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Agenda item 19

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INCIDENTS INVOLVING THE 1971 FUND

NISSOS AMORGOS

Note by the Director

Summary:

Legal proceedings relating to claims for compensation for very high amounts have been brought in five Venezuelan courts, including the Supreme Court. A number of smaller claims have been settled and paid in full by the shipowner's insurer. Partial payments of several other claims have been made by the shipowner's insurer and the 1971 Fund.

Technical documentation on the cause of the incident has been submitted by Instituto Nacional de Canalizaciones (INC). This documentation is being examined by the Secretariat.

It is proposed that the Administrative Council's decision on the level of payments taken at its March 2001 session should be maintained.

Action to be taken: Review the level of the 1971 Fund's payments.

1 The incident

- 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 3600 tonnes of crude oil was spilled.
- 1.2 With respect to the incident, the clean-up operations and the establishment of a Claims Agency in Maracaibo by the shipowner's insurer, Assurance-föreningen Gard (Gard Club), and the 1971 Fund, reference is made to documents 71FUND/EXC.55/9, 71FUND/EXC.57/8, 71FUND/EXC.58/8, 71FUND/EXC.59/10, 71FUND/EXC.60/10 and 71FUND/EXC.61/9.
- 1.3 This document contains information on the developments which have taken place since June 2001.

2 Claims presented to the Claims Agency

- 2.1 Claims presented to the Claims Agency have been approved for a total of Bs325 million (£300 000) plus US\$24.4 million (£16.6 million). The Gard Club has paid Bs1 261 million (£1.8 million). The 1971 Fund has made two payments totalling Bs16.7 million (£16 340). In addition the Gard Club and the 1971 Fund have paid US\$6.4 million (£4.4 million) to fishermen and fish processors.
- 2.2 Claims arising out of the *Nissos Amorgos* incident became time-barred on or shortly after 28 February 2000.

3 Court proceedings

- 3.1 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.

3.2 Criminal proceedings

The Criminal Court of Cabimas carried out an investigation into the cause of the incident to determine whether anyone has incurred criminal liability as a result of the incident. As a result of this investigation criminal proceedings were brought against the master. As regards these proceedings, reference is made to document 71FUND/A/ES.6/3, paragraph 3.2.

3.3 Civil proceedings

- 3.3.1 As reported to the Administrative Council at its 3rd session, claims by the six shrimp processors and the 2000 fishermen were settled in December 2000 and as a result a number of claims for compensation were withdrawn from the court proceedings. The current situation in respect of the claims pending in civil proceedings brought before various courts in Venezuela is as follows.

Republic of Venezuela

- 3.3.2 The Republic of Venezuela presented a claim for pollution damage for US\$60 million (£40.8 million)^{<1>} against the master, the shipowner and the Gard Club in the Criminal Court of Cabimas. The claim is based on a letter to the Attorney General from the Venezuelan Ministry of Environment and Renewable Natural Resources, which gave details of the amount of compensation allegedly payable to the Republic of Venezuela in respect of oil pollution. Compensation is claimed for damage to the communities of clams living in the inter tidal zone affected by the spill, for the cost of restoring the quality of the water in the vicinity of the affected coasts, for the cost of replacing sand removed from the beach during the clean-up operations and for damage to the beach as a tourist resort.
- 3.3.3 In March 1999 the 1971 Fund, the shipowner and the Gard Club presented to the Court a report on the various items of the claim by the Republic of Venezuela prepared by experts appointed by them. The experts had found that this claim had no merit.
- 3.3.4 At the request of the shipowner, the Gard Club and the 1971 Fund, the Criminal Court appointed a panel of three experts to advise the Court on the technical merits of the claim presented by the Republic of Venezuela. In its report presented in July 1999, the panel unanimously agreed with the findings of the 1971 Fund's experts that the claim had no merit.
- 3.3.5 The Republic of Venezuela has also presented a claim against the shipowner, the master of the *Nissos Amorgos* and the Gard Club before the Civil Court of Caracas for an estimated amount of

<1> In this document conversion of amounts in US\$ into Pounds Sterling is made on the basis of the rate of exchange at 1 October 2001 (£1 = US\$1.4697).

