



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUNDS

Agenda item: 3	IOPC/OCT13/3/3		
Original: ENGLISH	19 September 2013		
1992 Fund Assembly	92A18		
1992 Fund Executive Committee	92EC59		
Supplementary Fund Assembly	SA9		
1971 Fund Administrative Council	71AC31		●

INCIDENTS INVOLVING THE IOPC FUNDS – 1971 FUND

NISSOS AMORGOS

Note by the Secretariat

Objective of document:	To inform the 1971 Fund Administrative Council of the latest developments regarding this incident.
Summary of the incident so far:	On 28 February 1997, the Greek tanker <i>Nissos Amorgos</i> (50 563 GRT) spilled an estimated 3 600 tonnes of crude oil, after running aground whilst passing through the Maracaibo Channel in the Gulf of Venezuela.
Limitation of liability:	<p>In June 1997, the Cabimas Criminal Court held that the shipowner's liability was limited to Bs3 473 462 786 and that the 1971 Fund's limit of liability was 60 million SDR (Bs39 738 409 500 or US\$83 221 800). The shipowner provided to the Court a bank guarantee in the sum of Bs3 473 462 786. The Court accepted the guarantee as establishing a limitation fund under Article V of the 1969 Civil Liability Convention (1969 CLC).</p> <p>In February 2010, the Maracaibo Criminal Court of First Instance held that the master, the shipowner and the Gard Club had incurred a civil liability derived from a criminal action and ordered them to pay to the Venezuelan State US\$60 million plus indexation, interest and costs. In its judgement the Court denied the shipowner the right to limit his liability, stating that the Criminal Court of Cabimas had been wrong in its decision delivered in 1997. The judgement also stated that the 1971 Fund had a responsibility to intervene in those cases in which the compensation available under the 1969 CLC was insufficient.</p> <p>The master, shipowner and Gard Club in their appeal requested that the Court recognise the shipowner's right to limit his liability.</p> <p>In March 2011, the Court of Appeal upheld the judgement of the Court of First Instance and rejected the shipowner's request to limit his liability. The judgement stated that it would be for the shipowner and his insurer to obtain reimbursement of the amount paid in compensation to the Venezuelan State from the 1971 Fund.</p> <p>The master, shipowner and the Gard Club appealed to the Supreme Court requesting again that Court recognise the shipowner's right to limit his liability.</p> <p>In May 2013 the Supreme Court rejected the appeal and upheld the judgement of the Court of Appeal. This judgement by the Supreme Court is now final.</p>

Settled claims:	In April 1997, the Gard Club and the 1971 Fund set up a claims-handling agency in Maracaibo. Between 1997 and 2002, claims received by the agency were settled by the Gard Club and the 1971 Fund for a total of Bs288 million (£42 000) plus US\$24 397 612 (£15 million) and these amounts were paid to the claimants.
Outstanding claims:	Two claims remain in Court, one by the Bolivarian Republic of Venezuela for US\$60 million, duplicated and time-barred, and one by three fish processors for US\$30 million.
Recent developments:	<p>In May 2013 the Supreme Court upheld the judgement of the Maracaibo Criminal Court of Appeal, dismissing the appeals by the master, the shipowner, the Gard Club and the 1971 Fund. This judgement is now final.</p> <p>Meeting have taken place between representatives of the Gard Club and the 1971 Fund in Arendal, Norway, June 2013 and also with the International Group of P&I Associations and the Gard Club, in London in August and September 2013. The parties have not reached an agreement, however, both considered that it was important to continue the discussions.</p>
Action to be taken:	<p><u>1971 Fund Administrative Council</u></p> <p>Decide whether the 1971 Fund should reimburse the Gard Club any amount paid as a consequence of the judgement by the Supreme Court of Venezuela.</p>

