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COMPENSATION
FUND 1971

ASSEMBLY
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Agenda item 5

71FUND/A/ES.8/5
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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.

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, Assurancéföreningen 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 the developments in the legal proceedings before the courts.

2 Claims presented to the Claims Agency

- 2.1 As at 15 June 2001, 214 claims for compensation totalling Bs26 982 million (£26.7 million)^{<1>} 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.
- 2.2 Claims have been approved for a total of Bs3 751 million (£3.7 million) plus US\$16 million (£11.3 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.
- 2.3 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 (£42 million)^{<2>} 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.

<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 1 June 2001 (£1 = Bs1011.73), 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.

<2> In this document conversions of amounts in US\$ into Pounds Sterling is made on the basis of the rate of exchange at 1 June 2001 (£1 = US\$1.4150).

- 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 (£14 million), later increased to US\$60 million (£42 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 (£60 390) 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 (£14 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 \$7 million (£4.9 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 (£435 000). 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 PDVSA presented a claim for Bs3 814 million (£3.8 million) in the Civil Court in Maracaibo to recover outstanding costs incurred during the clean-up operations and the disposal of the oily sand. The part of the claim relating to the clean-up costs has been settled. The 1971 Fund has made a proposal for settlement of the part of the claim in respect of the cost of the disposal of the oily sand, and this proposal is being considered by PDVSA.

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 (£1.2 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 (£3.4 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 (£852 000) for indemnification under Article 5.1 of the 1971 Fund Convention.

4 Director's visit to Venezuela

- 4.1 The Director and the Claims Manager responsible for the *Nissos Amorgos* incident visited Venezuela in April 2001 in order to make progress in the claims settlements. During the visit meetings were held with the Minister of Foreign Affairs, the Minister of the Environment and Natural Resources, the Attorney General, the Republic of Venezuela Public Prosecutor, the Commandant of the Venezuelan Navy and the Instituto Nacional de Canalizaciones.
- 4.2 At these meetings the Director firstly suggested that, since the two claims presented by the Republic of Venezuela (both for US\$60 million) were duplications, one of these claims should be withdrawn so as to enable the 1971 Fund to increase the level of payments. The Director also made the point that the claims by the Republic of Venezuela were not admissible in principle (see paragraphs 3.3.2 - 3.3.5 above).
- 4.3 Discussions were also held concerning the cause of the incident. As reported to the Assembly in document 71FUND/EXC.63/6, the shipowner and the Gard Club have taken the position that the incident and the resulting pollution were due to the fact that the Maracaibo Channel was in a dangerous condition due to poor maintenance, that this was known by the Venezuelan authorities, but that its full extent was concealed and that the arrangements for alerting mariners to the dangers which existed were unreliable.
- 4.4 In October 1999, the Executive Committee instructed the Director to investigate these issues further in co-operation with the shipowner/Gard Club to the extent that there was no conflict of interest between them and the Fund.
- 4.5 The Venezuelan authorities indicated during the meetings in April 2001 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. The Director 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. So far no such documents have been received.

5 Summary of pending claims

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 (£42 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\$27 million (£19 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 (£435 000);
- (e) PDVSA in the Civil Court of Maracaibo for Bs3 314 million (£3.3 million);
- (f) ICLAM;
 - (i) in the Criminal Court of Cabimas for Bs57.7 million (£57 000);
 - (ii) in the Civil Court of Maracaibo for the same amount;
- (g) the shipowner and the Gard Club for Bs1 219 million (£1.2 million) and Bs3 473 million (£3.4 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, 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 Since the Administrative Council's 4th session there has been no further withdrawal of claims. As indicated in paragraphs 3.3.9 and 3.3.10, two additional claims against the 1971 Fund have been filed in court.
- 6.4 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 (£42 million) in each of two courts. Three fish and shellfish processing companies have claims totalling US\$27 million (£19 million) in the Supreme Court and in the Civil Courts. 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.
- 6.5 The claims for compensation pending before the courts now total US\$147 million (£104 million) plus Bs3 529 million (US\$4.9 million or £3.5 million). Other claims have been settled out of court at US\$21.5 million (£15.2 million). The 1971 Fund's total exposure stands therefore at

some US\$180 million (£129 million). The total amount available for compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention is 60 million SDR (US\$74.3 million or £52.9 million) ^{<3>}.

- 6.6 In view of this situation, the Director considers that the Administrative Council's decision taken at its 4th 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.
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^{<3>} The conversion of SDR into Pounds Sterling has been made at the rate of exchange at 31 May 2001, £1 = 1.133600 SDR.