US\$20 million (£13.6 million), later increased to US\$60 million (£40.8 million). It appears that this claim relates to the same four items of damage as the claim in the Criminal Court of Cabimas.

ICLAM

- 3.3.6 In March 1998, the Republic of Venezuela presented a claim on behalf of the Instituto para el Control y la Conservación de la Cuenca del Lago de Maracaibo (ICLAM) in the Criminal Court of Cabimas relating to the cost of monitoring the clean-up operations, which included the sampling and analysis of water, sediment and marine life. The same claim was also presented before the Civil Court of Maracaibo.
- 3.3.7 The Executive Committee, at its 60th session, considered that the work undertaken by ICLAM formed an important part of prudent and reasonable preventive measures and that therefore the claim for costs as assessed by the experts engaged by the Gard Club and the 1971 Fund at Bs61.1 million (£56 000) was admissible. In September 1999, the 1971 Fund paid ICLAM Bs15 268 867 (£16 000), ie 25% of the settlement amount. The 1971 Fund has offered to make ICLAM a further payment as a result of the increase of the level of payments to 40%. This offer is being considered by ICLAM.

Fish and shellfish processors

- 3.3.8 Two fish and shellfish processing companies presented a claim for US\$20 million (£13.6 million) in the Supreme Court against the 1971 Fund and, subsidiarily, against the Instituto Nacional de Canalizaciones (INC). The claim relates *inter alia* to loss of income from the national and export markets. No evidence has been submitted in support of the claim. The Supreme Court would in this case act as court of first and last instance.
- 3.3.9 In April 2001 a third fish and shellfish processing company presented a claim for \$10 million (£6.8 million) in the Supreme Court requesting that the company should be allowed to join as a third party in the proceedings brought by the first two processing companies before the Supreme Court.

Experts engaged by FETRAPESCA

- 3.3.10 In November 2000 the fishermen's union, FETRAPESCA, withdrew its claims from the Cabimas and Caracas Courts. Four experts engaged by the Civil Court of Caracas at the request of FETRAPESCA have opposed the withdrawal of the action on the grounds that their fees and expenses have not been paid. These experts have also submitted a third party application in which they request the Supreme Court to declare that the 1971 Fund should pay their fees and expenses of Bs100 million (£100 000).

Republic of Venezuela's former lawyers

- 3.3.11 Three lawyers previously engaged by the Republic of Venezuela to present its claim in the Civil Court of Caracas have submitted a claim against the Republic of Venezuela before the Supreme Court requesting payment of their fees in the amount of Bs440 million (£400 000). The powers of attorney granted by the Republic to these three lawyers were cancelled on 9 June 1997. In the pleadings the Republic of Venezuela's former lawyers stated that the Supreme Court should not accept the withdrawal of the claim by the Republic of Venezuela until their fees and expenses have been paid by the plaintiffs or the defendants in that claim. It should be noted that the claim by the Republic of Venezuela was brought against, *inter alia*, the 1971 Fund.

PDVSA

- 3.3.12 Petroleos de Venezuela S.A. (PDVSA), the national oil company, presented a claim for Bs3 814 million (£3 million) in the Civil Court in Maracaibo to recover costs incurred during the clean-up operations and the disposal of the oily sand over and above those already agreed through

the Claims Agency in Maracaibo. The total claim for the cost of clean-up operations has now been agreed at US\$7.1 million (£4.8 million) and for disposal of the oily sand at US\$1.3 million (£900 000). Written confirmation of this agreement from PDVSA and withdrawal of the court claim are expected in the near future.