1 Summary of the incident

Ship	<i>Nissos Amorgos</i>
Date of incident	28.02.1997
Place of incident	Maracaibo, Bolivarian Republic of Venezuela
Cause of incident	Grounding
Quantity of oil spilled	3 600 tonnes of crude oil
Flag State of ship	Greece
Gross tonnage	50 563 GRT
P&I insurer	Assuranceföreningen Gard (Gard Club)
CLC Limit	5 244 492 SDR (Bs3 473 million or BsF 3.5 million) ^{<1><2>} (US\$7.3 million)
CLC + Fund limit	60 million SDR (Bs39 738 million or US\$83 221 800)
Compensation	Claims have been settled for Bs288 476 394 (£42 000) and US\$24 397 612 (£15 million). All the settled claims have been paid.
Legal proceedings	<p>In May 2013, the Supreme Court dismissed the appeal by the master, shipowner and Gard Club, denying the shipowner the right to limit his liability and ordered them to pay the Venezuelan State US\$60 million.</p> <p>Two claims remain in Court, one by the Bolivarian Republic of Venezuela for \$60 million, which is duplicated and time-barred, and one by three fish processors for \$30 million.</p>

^{<1>} In January 2008 the Bolivar Fuerte (BsF) replaced the Bolivar (Bs) at the rate of 1 BsF = 1000 Bs. Until December 2011 the Bolivarian Republic of Venezuela used the term Bolivar Fuerte (BsF) to distinguish the new currency from the old currency or Bolivar (Bs). However, since the old currency was taken out of circulation in January 2012, the Venezuelan Central Bank decided that the use of the word 'Fuerte' was no longer necessary. Therefore, the name of the actual Venezuelan currency is now Bolivar (Bs). To avoid any confusion, we will continue to use the term Bolivar Fuerte (BsF) to distinguish the actual Venezuelan currency (from 2008) from the previous currency (pre 2008).

^{<2>} The decision on the limitation fund by the Cabimas Criminal Court in 1997 was reversed by the Maracaibo Criminal Court in February 2010 and the reversal was upheld by the Maracaibo Court of Appeal in March 2011 and later the Supreme Court in May 2013.

2 **Introduction**

The background information to this incident is summarised above and provided in more detail at the Annex.

3 **Limitation of liability**

- 3.1 In June 1997, the Criminal Court of Cabimas held that the shipowner's liability was limited to Bs3 473 462 786 (US\$7.3 million) and that the 1971 Fund's limit of liability was 60 million SDR (Bs39 738 409 500 or US\$83 221 800).
- 3.2 In February 2010, the Maracaibo Criminal Court of First Instance held that the master, the shipowner and the Gard Club had incurred a civil liability derived from the criminal action and ordered them to pay to the Venezuelan State BsF 29 220 620 (US\$60 million) plus indexation, interests and costs. In its judgement the Court denied the shipowner the right to limit his liability, stating that the Criminal Court of Cabimas had been wrong in its decision delivered in 1997 since, at that time, it was not certain that a criminal offence had been committed and the damage had not been quantified.
- 3.3 In its judgement, the Maracaibo Criminal Court of First Instance also stated that the 1971 Fund had a responsibility, as provided in Articles 2 and 4 of the 1971 Fund Convention, to intervene in those cases in which the compensation available under the 1969 CLC was insufficient. It was also ordered in the judgement that the 1971 Fund be notified.
- 3.4 In their appeal, the master, shipowner and Gard Club requested that the Court recognise the shipowner's right to limit his liability, as set out in Article V, paragraph 1 of the 1969 CLC.
- 3.5 In March 2011, the Maracaibo Criminal Court of Appeal upheld the judgement of the Maracaibo Criminal Court of First Instance and rejected the shipowner's request to limit his liability. The Court of Appeal also decided that it would be for the shipowner and his insurer to obtain reimbursement of the amount paid in compensation to the Venezuelan State from the 1971 Fund.
- 3.6 The master, shipowner and the Gard Club appealed to the Supreme Court requesting again that the Court recognise the shipowner's right to limit his liability
- 3.7 In May 2013 the Supreme Court rejected the appeal and upheld the judgement of the Court of Appeal.

