



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

ADMINISTRATIVE COUNCIL
11th session
Agenda item 4

71FUND/AC.11/3
8 July 2003
Original: ENGLISH

RECORD OF DECISIONS OF THE ELEVENTH SESSION OF THE ADMINISTRATIVE COUNCIL

(held on 8 July 2003)

Acting Chairman: Mr John Wren (United Kingdom)

Opening of the session

In the absence of the Administrative Council's Chairman, Captain R Malik (Malaysia), the session was opened by the Director.

Election of Acting Chairman

The Administrative Council elected Mr John Wren (United Kingdom) as Chairman for the session.

1 Adoption of the Agenda

The Administrative Council adopted the Agenda as contained in document 71FUND/AC.11/1.

2 Participation

2.1 The following States having at any time been Members of the 1971 Fund were present:

Algeria
Canada
Colombia
Cyprus
Denmark
Finland
France
Germany
Greece

India
Ireland
Italy
Japan
Liberia
Marshall Islands
Mexico
Netherlands
Norway

Panama
Poland
Portugal
Republic of Korea
Russian Federation
Spain
United Arab Emirates
United Kingdom
Venezuela

- 2.2 The following States which had not at any time been Members of the 1971 Fund were represented as observers:

Argentina	Grenada
Chile	Trinidad and Tobago

- 2.3 The following intergovernmental organisations and international non-governmental organisations were represented as observers:

Intergovernmental organisations

1992 Fund

International non-governmental organisations

International Group of P & I Clubs

3 Nissos Amorgos Incident

- 3.1 The Administrative Council took note of the information contained in document 71FUND/AC.11/2 concerning the *Nissos Amorgos* incident.

- 3.2 The Administrative Council recalled that the incident had 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Supreme Court and that a number of claims had been settled out of court and the corresponding legal actions had been withdrawn.

Settled claims

- 3.3 The Council took note of the information contained in paragraph 5.1 of 71FUND/AC.11/2 concerning the out-of-court settlement of claims.

Compensation claims in court

- 3.4 It was recalled that the Republic of Venezuela had presented a claim for pollution damage for US\$60 250 396 (£36 million) against the master, the shipowner and the shipowner's insurer, Assuranceforeningen Gard (Gard Club), in the Criminal Court in Cabimas, based on a report on the economic consequences of the pollution (by a Venezuelan university). It was also recalled that, at the request of the 1971 Fund, the Criminal Court had appointed a panel of three experts to advise the Court on the technical merits of the claim presented by the Republic of Venezuela and that in its report, presented in July 1999, the panel had unanimously agreed with the findings of the 1971 Fund's experts that the claim had no merit. The Council recalled that the Republic of Venezuela had 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 US\$20 million (£12 million), later increased to US\$60 250 396 (£36 million).

- 3.5 The 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.

- 3.6 It was recalled that, at the Administrative Council's 8th session, held in June 2001, the Venezuelan delegation had stated that the Republic of Venezuela had decided to withdraw the claim presented in the Civil Court of Caracas for an amount of \$60 million, that the withdrawal would take place as soon as the necessary documents had been signed by the shipowner and his

insurer, and that the withdrawal 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. The Council noted that this claim had not yet been withdrawn.

- 3.7 The Administrative Council noted that the 1971 Fund's exposure was US\$175.2 million calculated as follows.

Claimant	Category	US\$
Republic of Venezuela	Environmental damage	\$60 250 396
Republic of Venezuela	Environmental damage	\$60 250 396
ICLAM ^{<1>}	Preventive measures	\$36 000
ICLAM	Preventive measures / settled	\$36 000
Three fish processors	Loss of income	\$30 000 000
PDVSA ^{<2>}	Clean up / settled	\$8 364 222
Fishermen / processors	Loss of income / settled	\$16 033 389
Other claims	Property damage & income loss / settled	\$181 000
Total		\$175 151 404

Previous consideration of the level of payments

- 3.8 It was recalled that, at its 4th session held in March 2001, the Administrative Council had increased the level of the 1971 Fund's payments from 25% to 40% of the loss or damage actually suffered by each claimant as assessed by the experts engaged by the 1971 Fund and the Gard Club. It was further recalled that the Council had authorised the Director to increase the level of the 1971 Fund's payments to 70% when the Fund's total exposure in respect of the incident fell below US\$100 million or 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). It was also recalled that the Council had reviewed the level of payments at its sessions in June 2001, October 2001 and October 2002 and had decided to maintain its 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).
- 3.9 It was recalled that in April 2002 representatives of the 1971 Fund had 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. It was also recalled that the Government representatives had stated that the Government was examining the possibility of withdrawing at least one of these actions.
- 3.10 It was noted that no further developments had taken place since then and that, in view of this situation, the Director had not been able to increase the level of payments.

