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COMPENSATION  
FUND 1971

ASSEMBLY  
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Agenda item 3

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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. Further claims are time-barred. In view of the uncertainty as to the total amount of the claims arising out of this incident, the payments are limited to 25% of loss or damage suffered by each claimant. A claim was presented by six shrimp processors and 2 000 fishermen, who maintained that a downturn in catches of shrimps in 1998 was caused by the oil spill. The Administrative Council decided at its October 2000 session that this claim was admissible in principle. The claim was settled in December 2000 at US\$16 million (£10.8 million), and 25% of the settlement amount has been paid. As a result of this settlement a number of court actions have been withdrawn.

**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 claims situation and on the developments in the legal proceedings before the courts.

## **2 Claims presented to the Claims Agency**

### **2.1 General situation**

- 2.1.1 As at 31 December 2000, 214 claims for compensation totalling Bs 26 982 million (£26 million)<sup><1></sup> had been presented to the Claims Agency. These claims relate to the cost of clean-up operations, damage to property (nets, boats and outboard motors) and losses suffered by fishermen, fish transporters, fish and shrimp processors and businesses within the tourism sector.
- 2.1.2 Claims have been approved for a total of Bs3 751 million (£3.6 million) plus US\$16 million (£10.7 million). The Gard Club has paid Bs1 261 million (£1.8 million) plus US\$ 4 million (£2.7 million). The 1971 Fund has made two payments totalling Bs 16.7 million (£16 340) and one payment for US\$ 2.2 million (£1.5 million).
- 2.1.3 Claims arising out of the *Nissos Amorgos* incident became time-barred on or shortly after 28 February 2000.

### **2.2 Claim by six shrimp processors and 2 000 fishermen**

- 2.2.1 A claim for US\$25 million (£16.8 million) was presented by six shrimp processing companies and 2 000 fishermen who had alleged that the oil spilled from the *Nissos Amorgos* in the Gulf of Venezuela on 28 February 1997 had caused a reduction in shrimp catches in Lake Maracaibo in 1998.
- 2.2.2 Representatives of the Gard Club and of the 1971 Fund made several visits to the processing plants operated by the six companies to discuss the basis of the claim and to examine the accounts and records of each plant. On the basis of the data obtained, the Director accepted that there was a statistically significant reduction in shrimp supplies to the plants, and hence catches, in 1998 relative to 1997 and 1999. The extent of this reduction varied within a range of 48% to 71% amongst the different companies with an average of 61%. However, the data obtained, as well as long term national catch statistics, showed that there was considerable variation from year to year in shrimp supplies to individual companies.
- 2.2.3 The claimants appointed six biologists to consider the possible causes of the reduction in catches/supplies. The 1971 Fund and the Gard Club appointed three marine biologists with worldwide experience of the effects of oil on shrimp fisheries. The positions of the two groups of biologists are set out in paragraphs 2.2.8 - 2.2.15 of document 71FUND/A.23/14/8.
- 2.2.4 At its October 2000 session the Administrative Council noted the Director's analysis of the claim as follows:

For any claim to be admissible under the 1969 Civil Liability Convention and the 1971 Fund Convention it must be shown that the alleged loss or damage was caused by the contamination resulting from the oil spill. The Director noted that there was no contemporaneous evidence, such as comparable data on petroleum hydrocarbon concentrations in biota, sediments or water in the oiled area and adjacent un-oiled areas before and after the *Nissos Amorgos* incident. However, the Director took the view that in the case of fishery claims relating to losses arising some time after a pollution incident, it would be unreasonable to expect

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<1> In this document the conversion of amounts in Venezuelan Bolivars into Pounds Sterling is made on the basis of the rate of exchange at 29 December 2000 (£1 = Bs 1045.29), except in respect of the amounts paid by the Gard Club and the 1971 Fund where conversion has been made at the rate of the date of payment.

such data to be available. The Director had taken into account that laboratory experiments had demonstrated that low concentrations of oil could affect the reproduction and feeding of shellfish and the survival of shrimps. Oil was reported in the vicinity of the shrimp spawning areas in the Bay of Calabozo. Although the biologists engaged by the 1971 Fund and the Gard Club had stated that there appeared to be equally plausible factors other than the oil spill which could have contributed to the downturn in catches, they had not been able to identify any such factor which did actually contribute to this downturn. In spite of the lack of conclusive evidence establishing or refuting a direct link between the oil spill and the downturn in shrimp catches, and after having examined the opinions of the various biologists, the Director considered that the oil from the *Nissos Amorgos* was most probably a significant contributory factor to this downturn.

2.2.5 The Administrative Council approved the Director's proposal that the claim should be considered admissible in principle, but stated that in quantifying any losses attributable to the *Nissos Amorgos* incident, account should be taken of other factors as reflected in normal variations from year to year in shrimp catches (document 71FUND/AC.2/A.23/22, paragraph 17.9.10).