Shipowner and Gard Club

- 3.3.13 The shipowner and the Gard Club took legal action against the 1971 Fund before the Criminal Court in respect of two claims. The first claim for an amount of Bs1 219 million (£1.1 million) is in subrogation of the rights of the claimants to whom the shipowner and the Club have paid compensation. The second claim is for an amount of Bs3 473 million (£3.2 million) to recover the amounts paid as a result of the incident if the shipowner were to be wholly exonerated from liability under Article III.2(c) of the 1969 Civil Liability Convention or, alternatively, for an amount of Bs862 million (£790 000) for indemnification under Article 5.1 of the 1971 Fund Convention.

4 Cause of the incident

- 4.1 At its 5th session, held in June 2001, the Administrative Council noted that during a visit by the Director to Venezuela in April 2001 discussions had been held concerning the cause of the incident. It was recalled that the shipowner and his insurer had taken the position that the incident and the resulting pollution were due to the fact that the Maracaibo Channel had been in a dangerous condition due to poor maintenance and that this had been known to the Venezuelan authorities but that its full extent was concealed and that the arrangements for alerting mariners to the dangers which existed were unreliable. The Council also recalled that in October 1999, the Executive Committee had instructed the Director to investigate these issues further in co-operation with the shipowner and his insurer to the extent that there was no conflict of interest between them and the Fund. It was further noted that during the meetings the Venezuelan authorities had indicated that they had significant documentary evidence, which showed that the Maracaibo Channel was in good condition and that there was no contributory negligence on the part of INC. It was further noted that the Director had invited the Venezuelan authorities to make these documents available so as to enable the 1971 Fund's experts to examine them and the 1971 Fund to take a position on the basis of all relevant facts. It was also noted that so far no such documents had been received.
- 4.2 At the Administrative Council's June 2001 session, the Venezuelan delegation expressed its appreciation of the efforts made by the Director and the Secretariat to make progress in respect of the *Nissos Amorgos* case. A representative of INC stated that after the *Nissos Amorgos* incident INC had carried out a survey of the channel, which showed that the conditions were favourable for navigation. It was mentioned that the Republic of Venezuela had also investigated the circumstances of the incident and that the results of this investigation confirmed the conclusions of the study carried out by INC that the channel was in perfect condition for navigation. The representative of INC emphasised that INC was not a defendant as to the question of the condition of the channel for navigation but would make available to the 1971 Fund technical documentation on the conditions of the channel which had been presented to the Supreme Court, in order to enable the Fund to take a decision based on the facts of the case.
- 4.3 In September 2001, INC presented to the 1971 Fund substantial technical documentation on the condition of the channel for navigation. This documentation is being examined by the 1971 Fund.

5 Summary of claims pending before the Venezuelan Courts

After the withdrawal of a number of court actions the following claims are pending in the courts:

- (a) Republic of Venezuela;
 - (i) in the Criminal Court of Cabimas for US\$60 million (£40.8 million);
 - (ii) in the Civil Court of Caracas for the same amount;
- (b) three fish and shellfish processing companies in the Supreme Court for US\$30 million (£20.4 million);
- (c) four experts engaged by FETRAPESCA in the Supreme Court for fees for Bs100 million (£100 000);
- (d) three lawyers against the Republic of Venezuela for fees for Bs440 million (£400 000);
- (e) PDVSA in the Civil Court of Maracaibo for Bs3 314 million (£3 million);
- (f) ICLAM;
 - (i) in the Criminal Court of Cabimas for Bs57.7 million (£53 000);
 - (ii) in the Civil Court of Maracaibo for the same amount;
- (g) the shipowner and the Gard Club for Bs1 219 million (£1.1 million) and Bs3 473 million (£3.2 million).