Amount available for compensation

- 3.11 The Council recalled that, immediately after the incident, the *Nissos Amorgos* had been detained pursuant to an order rendered by the Criminal Court of first instance in Cabimas. It was recalled that the shipowner had 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, and that the Cabimas Court had ordered the release of the ship on 27 June 1997 (document 71FUND/EXC.55/9, paragraphs 5.1.1 and 5.1.2).
- 3.12 The Council noted that the order by the Cabimas Court of 27 June 1997 also provided that the maximum amount payable under the 1969 Civil Liability Convention and the 1971 Fund

^{<1>} Instituto para el Control y la Conservación de la Cuenca del Lago de Maracaibo.

^{<2>} Petróleos de Venezuela S.A.

Convention, namely 60 million SDR, corresponded to Bs 39 738 million or US\$ 83 221 800 (£50 million).

Administrative Council's consideration

- 3.13 It was noted that the Director had 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 had not fallen below US\$100 million and no legal actions had been withdrawn.
- 3.14 The Council noted that the maximum amount available for compensation, US\$83.2 million, represented 47.5% of the 1971 Fund's exposure. It further noted the view expressed by the Director that, when considering the level at which payments could be made, account should be taken of the fact that the claims by the Republic of Venezuela were duplicated, that the Procuradora General de la Republica (Attorney General) had admitted this duplication in writing, and that the duplication had also been recognized by the Public Prosecutor of Venezuela to the Director at a meeting in Caracas in April 2001.
- 3.15 The Administrative Council noted the Director's view that, as regards the claims by the Republic of Venezuela, it appeared that the courts would not be able to hold the 1971 Fund liable to pay compensation twice for the same loss. The Council also noted that 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 and the maximum amount available for compensation would represent 72.4% of the 1971 Fund's exposure. It was further noted that this level of exposure could enable the level of payments to be increased to 65%, which would give the 1971 Fund a margin of US\$6.5 million against overpayment.
- 3.16 It was recalled that the governing bodies of the 1971 and 1992 Funds had in the past repeatedly expressed the view that it was 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.
- 3.17 The Council noted that the economic conditions in Venezuela had deteriorated considerably since April 2002 when representatives of the 1971 Fund last visited Venezuela. It was also noted that shrimp fishermen in Lake Maracaibo were tending to suffer most in these circumstances, and that several thousand shrimp fishermen in Maracaibo had 60% of their agreed compensation still outstanding. It was further noted that the living conditions of this community had been 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. The Council recognised that in these circumstances all claimants, but particularly the shrimp fishermen, whose claims had been settled would greatly benefit from an increase in the level of payments.
- 3.18 It was recalled that when the level of payments had been fixed in previous cases, the basis for the decision had been the maximum exposure of the 1971 Fund, including all outstanding claims, and that all claims pending in court had been taken into account, including any which, in the Fund's view, were clearly not admissible.
- 3.19 Some delegations suggested that when considering the level of payments the Council should not base its decision on the amounts claimed but in exceptional cases where the claims were obviously groundless should make an assessment of the real value of the claims so as to get a more realistic assessment of the actual exposure of the 1971 Fund.
- 3.20 A number of other delegations expressed the view that it was important to maintain the policy that when considering the level of payments all pending claims had to be taken into account for the amount claimed, including those claims which in the Fund's view were clearly inadmissible. It was suggested that unless this policy were to be maintained, the Fund could run into a considerable risk of overpayment. It was stated that this issue had added importance as the

Member States looked to winding up the 1971 Fund. It was suggested that an overpayment situation at this stage might delay the winding up process considerably and must be avoided at all costs.

