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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 (£32.2 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 his insurer, 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.

Discussions have been held within the Venezuelan administration as well as between the Venezuelan authorities, the shipowner's insurer and the 1971 Fund for the purpose of facilitating the resolution of the outstanding issues. So far these discussions have not resulted in the issues being resolved.

In October 2005 the Administrative Council considered on the basis of a document presented by the Director whether the 1971 Fund should take recourse action against the Instituto Nacional de Canalizaciones (INC). The Court decided to postpone its decision on this issue.

Since a recourse action by the 1971 Fund against INC would be time-barred unless taken before 28 February 2008, the Administrative Council will have to decide whether such an action should be brought.

Action to be taken: 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 in Cabimas 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 September 2000 the Criminal Court of Appeal decided not to consider the appeal but ordered the Criminal Court in 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 In 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 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 (£70 million) ^{<2>}		

Claims by the Republic of Venezuela

- 3.2 The Republic of Venezuela presented a claim for environmental damage for US\$60 250 396 (£32.2 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 (£32.2 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

^{<2>} Conversion of currencies in this document has been made on the basis of exchange rates as at 13 September 2006 except in respect of payments made by the 1971 Fund where the conversion has been made at the rate on the date of payment.

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.

Claims by fish processors

- 3.8 Three fish processors presented claims totalling US\$30 million (£14 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'.

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 (£864 000), 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 (£44.4 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 (£69 000)	\$24 397 612 (£13 million)

- 6.2 All settled claims have been paid in full.

7 Recent developments

- 7.1 At the Administrative Council's October 2005 session, the Venezuelan delegation acknowledged that most outstanding claims resulting from the *Nissos Amorgos* incident were time-barred and requested the Administrative Council to authorise the Director to approach the Gard Club and the Attorney General and the Public Prosecutor of the Republic of Venezuela to facilitate the resolution of the outstanding issues arising from this incident. That delegation pointed out that a resolution of the rest of the outstanding issues would contribute to the winding up of the 1971 Fund. The Director indicated his willingness to make the suggested approaches. The Administrative Council invited the Director to approach the Gard Club and the Attorney General and the Public Prosecutor of the Republic of Venezuela for the purpose of assisting them in resolving the outstanding issues.
- 7.2 Since October 2005 there have been several meetings and discussions between the Venezuelan delegation and the 1971 Fund. During this period the 1971 Fund has also held meetings and discussions with the Gard Club. In February 2006 the 1971 Fund wrote to the Venezuelan delegation setting out possible solutions to the outstanding issues. In May 2006 a meeting took place in Caracas between the various interested parties including representatives of the Venezuelan Government. The 1971 Fund was represented at the meeting by its Venezuelan lawyers. The purpose of the meeting was to brief the various parties as regards the current situation concerning the outstanding claims.
- 7.3 In June 2006 a meeting was held in London between the Venezuelan delegation and the 1971 Fund at which time the Fund was informed that the Venezuelan authorities were well advanced in

^{<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.

their internal discussions and that meetings would take place in Venezuela in the near future between the five government departments concerned and with representatives of the private claimants. The Venezuelan delegation stated that it would inform the 1971 Fund of the outcome. In discussions with the Venezuelan delegation in September 2006, the 1971 Fund was informed that a meeting had taken place in Caracas in August 2006 and that it would be helpful if representatives of the Gard Club and the 1971 Fund could visit Venezuela in the near future. Arrangements are being made for such a visit in early October 2006.

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

- 8.1 At its May 2004 session, the Administrative Council considered the issue of whether the 1971 Fund should take recourse action against INC, the agency responsible for the maintenance of the Lake Maracaibo navigation channel. The discussion was based on a document submitted by the Director, the relevant parts of which are reproduced at the Annex (document 71FUND/AC.14/2, section 8).
- 8.2 In conclusion the Director considered the following main factors:
- (a) there were facts that spoke in favour of the incident being caused by deficiencies of the channel and other facts supporting the view that the grounding had been caused by negligence on the part of the vessel;
 - (b) the 1971 Fund would have the burden of proof that the incident had been caused by or contributed to by deficiencies in the channel;
 - (c) there was 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 had been dealt with in arbitration in New York and the arbitrators had concluded that the grounding was solely caused by error in navigation; and
 - (e) a Venezuelan criminal court had held the master of the *Nissos Amorgos* liable for the incident, although this judgement was the subject of appeal ^{<5>}.
- 8.3 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 would succeed and that for this reason he had proposed that the Fund should not pursue such an action.
- 8.4 In summing up the discussion that took place at the Council's 14th 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.
- 8.5 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 INC (document 71FUND/AC.14/4, paragraph 3.1.93).
- 8.6 A time bar period of 10 years would apply to a recourse action by the 1971 Fund against INC. In order to avoid that a recourse action by the 1971 Fund becomes time-barred, the Fund would have

<5> As mentioned in paragraph 2.5 above the criminal proceedings have been terminated on the grounds that the action against the master was time-barred.

to take such an action before 28 February 2007. For this reason the Director needs instructions from the Administrative Council as to whether such action should be brought before that date.

