Control y la Conservación de la Cuenca del Lago de Maracaibo

^{<4>} Paid in full by the shipowner's insurer with the exception of the claim by Corpozulia, a tourism authority of the Republic of Venezuela.

would succeed and that for this reason he had proposed that the Fund should not pursue such an action.

- 7.3 In summing up the discussion that took place at the 14th Council session, the Chairman stated that it was important that there should be a wide consensus for a decision not to take recourse action against INC and that, since a slight majority of those delegations that had expressed a view had been in favour of postponing a decision and that even some of those delegations supporting the Director's proposal had been very hesitant, such consensus did not exist.
- 7.4 The Administrative Council decided that the 1971 Fund should postpone taking a position as to whether or not the Fund should take recourse action against NC (document 71FUND/AC.14/4, paragraph 3.1.93).
- 7.5 A time bar period of 10 years would apply to a recourse action by the 1971 Fund against INC. Such an action would therefore become time-barred on 28 February 2007. For this reason the Administrative Council would have to take a decision no later than during 2006 as to whether such action should be brought.

8 Action to be taken

The Administrative Council is invited:

- (a) to take note of the information contained in this document;
 - (b) to note the Director's position as regards the issue of time bar referred to in paragraph 3.7; and
 - (c) to give the Director such instructions in respect of this incident as it deems appropriate.
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