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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 (£30 million) each. 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 that could arise from the criminal act.

In March 2007 the Supreme Court (Constitutional Section) decided to annul the judgement by the Court of Appeal and to send back the criminal file to the Court of Appeal where a different section would render a new judgement. In its judgement the Supreme Court stated that the judgement by the Court of Appeal contravened the Venezuelan Constitution since it had not decided on the claim for compensation submitted by the Republic of Venezuela which had been presented to obtain compensation to the Venezuelan State for the damage caused by the spill.

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.

In October 2006 the Administrative Council decided that the 1971 Fund should not take recourse action against the Instituto Nacional de Canalizaciones (INC).

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.

The judgement rendered by the Supreme Court (Constitutional Section) might delay the resolution of this incident and the winding up of the 1971 Fund.

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 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 appeared to imply that the judgement of the first instance Court was 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.
- 2.6 In October 2006 the public prosecutor requested the Supreme Court (Constitutional Section) to revise the judgement of the Criminal Court of Appeal on the grounds that the Court had not

<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.

decided in respect of the claim for compensation submitted by the public prosecutor on behalf of the Republic of Venezuela (cf paragraph 3.1).

- 2.7 In a judgement rendered in March 2007 the Supreme Court (Constitutional Section) decided to annul the judgement of the Court of Appeal and send back the criminal file to the Court of Appeal where a different section would render a new judgement. In its judgement the Supreme Court stated that the judgement of the Court of Appeal was unconstitutional since it had not decided on the claim for compensation submitted by the Republic of Venezuela that had been presented to obtain compensation for the Venezuelan State for the damage caused.
- 2.8 The Director has met with representatives of the shipowner and the Assuranceforeningen Gard (Gard Club) to examine the consequences of the judgement by the Supreme Court. The Gard Club informed the Director that it had also decided to let a recourse action against INC become time-barred (cf paragraph 7.5). At the meeting surprise was expressed that the public prosecutor had waited two years, and until the 1971 Fund and the Gard Club had decided not to bring recourse actions against INC, to request a revision of the Court of Appeal judgement. In the Director's view, the Supreme Court (Constitutional Section) judgement is likely to delay even more the resolution of this incident.

3 Claims for compensation in court

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

Claimant	Category	Claimed amount US\$	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		
		(£75 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 (£30 million) against the master, the shipowner and his insurer, 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 (£30 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 related to the same items of damage. It was also noted

^{<2>} The rate of conversion of US\$ into Pounds sterling has been made on the basis of the rate at 4 September 2007 (US\$1 = £0.4968 and Bs4 322 = £1), except in respect of claims paid by the 1971 Fund where conversions have been made at the rate of exchange on the date of payment.

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.

3.8 At its October 2005 session the Administrative Council endorsed the view of the Director that the claims by the Republic of Venezuela were time-barred vis-à-vis the 1971 Fund.

Claims by fish processors

3.9 Three fish processors presented claims totalling US\$30 million (£15 million) in the Supreme Court against the 1971 Fund and the Instituto Nacional de Canalizaciones (INC). These claims were presented in the Supreme Court not as a result of an 'avocamiento' but because one of the defendants is an agency of the Republic of Venezuela and, under Venezuelan law, claims against the Republic have to be presented before the Supreme Court. 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.

3.10 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'

3.11 In a judgement rendered in July 2005, the Supreme Court decided to accept the withdrawal of claims by a group of 11 fish and shellfish processors and the fishermen's union FETRAPESCA following the settlement reached by the six shrimp processors and the 2 000 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 (£800 000), 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 Bs39 738 million or \$83 221 800 (£41.3 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.

<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.

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

7.1 In October 2006 the Administrative Council recalled that at its May 2004 session, it had 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. The Council also noted that the discussion had been based on a document submitted by the Director, the relevant parts of which were reproduced in the Annex to document 71FUND/AC.20/13/3.

7.2 The Council recalled that the Director had 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 an arbitration in New York and the arbitrators had concluded that the grounding was solely caused by an 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.

7.3 The Council recalled 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 that reason he had proposed that the Fund should not pursue such an action.

7.4 The Administrative Council recalled that in summing up the discussion that took place at its May 2004 session, the Chairman had 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. It was recalled that it had been 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).

7.5 The Council noted that a time-bar period of ten years applied to a recourse action by the 1971 Fund against INC, that such an action would therefore become time-barred on 28 February 2007 and that for this reason the Director needed instructions from the Council as to whether such action should be brought before that date.

7.6 It was noted that the factors set out in paragraph 7.2 (a)-(d) had not changed since May 2004 and that the Director had therefore still considered it unlikely that a recourse action by the 1971 Fund against INC would succeed. It was noted that for this reason he maintained his recommendation that the Fund should not pursue such an action.

7.7 The Administrative Council decided that the 1971 Fund should not take recourse action against INC.

8 Recent developments

8.1 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.

- 8.2 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.
- 8.3 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 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. The 1971 Fund visited Venezuela in October 2006 where a meeting was held at the Ministry of External Affairs attended by representatives of the Ministry of External Affairs, Ministry of the Environment, Public Prosecutor, Attorney General and the Instituto Nacional de los Espacios Acuáticos (National Institute of Aquatic Spaces). At the meeting the participants expressed a desire to resolve the outstanding issues without pursuing the claims in court. There has been no progress on such a resolution since then.

9 Action to be taken

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 incident as it may deem appropriate.
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