



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1971

ADMINISTRATIVE COUNCIL  
11th session  
Agenda item 2

71FUND/AC.11/2  
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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.

In view of the uncertainty as to the total amount of the claims arising out of the *Nissos Amorgos* incident, the level of the Fund's payments was fixed by the Administrative Council in March 2001 at 40% of the loss or damage actually suffered by each claimant. The Council authorised the Director to increase the level of payments to 70% when the 1971 Fund's total exposure fell below US\$100 million or to increase the payments to between 40% and 70% if and to the extent that actions withdrawn from court would allow it. So far no actions have been withdrawn and the Director has therefore not been able to increase the level of payments.

The Director proposes nevertheless that the Administrative Council should increase the level of payments to 65%.

**Action to be taken:**

Review the level of the 1971 Fund's payments.

#### **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 A number of claims have been settled out of court and the corresponding legal actions have been withdrawn.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 The Criminal Court in Cabimas carried out an investigation into the cause of the incident to determine whether anyone had incurred criminal liability as a result of the incident. As a result of this investigation criminal proceedings were brought against the master. In his pleadings to the Criminal Court the master maintained that the damage was substantially caused by negligence imputable to the Republic of Venezuela.
- 2.2 The 1971 Fund submitted pleadings to the Court maintaining that the damage had been principally caused by negligence imputable to the Republic of Venezuela.
- 2.3 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.
- 2.4 The 1971 Fund presented pleadings to the Court of Appeal arguing that the evidence presented had not been sufficiently considered by the Court.
- 2.5 In a decision rendered in September 2000 the Court of Appeal decided not to consider the appeal and to order the Court of Cabimas to send the file to the Supreme Court due to the fact that the Supreme Court was considering a request for 'avocamiento' (cf section 4 below). The Court of Appeal's decision appears to imply that the judgement of the Criminal Court of Cabimas is null and void.
- 2.6 There has been no development in the criminal proceedings since September 2000.

## 3 Compensation claims in court

- 3.1 The situation in respect of the compensation claims pending before the courts in Venezuela is as follows.

Claimant	Category	Claimed amount Bolivars	Claimed amount US\$	Status of claim
Republic of Venezuela	Environmental damage		\$60 250 396	Pending in criminal court
Republic of Venezuela	Environmental damage		\$60 250 396	Pending in civil court
ICLAM <sup>&lt;1&gt;</sup>	Preventive measures	Bs.57.7 million	\$36 000	Settled at Bs15 268 867 but remains pending in Criminal Court
ICLAM	Preventive measures	Bs.57.7 million	\$36 000	Pending in Civil Court Duplication
Three fish processors	Loss of income		\$ 30 000 000	Pending/no loss proven
<b>Total</b>			<b>\$150 572 792</b>	

### *Claims by the Republic of Venezuela*

- 3.2 The Republic of Venezuela presented a claim for pollution damage for US\$60 250 396 (£36.23 million) against the master, the shipowner and the Gard Club in the Criminal Court in

<sup><1></sup> Instituto para el Control y la Conservación de la Cuenca del Lago de Maracaibo

Cabimas. The claim is based on a report on the economic consequences of the pollution written by a Venezuelan university. Compensation is claimed for:

- |   |   |                |
|---|---|----------------|
| • | damage to the communities of clams living in the inter-tidal zone affected by the spill | US\$37 301 942 |
| • | the cost of restoring the quality of the water in the vicinity of the affected coasts   | US\$5 000 000  |
| • | the cost of replacing sand removed from the beach during the clean-up operations        | US\$1 000 000  |
| • | damage to the beach as a tourist resort   | US\$16 948 454 |

3.3 At the request of 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.

3.4 The Republic of Venezuela has also presented a claim against the shipowner, the master of the *Nissos Amorgos* and the shipowner's insurer, Assuranceforeningen Gard (Gard Club), before the Civil Court of Caracas for an estimated amount of US\$20 million (£12 million), later increased to US\$60 250 396 (£36 million).

3.5 The two claims presented by the Republic of Venezuela are duplications, since they are based on the same university report and relate to the same items of damage. The Procuraduria General de la Republica (Attorney General) admitted this duplication in a note submitted to the 1971 Fund's Venezuelan lawyers in August 2001.