- 8.7 The factors set out in paragraph 8.2 (a)-(d) have not changed since May 2004. The Director therefore considers it unlikely that a recourse action by the 1971 Fund against INC would succeed. For this reason he maintains his recommendation 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 decide whether the 1971 Fund should bring recourse action against INC before 28 February 2007; and
- (c) to give the Director such other instructions in respect of this incident as it may deem appropriate.

* * *

ANNEX

Extract from document 71FUND/AC.14/2

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^{<a>}, 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:

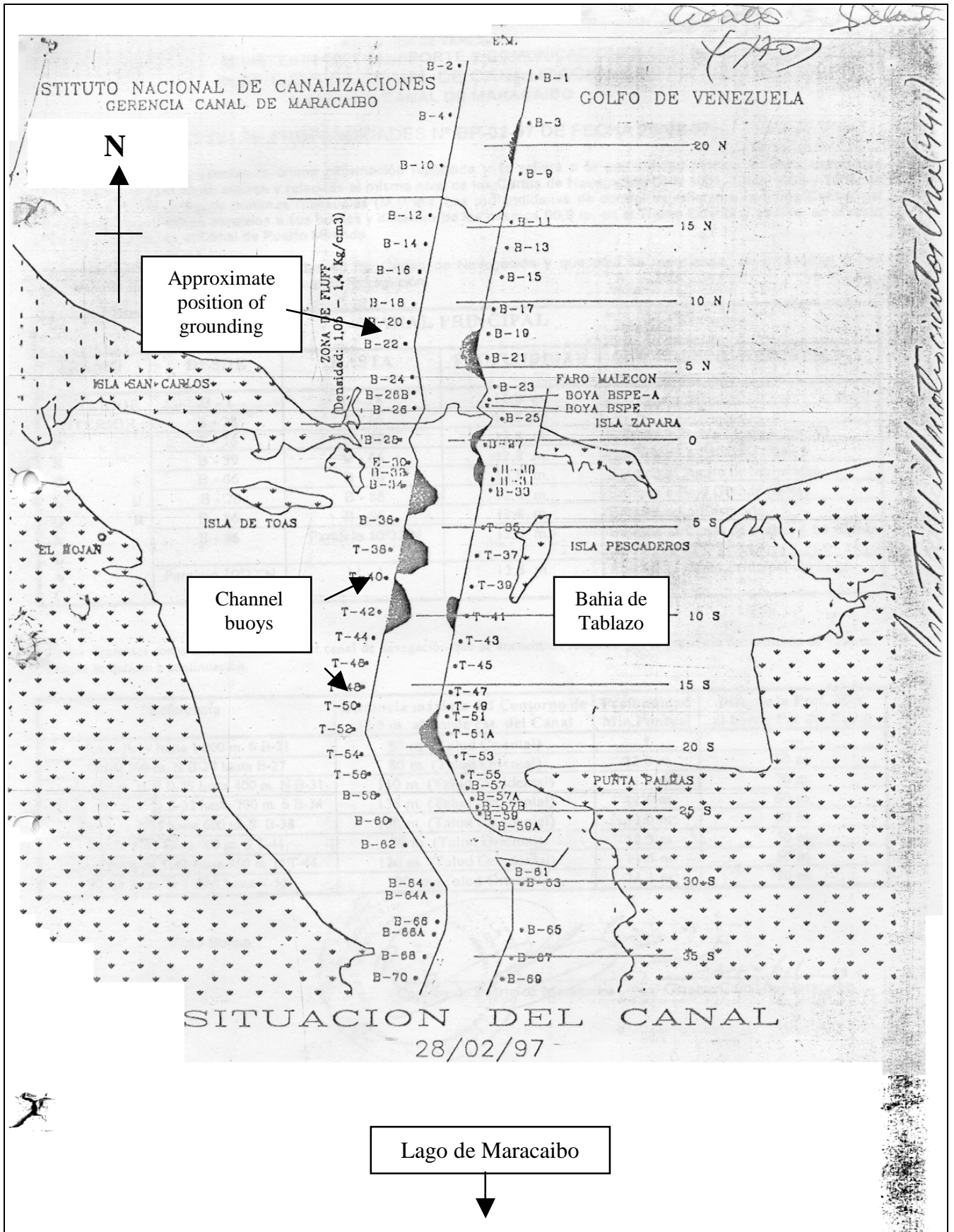
- Introductory documents including a summary by INC of the case against the vessel and the pleadings in the criminal action brought against the master and owners of the *Nissos Amorgos*
- Contemporary records from the *Nissos Amorgos*
- Reports by parties involved in the incident, including the master 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^{<1>} 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.

<1> 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^{}.

 See paragraphs 2.1-2.5 of document 71FUND/AC.20/13/3.

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.