2.2.6 A number of meetings took place during the period October – December 2000 with lawyers representing the six shrimp processing companies and 2000 fishermen to quantify the losses attributable to the *Nissos Amorgos* incident. After having considered the factors reflected in normal variations from year to year in shrimp catches, agreement was reached between the claimants, the Gard Club and the 1971 Fund that the losses attributable to the *Nissos Amorgos* incident amounted to US\$16 033 389 million (£10.8 million). A settlement agreement was concluded on 1 December 2000. On 6 December 2000 the Club and the 1971 Fund paid to the claimants US\$4 008 347 (£2.7 million), corresponding to 25% of the admissible amount.<sup><2></sup>

### 2.3 Claims relating to clean-up operations

#### *Claim by Lagoven and Maraven*

2.3.1 The claims relating to clean-up operations undertaken by Lagoven and Maraven (wholly owned subsidiaries of the national oil company, Petroleos de Venezuela – PDVSA) have been resolved. The total admissible amount of both claims was agreed at Bs 3 462 million ( £3.3 million) plus US\$35 850 (£24 000). The Gard Club has made interim payments to PDVSA totalling Bs1 046 million ( £1.2 million).

#### *Claim by PDVSA for disposal of the oily sand*

2.3.2 During the clean-up operations an estimated 48 000 m<sup>3</sup> of contaminated sand was collected. The oily sand has been provisionally stored immediately inland of the affected beach. Following an investigation into various options for disposing of the oily sand, the Gard Club and the 1971 Fund agreed that land farming in the dunes adjacent to the beach was the most appropriate method. The cost was estimated by PDVSA at Bs1 500 million (£1.4 million). The Gard Club and the 1971 Fund informed PDVSA that they considered this estimate to be reasonable.

2.3.3 In December 2000 PDVSA informed the Gard Club and the 1971 Fund that the disposal of the oily sand had been carried out during 2000 and that its cost amounted to Bs886 million (£848 000) plus US\$16 786 (£11 270), ie an amount lower than the estimate set out in paragraph 2.3.2 above. The Club and the 1971 Fund are examining the documentation presented by PDVSA.

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<2> In December 2000 the Gard Club reimbursed the 1971 Fund the amount paid by the Fund to the claimants (US\$2 231 525).

- 2.3.4 The Instituto para el Control y la Conservación de la Cuenca del Lago de Maracaibo (ICLAM), part of the Venezuelan Ministry of Environment and Renewable Resources, presented a claim for the costs incurred in monitoring the disposal of the oily sand as required by Venezuelan law in the amount of Bs9.6 million (£9 600) This claim has been assessed by the Club's and the 1971 Fund's experts in the amount claimed. A payment of Bs2.4 million (£2 300), ie 25% of the assessed amount, will be made to ICLAM in the near future.

### **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**

- 3.2.1 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. 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. In the pleadings it was stated that the shipowner and the Gard Club agreed with the master's defence. As regards the pleadings of the master and the submissions by the shipowner, the Gard Club and the 1971 Fund reference is made to paragraphs 3.2.4 - 3.2.8 of document 71FUND/A.23/14/8.

- 3.2.2 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.

- 3.2.3 The master appealed against the judgement before the Criminal Court of Appeal in Maracaibo.

- 3.2.4 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 is considering a request for avocamiento (cf paragraph 3.4). The Court of Appeal's decision appears to imply that the judgement of the Criminal Court of Cabimas is null and void.

#### **3.3 Civil proceedings**

- 3.3.1 As a result of the settlement of the claims by the six shrimp processors and the 2000 fishermen referred to in paragraph 2.2.6 above, a number of claims for compensation have been withdrawn from the court proceedings. The current situation in respect of the 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 million) 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 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.
- 3.3.6 These two actions are suspended pending a decision on the request for 'avocamiento' (cf paragraph 3.4).

#### *ICLAM*

- 3.3.7 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 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 (£65 000) was admissible. In September 1999, the 1971 Fund paid ICLAM Bs15 268 867 (£16 000), ie 25% of the assessed amount. ICLAM has also presented this claim before the Civil Court of Maracaibo.
- 3.3.8 The action by ICLAM in Cabimas is suspended pending a decision on the request for 'avocamiento'.

#### *FETRAPESCA*

- 3.3.9 FETRAPESCA presented a claim for compensation for pollution damage for an estimated amount of US\$130 million (£87 million) plus legal costs in the Criminal Court of Cabimas. FETRAPESCA also submitted a claim for the same amount in the Civil Court of Caracas. A branch of FETRAPESCA presented a claim for an estimated amount of US\$10 million (£6.7 million) in the Civil Court of Caracas.
- 3.3.10 On 30 November 2000 FETRAPESCA and its branch withdrew these three actions from the courts.

