



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.

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 Executive Committee at 40% of the loss or damage actually suffered by each claimant. In March 2001 the Administrative Council authorised the Director to increase the level of payments to 70% when certain conditions were fulfilled. So far these conditions have not been fulfilled. 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 Introduction

This document summarises the present situation in respect of the claims for compensation and sets out the developments in respect of the *Nissos Amorgos* incident.

2 Claims for compensation

- 2.1 As at 20 September 2002, 214 claims for compensation totalling Bs15 000 million (£6.9 million) and US\$25 million^{<1>} (£16 million) had been presented to the shipowner's insurer, Assuranceöreningen Gard (Gard Club), and the 1971 Fund. These claims relate to the costs of

^{<1>} In this document conversion of amounts in US\$ into Pounds Sterling is made on the basis of the rate of exchange at 31 August 2002 (£1 = US\$1.5469).

clean-up operations, disposal of oily sand, damage to property (nets, boats and outboard motors), losses suffered by fishermen, fish transporters, shrimp processors and businesses in the tourism sector. Claims have been approved for a total of Bs3 751 million (£1.7 million) plus US\$16 million (£10.4 million). The Gard Club has paid Bs1 261 million (£1.8 million) plus US\$4 million (£2.7 million). The 1971 Fund has paid US\$2.4 million (£1.6 million) to fishermen and fish processors and US\$1.2 million (£800 000) to the Venezuelan national oil company, PDVSA, for costs incurred during the clean-up operations and the disposal of the oily sand.

2.2 Claims arising out of the *Nissos Amorgos* became time-barred on or shortly after 28 February 2000.

2.3 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 Criminal proceedings

3.1 The Criminal Court of 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 of Cabimas the master maintained that the damage was substantially caused by negligence imputable to the Republic of Venezuela.

3.2 The 1971 Fund submitted pleadings to the Court maintaining that the damage had been principally caused by negligence imputable to the Republic of Venezuela.

3.3 In a judgement rendered in May 2000, the Criminal Court of Cabimas 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.

3.4 The 1971 Fund presented pleadings to the Court of Appeal arguing that the evidence presented had not been sufficiently considered by the Court.

3.5 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 paragraph 5 below). The Court of Appeal's decision appears to imply that the judgement of the Criminal Court of Cabimas is null and void.

4 Civil proceedings

4.1 Claims by six shrimp processors and 2 000 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.

4.2 *Republic of Venezuela*

4.2.1 The Republic of Venezuela presented a claim for pollution damage for US\$60 million (£40 million) against the master, the shipowner and the Gard Club in the Criminal Court of Cabimas. 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.

- 4.2.2 In March 1999 the 1971 Fund, the shipowner and the Gard Club presented to the Court a report prepared by their experts on the various items of the claim by the Republic of Venezuela which concluded that the claim had no merit.
- 4.2.3 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.
- 4.2.4 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 US\$20 million (£13 million), later increased to US\$60 million (£40 million). It appears that this claim relates to the same four items of damage as the claim in the Criminal Court of Cabimas.
- 4.2.5 At the Administrative Council's 8th session 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. This claim has not yet been withdrawn.
- 4.3 *Republic of Venezuela's former lawyers*
- 4.3.1 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 before the Supreme Court requesting payment of their fees in the amount of Bs440 million (£200 000). 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 until their fees and expenses have been paid by the plaintiffs or the defendants in that claim. The claim by the Republic was brought against, *inter alia*, the 1971 Fund.
- 4.4 *ICLAM*
- 4.4.1 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.
- 4.4.2 The Executive Committee considered in February 1999 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% mentioned below. This offer is being considered by ICLAM.
- 4.5 *Fish and shellfish processors*
- 4.5.1 Two fish and shellfish processing companies presented a claim for US\$20 million (£13 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 was submitted in support of the claim. The Supreme Court would in this case act as court of first and last instance.

- 4.5.2 In January 2002 the two fish and shellfish processing companies submitted some documentation in support of their claim. The experts engaged by the 1971 Fund have examined this documentation and found that the evidence presented does not establish that the two fish and shellfish processing companies have suffered any loss as a result of the *Nissos Amorgos* incident. Since the information provided is not complete, the claimants have been invited to present additional documentation in support of their claim.
- 4.5.3 In April 2001 a third fish and shellfish processing company presented a claim for US\$10 million (£6.5 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.
- 4.5.4 The 1971 Fund has presented pleadings to the Supreme Court maintaining that this Court should not accept jurisdiction in respect of these claims and should not act as a court of first instance since that would deprive the parties of the right to appeal. The Fund has argued that the Civil Court of first instance in Caracas should have jurisdiction in respect of these claims.