3.6 At the Administrative Council's 8th 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 was 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. This claim has not yet been withdrawn.

#### *Claims by ICLAM*

3.7 The claim submitted by ICLAM was settled but has not been withdrawn from the Courts.

#### *Claims by fish processors*

3.8 Three fish processors presented claims totalling US\$30 million (£18 million) in the Supreme Court against the 1971 Fund. The Supreme Court would in this case act as court of first and last instance.

3.9 In January 2002 two of the fish processors submitted some documentation in support of their claims. The experts engaged by the 1971 Fund have examined this documentation and found that the evidence presented did not establish that the companies had suffered any loss as a result of the *Nissos Amorgos* incident.

*Claims against other parties*

- 3.10 Two additional claims have been submitted in the Supreme Court against parties other than the shipowner/his insurer and the 1971 Fund as follows:

<b>Claimant</b>	<b>Category</b>	<b>Claim (Bs)</b>	<b>Equivalent (US\$)</b>
Republic of Venezuela's former lawyers	Fees	Bs440 million	\$275 344
Experts engaged by fishermen's trade union (FETRAPESCA)	Fees	Bs100 million	\$62 578

#### **4 Avocamiento**

- 4.1 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.
- 4.2 In May 1999 two separate requests of 'avocamiento' were filed before the Supreme Court by two processors and by a fishermen's trade union (FETRAPESCA) representing a group of processors and fishermen whose claims have been settled (cf section 5). The 1971 Fund opposed these two requests. In July 1999 the Supreme Court rejected the request of 'avocamiento' by the two processors.
- 4.3 As regards the other request of 'avocamiento' filed by FETRAPESCA, in February 2000 the Supreme Court ordered the Criminal Court of Cabimas and the Civil Court of Caracas to send to the Supreme Court the entire court files. In November 2000 FETRAPESCA withdrew the request of 'avocamiento' filed before the Supreme Court, since the claims it had filed on behalf of the members had been settled. The Court has, however, not yet accepted the withdrawal. Until the issue of 'avocamiento' is resolved, court proceedings cannot progress.
- 4.4 The 1971 Fund, the shipowner and the Gard Club have on various occasions requested the Supreme Court to accept FETRAPESCA's withdrawal of its request of 'avocamiento'. On 21 November 2002 and 21 January 2003, the section of the Supreme Court dealing with the claims by three fish processors (paragraphs 3.8 and 3.9) decided that the legal proceedings should be continued even though the other section of the Supreme Court had not made a decision on the request of 'avocamiento'. The 1971 Fund, the shipowner and the Gard Club have requested a revision of these decisions by the constitutional section of the Supreme Court on the grounds that the decisions are in breach of the Venezuelan Constitution.

#### **5 Settled claims**

- 5.1 The following claims have been settled out of court:

<b>Claimant</b>	<b>Category</b>	<b>Settlement amount Bs</b>	<b>Settlement amount US\$</b>
Petroleos de Venezuela S.A. (PDVSA)	Clean up		\$8 364 223
Shrimp fishermen and processors	Loss of income		\$16 033 389
Other claims	Property damage and loss of income	Bs 289million	\$181 000
<b>Total</b>			<b>\$24 578 612</b>

## 6 Level of payments

- 6.1 In view of the uncertainty as to the total amount of the claims arising from this incident, the Executive Committee decided at its 55th session held in October 1997 that the 1971 Fund's payments should be limited to 25% of the loss or damage actually suffered by each claimant (document 71FUND/AC.2/A.23/22, paragraph 17.9.17). At its 4th session held in March 2001, the Administrative Council increased the level of payments to 40%. It also authorised the Director to increase the level of the 1971 Fund's payments to 70% when the 1971 Fund's total exposure in respect of the incident fell below US\$100 million. The Council further authorised the Director to increase the payments to between 40% and 70% if and to the extent that actions withdrawn from the courts would allow it (document 71FUND/AC.4/ES.7/6, paragraph 3.3.9). The Administrative Council reviewed the level of payments at its sessions in June 2001, October 2001 and October 2002 and decided to retain the decision as to the level of payments taken at its 4th session (cf document 71FUND/AC.9/20, paragraphs 15.7.5-15.7.9).
- 6.2 In April 2002 representatives of the 1971 Fund visited Venezuela and attended various meetings with representatives of the Venezuelan Government to explore the possibilities of a withdrawal of the two court actions presented by the Republic of Venezuela. The Government representatives stated that the Government was examining the possibility of withdrawing at least one of these actions. However, no further developments have taken place since then.
- 6.3 In view of this situation, the Director has not been able to increase the level of payments.