- 3.21 The Administrative Council decided that the 1971 Fund should maintain the policy that when considering the level of payments, all pending claims should be taken into account for the amount claimed, whether they in the Fund's view were admissible or not, and that pending claims should be disregarded only in exceptional circumstances.
- 3.22 All delegations present supported the Director's proposal to increase the level of payments to 65%, in view of the special circumstances of the *Nissos Amorgos* incident and in particular the economic circumstances of the fishermen.
- 3.23 A number of delegations stated that it was regrettable that the Republic of Venezuela had submitted two claims relating to the same damage and that they would have preferred that the Republic had withdrawn at least one of these claims. However, since the Republic had not done so, those delegations considered that, in the light of the Director's analysis in paragraph 8.3, they could be confident that there was in fact a duplication of claims and that the Venezuelan courts should not be able to hold the Fund liable to pay twice for the same damage. A number of delegations attached great importance to the acceptance by the Attorney General and the Public Prosecutor that the claims were in fact duplicated.
- 3.24 Many delegations emphasised that the 1971 Fund's mandate was to pay compensation to victims of oil pollution as promptly as possible. It was suggested that it was particularly important for the Fund to fulfil this role in respect of the economically weaker groups of society, to which fishermen often belonged. It was mentioned that in the case of the *Nissos Amorgos* incident the white shrimp fishermen had shown a willingness to co-operate with the Fund and facilitate claims settlements and that the payments to these claimants had been partially blocked by lengthy and complex court proceedings commenced by other claimants whose claims were unfounded.
- 3.25 The Administrative Council considered that, in the unlikely event that the Venezuelan Courts were to accept both claims submitted by the Republic of Venezuela, the 1971 Fund would nevertheless disregard one of them.
- 3.26 In the light of the considerations referred to in paragraphs 3.23-3.25 above and taking into account the exceptional circumstances in the *Nissos Amorgos* case, the Administrative Council decided to increase the 1971 Fund's level of payments from 40% to 65% of the loss or damage actually suffered by each claimant, as proposed by the Director.
- 3.27 The Council also decided that the authorisation given to the Director at its 4th session should be maintained, namely that the Director was authorised to increase the level of payments to 70% when the 1971 Fund's total exposure fell below US\$100 million.
- 3.28 The Venezuelan delegation expressed its gratitude to all the other delegations for their support to the victims of the *Nissos Amorgos* incident in Venezuela.
- 3.29 The Venezuelan delegation stated that it was not possible for the Venezuelan Government to influence the Venezuelan courts as a result of the principle of separation of powers laid down in the Venezuelan Constitution and that it fell to the Venezuelan Supreme Court to take the necessary decisions.
- 3.30 A number of delegations expressed concerns that the level of payments would remain at 65% for a considerable period of time unless a solution could be found to the outstanding claims. It was suggested that the 1971 Fund could not do more to assist claimants and that it was for the Venezuelan Government to take the necessary steps to resolve the problems. Fears were expressed that unless a solution was found, the *Nissos Amorgos* incident could prevent the 1971

Fund being wound up. It was suggested that the Venezuelan Government could consider *inter alia* to undertake not to pursue its claims unless this would not be detrimental to other claimants, ie to 'stand last in the queue' as some other Governments had done in previous incidents.

- 3.31 The Administrative Council emphasised the importance of a uniform application of the Conventions as regards the admissibility of claims and referred to the Resolution on the interpretation and application on the 1992 Civil Liability Convention and 1992 Fund Convention (Resolution No 8) adopted by the 1992 Fund Administrative Council at its 1st session held on 8 and 9 May 2003 (document 92FUND/AC.1/A/ES.7/7, Annex).
- 3.32 The Administrative Council recalled the position taken by the governing bodies of the 1971 and 1992 Funds as regards the admissibility of claims relating to damage to the environment. It was in particular recalled that the IOPC Funds had consistently taken the view that claims for compensation for damage to the marine environment calculated on the basis of theoretical models were not admissible, that compensation could be granted only if a claimant had suffered a quantifiable economic loss and that damages of a punitive nature were not admissible.
- 3.33 The Administrative Council noted that the components of the claims by the Republic of Venezuela set out in paragraph 3.2 of document 71FUND/AC.11/2 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.
- 3.34 The Administrative Council noted that the claims by three fish processors pending in the Supreme Court had not been substantiated by supporting documentation and that they should therefore be treated as not admissible.
- 3.35 The Administrative Council noted that if both claims by the Republic of Venezuela were withdrawn or not pursued to the detriment of other claimants, the 1971 Fund would be able to increase its level of payments to 100%.

4 Any other business

No issues were raised under this agenda item.

5 Adoption of the Record of Decisions

The draft Record of Decisions of the Administrative Council, as contained in document 71FUND/AC.11/WP.1, was adopted, subject to certain amendments.