4.6 *FETRAPESCA*

In November 2000 a 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 requested the Supreme Court to declare that the 1971 Fund should pay their fees and expenses of Bs100 million (£46 000).

4.7 *PDVSA*

- 4.7.1 Petroleos de Venezuela SA (PDVSA), the national oil company, presented a claim for Bs3 814 million (£1.7 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 been agreed at US\$7.1 million (£4.6 million) and for disposal of the oily sand at US\$1.3 million (£840 000).
- 4.7.2 In January 2002 the 1971 Fund paid US\$1.2 million (£800 000) to PDVSA, which together with earlier payments made by the shipowner/Gard Club and the 1971 Fund constitutes 40% of the settlement amount of all PDVSA's claims. As a result of these payments PDVSA has withdrawn its court action against the shipowner/Gard Club and the 1971 Fund.

4.8 *Shipowner and Gard Club*

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 (£560 000) 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 (£1.6 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 (£395 000) for indemnification under Article 5.1 of the 1971 Fund Convention.

5 Supreme Court: request of 'avocamiento'

- 5.1 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.
- 5.2 In May 1999 two independent requests of 'avocamiento' were filed by two fish processors and by FETRAPESCA before the Supreme Court. The shipowner and the Gard Club opposed these two requests. The 1971 Fund also opposed the requests on the grounds that the circumstances upon which the requests were based were not exceptional and that the reason for the requests was not the reinstatement of the environment but the private interests of the plaintiffs. The 1971 Fund's opposition was also based on the grounds that public interest and social order had not been threatened by the *Nissos Amorgos* incident nor had it become necessary to re-establish order in the legal proceedings. In addition, the 1971 Fund maintained that justice had not been denied to the plaintiffs to whom the normal legal channels were open. The 1971 Fund also argued that to transfer proceedings to the Supreme Court would deprive the parties of the right of appeal.
- 5.3 In July 1999 the Supreme Court rejected one of the requests of 'avocamiento', namely that of the two fish processors.
- 5.4 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.
- 5.5 Since the 'avocamiento' proceedings have two phases, namely the delivery of the court files to the Supreme Court and thereafter the decision to grant or to deny the 'avocamiento', the shipowner, the Gard Club and the 1971 Fund requested the Supreme Court to clarify whether the Supreme Court had in fact granted the 'avocamiento' in respect of FETRAPESCA's request.
- 5.6 In a decision rendered in February 2000 the Supreme Court stated that in its previous decision the Court had considered FETRAPESCA's request admissible only from a procedural point of view and that the decision on the 'avocamiento' itself would be taken once the court files had been considered. The Court has not rendered a decision in this regard.
- 5.7 On 30 November 2000 FETRAPESCA withdrew the request of 'avocamiento' filed before the Supreme Court. The Court has, however, not yet accepted the withdrawal.

6 Summary of claims pending before the Venezuelan Courts

- 6.1 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 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 million);
- (c) four experts engaged by FETRAPESCA in the Supreme Court for fees for Bs100 million (£46 000);
- (d) three lawyers against the Republic of Venezuela for fees for Bs440 million (£200 000);
- (e) ICLAM;
 - (i) in the Criminal Court of Cabimas for Bs57.7 million (£26 000);
 - (ii) in the Civil Court of Maracaibo for the same amount;
- (f) the shipowner and the Gard Club for Bs1 219 million (£560 000) and Bs3 473 million (£1.6 million).

7 Level of payments

- 7.1 At its 55th session held in October 1997 the Executive Committee noted that there was great uncertainty as to the total amount of the claims arising out of the *Nissos Amorgos* incident. It therefore decided that the 1971 Fund's payments should be limited to 25% of the loss or damage actually suffered by each claimant, as assessed by the experts of the Gard Club and the Fund. At its 4th session 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.
- 7.2 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. No further developments have taken place since then.
- 7.3 In view of this situation, the Director has not been able to increase the level of payments.

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