6 Level of payments

- 6.1 In view of the uncertainty as to the total amount of the claims arising out of the incident, the Administrative Council decided, at its 2nd session, held in October 2000, to maintain the level of the 1971 Fund's payments at 25% of the loss or damage actually suffered by each claimant (document 71FUND/AC.2/A.23/22, paragraph 17.9.17).
- 6.2 At its 4th session, held in March 2001, the Administrative Council decided to increase the level of payments to 40% of the loss or damage actually suffered by each claimant and authorised the Director to increase the level of payments to 70% when the 1971 Fund's total exposure in respect of the *Nissos Amorgos* incident fell below US\$100 million. The Council also authorised the Director to increase the Fund's payments up to a level of between 40% and 70% if and to the extent the actions withdrawn from the courts would allow it (document 71FUND/AC.4/ES.7/6, paragraph 3.3.9).
- 6.3 At the Administrative Council's 5th session, held in June 2001, the Venezuelan delegation stated that the Republic of Venezuela had decided to withdraw one of the Republic's claims, that presented by the Republic in the Civil Court of Caracas for an amount of \$60 million, and that the withdrawal would take place as soon as the necessary documents had been signed by the shipowner and his insurer. It was stated that the withdrawal of that claim had been decided for the purpose of contributing to the resolution of the *Nissos Amorgos* case and to assist the victims, especially the fishermen, who had suffered and were still suffering the economic consequences of the incident. That delegation stated that the Republic of Venezuela hoped that with the withdrawal of this claim, the level of payments would be increased substantially, in accordance with the Council's decision of March 2001, as another show of the goodwill that existed in the effort to conclude the case. The Venezuelan delegation stated that for these reasons it considered it appropriate to ask for an increase in the level of payments.
- 6.4 In view of the continuing uncertainty as to the level of claims arising out of the *Nissos Amorgos* incident the Administrative Council decided at its June 2001 session to retain the decision as to

the level of payments taken at its 4th session. It was agreed that the level of payments should be reviewed at the Council's next session (document 71FUND/AC.5/A/ES.8/10, paragraph 5.3.10).

- 6.5 The Director stated that if the claim of the Republic of Venezuela referred to in paragraph 3.3.5 was withdrawn, he intended to use the authority given to him by the Council to increase the level of payments to between 50% and 60%.
- 6.6 Since the June 2001 session of the Administrative Council, discussions have taken place between representatives of the Venezuelan Government and the Director with the objective of facilitating the withdrawal of one of the Republic's claims. However, neither claim has so far been withdrawn.
- 6.7 Several pending actions are duplicated, since claims relating to what appears to be the same damage have been presented before two or three courts. The Republic of Venezuela has submitted claims for US\$60 million (£40.8 million) in each of two courts. Three fish and shellfish processing companies have claims totalling US\$30 million (£20.4 million) in the Supreme Court. The claims covered by the actions brought by PDVSA and ICLAM have already been settled but have not yet been withdrawn from the courts. Experts engaged by FETRAPESCA are claiming Bs100 million (£100 000) in the Supreme Court.
- 6.8 The claims for compensation pending before the courts once PDVSA has withdrawn its claim will total US\$150 million (£102 million) plus Bs215 million (US\$300 000 or £200 000). Other claims have been settled out of court at US\$24.4 million (£16.6 million) plus Bs325 million (US\$440 000 or £300 000). The 1971 Fund's total exposure stands therefore at some US\$175 million (£119 million). The total amount available for compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention is 60 million SDR (US\$77.1 million or £52.4 million) <2>.
- 6.9 In view of this situation, the Director considers that the Administrative Council's decision taken at its 5th session on the level of payments should be maintained.

7 Action to be taken by the Assembly

The Assembly is invited:

- (a) to take note of the information contained in this document;
- (b) to review the level of the 1971 Fund's payments of claims arising from this incident (section 6); and
- (c) to give the Director such other instructions in respect of the handling of this incident and of claims arising therefrom as it may deem appropriate.

<2> The conversion of SDR into Pounds Sterling and U.S. Dollars has been made at the rate of exchange at 4 October 2001, £1 = 1.14559 SDR and \$1 = 0.777886 SDR.