## 7 Maximum amount available for compensation

- 7.1 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 (£1.3 million), 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).
- 7.2 The 1971 Fund's Venezuelan lawyers have recently obtained a copy of the order by the Cabimas Court of 27 June 1997 which also provides that the maximum amount payable under the 1969 Civil Liability Convention and the 1971 Fund Convention, namely 60 million SDR, corresponds to Bs 39 738 million or US\$ 83 221 800 (£50 million).

## 8 Director's analysis

- 8.1 The 1971 Fund's exposure is US\$175.2 million calculated as follows:

<b>Claimant</b>	<b>Category</b>	<b>US\$</b>
Republic of Venezuela	Environmental damage	\$60 250 396
Republic of Venezuela	Environmental damage	\$60 250 396
ICLAM	Preventive measures	\$36 000
ICLAM	Preventive measures	\$36 000
Three fish processors	Loss of income	\$30 000 000
PDVSA	Clean up	\$8 364 222
Fishermen / processors	Loss of income	\$16 033 389
Other claims	Property damage & income loss	\$181 000
<b>Total</b>		<b>\$175 151 404</b>

- 8.2 The Director has not been able to increase the level of payments, as authorised by the Administrative Council in 2001, since the Fund's total exposure in respect of the incident has not fallen below US\$100 million and no legal actions have been withdrawn.
- 8.3 The maximum amount available for compensation, US\$83.2 million, represents 47.5% of the 1971 Fund's exposure. However, there are a number of factors to take into account in respect of the claims submitted by the Republic of Venezuela when considering the level at which payments could be made:
- The claims by the Republic of Venezuela are duplicated. The claims have the same claimant, defendants, items claimed, claimed amount and supporting evidence.
  - The Procuradora General de la Republica (Attorney General) has admitted this duplication in writing. This admission was subsequent to the decision of the Administrative Council of March 2001 whereby the level of payments was increased to 40% and the Director was authorised to increase this level under specific conditions.
  - This duplication was also recognized by the Public Prosecutor of Venezuela to the Director at a meeting in Caracas in April 2001.
- 8.4 In view of these factors the Administrative Council may wish to examine whether the two claims submitted by the Republic of Venezuela should be considered as one single claim of \$60.3 million. It appears that the courts would not be able to hold the 1971 Fund liable to pay compensation twice for the same loss. If the claims submitted by the Republic of Venezuela were considered as one single claim of US\$60.3 million, the total exposure of the 1971 Fund would be US\$114.9 million. The maximum amount available for compensation would represent 72.4% of the 1971 Fund's exposure.
- 8.5 The Administrative Council has expressed the view that it is necessary to strike a balance between the importance of the Fund's paying compensation as promptly as possible to victims of oil pollution damage and the need to avoid an over-payment situation.
- 8.6 The economic conditions in Venezuela have deteriorated considerably since April 2002 when representatives of the 1971 Fund last visited Venezuela. Shrimp fishermen in Lake Maracaibo are amongst the poorest members of society and tend to suffer most in these circumstances. Several thousand shrimp fishermen in Maracaibo have 60% of their agreed compensation still outstanding. The living conditions of this community was illustrated by the Venezuelan delegation during a presentation on Thursday 8 May 2003 in connection with the 7th extraordinary session of the 1992 Fund Assembly. In these circumstances all claimants whose claims have been settled, particularly the shrimp fishermen, would greatly benefit from an increase in the level of payments.
- 8.7 In the light of the foregoing the Director considers that an increase of the 1971 Fund's level of payments from 40% to 65% would be appropriate. Applying 65% to the total exposure of the 1971 Fund of US\$114.9 million would give US\$74.7 million, which would give the 1971 Fund a certain margin against overpayment. The Director proposes therefore that the Administrative Council should increase the level of payments to 65% of the loss or damage actually suffered by each claimant.

**9 Action to be taken by the Administrative Council**

The Administrative Council 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 8); and
  - (c) to give the Director such other instructions in respect of this incident as it may deem appropriate.
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