#### *Group of fish and shellfish processors*

- 3.3.11 Eight fish and shellfish processors presented a claim for compensation for an estimated amount of US\$100 million (£67 million) plus legal costs in the Criminal Court of Cabimas. Eleven fish and shellfish processors also presented a similar claim for the same amount in the Civil Court of Caracas. This latter claim corresponds to the one filed in the Criminal Court, except that there is a difference in respect of the number of claimants.
- 3.3.12 On 30 November 2000 four of the eight fish and shellfish processors withdrew their actions from the Criminal Court in Cabimas. On the same date seven of the eleven fish processors withdrew their claims from the Civil Court in Caracas. Four processors (who are not covered by the settlement referred to in paragraph 2.2.6 above) have not withdrawn their actions from either court. The 1971 Fund is aware that discussions have taken place between all the fish and shellfish processors and FETRAPESCA for the purpose of achieving the withdrawal of the actions brought before the courts by these four processors.
- 3.3.13 Two fish and shellfish processors 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 has been submitted in support of the claim. The Supreme Court would in this case act as court of first and last instance. This action has not been withdrawn.

*Six shrimp processors and 2 000 fishermen*

- 3.3.14 A legal action was brought before a Civil Court in Maracaibo against the shipowner, the Gard Club and the 1971 Fund by six shrimp processing companies and by the fishermen supplying shrimps to these companies claiming compensation for US\$25 million (£16.8 million) (cf section 2.2). This action was withdrawn on 6 December 2000, as a result of the settlement referred to in paragraph 2.2.6 above.

*Owner of 60 fishing boats*

- 3.3.15 The owner of 60 fishing boats brought an action before the Civil Court in Maracaibo claiming compensation in the amount of Bs60 million (£57 000). On 6 December 2000 the claimant withdrew the action.

*Owner of a coconut plantation*

- 3.3.16 The owner of a coconut plantation on which he also farms goats brought an action before the Civil Court in Maracaibo claiming compensation for Bs6.6 million (£7 000). This claim was settled at Bs3.6 million (£3 700), and the legal action was withdrawn.

*PDVSA*

- 3.3.17 PDVSA presented a claim for Bs3 814 million (£3.6 million) in the Civil Court in Maracaibo to recover the costs incurred during the clean-up operations and the disposal of the oily sand. It is expected that the claim in respect of the cost of the disposal of the oily sand will be settled in the near future (cf paragraph 2.3.3 above).

*Shipowner and Gard Club*

- 3.3.18 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 (£1.2 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 (£3.6 million) to recover the amounts paid as a result of the incident if the shipowner is wholly exonerated from liability under Article III.2(c) of the 1969 Civil Liability Convention or, alternatively, for an amount of Bs862 million (£825 000) for indemnification under Article 5.1 of the 1971 Fund Convention.
- 3.3.19 This action is suspended pending a decision on the request of 'avocamiento' (cf section 3.4).

3.4 Supreme Court: request of 'avocamiento'

- 3.4.1 In May 1999 two independent requests of 'avocamiento' were filed by two fish processors and by FETRAPESCA before the Supreme Court. 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.

- 3.4.2 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.

- 3.4.3 In July 1999 the Supreme Court rejected one of the requests of 'avocamiento', namely that of the two fish processors.
- 3.4.4 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.
- 3.4.5 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.
- 3.4.6 In a decision dated 29 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.
- 3.4.7 On 30 November 2000 FETRAPESCA withdrew the requests of 'avocamiento' filed before the Supreme Court.

#### **4 Summary of pending claims**

After the withdrawal of a number of court actions the following claims for compensation 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) ICLAM
  - (i) in the Criminal Court of Cabimas for Bs57.7 million (£54 000);
  - (ii) in the Civil Court of Maracaibo for the same amount;
- (c) Four fish and shellfish processors
  - (i) in the Criminal Court of Cabimas for US\$ 100 million (£67 million);
  - (ii) in the Civil Court of Caracas for the same amount;

in both cases as part of the partially withdrawn action;
- (d) PDVSA in the Civil Court of Maracaibo for Bs3314 (£3.6 million) (cf paragraph 3.3.17)
- (e) the shipowner and the Gard Club as set out in paragraph 3.3.18 above;
- (f) two fish and shellfish processors in the Supreme Court as set out in paragraph 3.3.13 above.

#### **5 Level of payments**

- 5.1 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, to maintain the limit 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).

- 5.2 As a result of the agreement reached with the six shrimp processors and the 2000 fishermen a substantial number of claims for compensation have been withdrawn before the courts. Several pending actions are duplicated, since claims relating to what appears to be the same damage have been presented before two or sometimes three courts. The Republic of Venezuela has submitted a claim for US\$60 million ( £40million) in two courts. Four fish and shellfish processors still maintain a claim for US\$100 million (£67 million) before two courts, and two of them have also presented a claim for US\$20 million (£13 million) in the Supreme Court. The claims covered by the actions brought by PDVSA and ICLAM have already been settled and should therefore be withdrawn.
- 5.3 The Director expects that further developments in the pending court actions will take place before the Assembly session. The Assembly will be invited to consider the level of payments in the light of the developments.

**6 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 5); 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.
-