4 **Claims for compensation**

- 4.1 Claims settled and paid by the Gard Club and the 1971 Fund:

Claimant	Category of claim	Settled and paid amount (Bs)	Settled and paid amount (US\$)
Petroleos de Venezuela SA (PDVSA)	Clean up		8 364 223
Instituto para el Control y la Conservación de la Cuenca del Lago de Maracaibo (ICLAM)	Preventive measures	70 675 468	
Shrimp fishermen and processors	Loss of income		16 033 389
Others	Property damage and loss of income	217 800 926	
Total		Bs288 476 394 (£42 000)	US\$24 397 612 (£15 million)

4.2 Judgement awarded by the Supreme Court (Criminal section):

Claimant	Category of claim	Claimed amount (US\$)	Court	Fund's position
Bolivarian Republic of Venezuela	Environmental damage	60 250 396	Supreme Court (Criminal section)	Judgement against the shipowner and Gard Club, not against the Fund

4.3 Outstanding claims:

Claimant	Category of claim	Claimed amount (US\$)	Court	Fund's position
Bolivarian Republic of Venezuela	Environmental damage	60 250 396	Supreme Court (Political administrative section)	Time-barred and not admissible
Three fish processors	Loss of income	30 000 000	Supreme Court (Political administrative section)	No loss proven
Total		90 250 396		

5 Consideration by the 1971 Fund Administrative Council at its October 2012 session

5.1 The International Group of P&I Associations made the following statement at the October 2012 session of the 1971 Fund Administrative Council:

‘One of the purposes of this intervention is draw to the attention of the Administrative Council to the possible implications of a judgement from the Supreme Tribunal on the shipowner’s appeal from the Maracaibo Criminal Court of Appeal in so far as they may affect the 1971 Fund. As mentioned in the International Group submission, four months after the spill, a limitation fund was established in the Cabimas Court in accordance with Article VI of the 1969 CLC, the Court accepted the owner’s right to limit and released the ship from arrest. No appeal was made from this decision and at no time has there been an allegation that the incident was attributable to actual fault or privity on the part of the owner.

In the intervening period admissible claims have been paid in accordance with the current practice of the time, firstly the shipowner paying up to the approximate CLC limitation sum, and subsequently payments being made by the 1971 Fund. In 2006 an audit was made by the Gard Club and the Fund encompassing all the compensation payments and joint claims-handling expenses incurred respectively by the Club and the 1971 Fund. A provisional adjusting balance has been settled, based on the 1969 CLC limitation amount and the corresponding proportions of claims-handling costs to be borne by both parties. However it is not possible to complete the audit since there are still outstanding claims.

Fourteen years after the decision of the Cabimas Court that the owner had the right to limit, the Maracaibo Criminal Court of Appeal overturned the decision, holding that the shipowner did not have the right to limit liability. This decision is subject to appeal to the Supreme Tribunal. The Club shares the view of the Director that there are no grounds to hold that the shipowner is not entitled to limit liability. Nonetheless there remains the possibility that the Supreme Tribunal will uphold the decision of the Maracaibo Court of Appeal and that the limitation fund guarantee will be encashed in partial satisfaction of the judgement. This would mean that the shipowner will have paid twice the limitation fund and in accordance with the practice adopted between the Club and the Fund, namely that an audit should be made at the end of the case to ensure that the various financial outgoings were correctly distributed between them, the Club would look to the Fund for reimbursement of any sum above the limitation amount. Of course, the Club hopes that it

will not come to this, but we feel that it is important to at least raise it at this stage given the most recent court judgement.'

- 5.2 A number of delegations at that meeting expressed concern with respect to the implementation of the Conventions by the Bolivarian Republic of Venezuela and with respect to the decisions of the Venezuelan courts.
- 5.3 One delegation, while not wishing to take a position on the claim at this stage, observed that there were potentially serious issues for the CLC and Fund regime to consider. That delegation expressed concerns with respect to the admissibility of the claim by the Venezuelan Government and to the Maracaibo Court of Appeal's decision regarding the shipowner's right to limit his liability. The same delegation expressed the view that, if the court maintained its decision on the shipowner's right to limit his liability, it would be difficult for the Administrative Council to decide how the burden should be shared between the shipowner/its insurer and the 1971 Fund.
- 5.4 Another delegation, while associating itself with the comments of the other delegations, expressed the view that, although there was not yet a decision to take, the comments by the delegations that had intervened should be seen as a warning that the fundamental principles of the Conventions, and in particular the provisions regarding time bar and shipowner's limitation, should not be disregarded.
- 5.5 A number of other delegations expressed their agreement with these comments.

6 Recent developments

- 6.1 In May 2013 the Supreme Court (Criminal section) upheld the judgement of the Maracaibo Criminal Court of Appeal and the Maracaibo Criminal Court of First Instance (see paragraph 3.2 above), dismissing the appeals by the master, the shipowner, the Gard Club and the 1971 Fund. This judgement is now final.
- 6.2 The master, shipowner and Gard Club requested the Supreme Court (Political Administrative Chamber) to order the transfer of the shipowner's limitation fund, originally constituted in the criminal proceedings, to the Political Administrative Chamber of the Supreme Court where all the pending civil claims arising from the incident had been consolidated.
- 6.3 In June, July and August 2013 the master, shipowner and Gard Club submitted pleadings to the Supreme Court (Political Administrative Chamber) reiterating their request to order the transfer of the shipowner's limitation fund. In their request, the master, shipowner and Gard Club have argued that the limitation fund was deposited according to the 1969 CLC and as such should be available not only to the civil claim presented by the Bolivarian Republic of Venezuela in the criminal proceedings but also to all claimants in this incident.

7 Meetings with the Gard Club and the International Group of P&I Associations

- 7.1 A meeting took place with the Gard Club in Arendal, Norway in June 2013, between the Chief Legal Counsel and the Head of Claims from the Gard Club, Mr Alfred Popp, Chairman of the Consultation Group on the winding up of the 1971 Fund, Mr Gaute Sivertsen, Chairman of the 1992 Fund Assembly who had kindly facilitated the arrangement of the meeting, and the Director of the IOPC Funds on behalf of the 1971 Fund.
- 7.2 During the meeting it was mentioned that the Club would look to the Fund for reimbursement of any sum above the limitation amount. The Director stated, however, that the 1971 Fund could only pay compensation arising from a legal obligation and, in this case, the judgement by the Supreme Court of Venezuela had not ordered the 1971 Fund to pay compensation.
- 7.3 A further meeting with the International Group of P&I Associations, the Gard Club, the Chairman of the Consultation Group and the Director took place in September 2013. The parties did not reach an agreement, however, all parties considered that it was important to continue the discussions.

8 Director's considerations

- 8.1 The Director sympathises with the situation in which the Gard Club finds itself. In 1997, the Criminal Court in Cabimas held that the shipowner's liability was limited to some US\$7.3 million. Now, fourteen years later, this decision has been overturned and the shipowner has been denied the right to limit his liability. In the Director's view, this decision by the Venezuelan Courts is wrong since there are no grounds to hold that the shipowner is not entitled to limit his liability.
- 8.2 The judgement by the Court of First Instance, confirmed by the Court of Appeal and Supreme Court, rejected the shipowner's request to limit his liability and stated that it would be for the shipowner and his insurer to obtain reimbursement of the amount paid in compensation to the Venezuelan State from the 1971 Fund. However, the judgement by the Venezuelan Courts is not against the 1971 Fund.
- 8.3 The Director considers that it would be very difficult for the 1971 Fund to agree to pay compensation in excess of the shipowner's limitation amount since the judgement is not against the 1971 Fund. In the Director's view, the 1971 Fund can only pay compensation based on a legal obligation to do so and, in this case, a legal obligation does not exist.
- 8.4 The Director, however, is of the view that it is for the 1971 Fund Administrative Council to decide whether the 1971 Fund should reimburse the Gard Club any amount paid as a consequence of the judgement by the Supreme Court of Venezuela.

9 Action to be taken1971 Fund Administrative Council

The 1971 Fund Administrative Council is invited:

- (a) to take note of the information contained in this document;
- (b) to decide whether the 1971 Fund should reimburse the Gard Club any amount paid as a consequence of the judgement by the Supreme Court of Venezuela; and
- (c) to give the Director such instructions in respect of the handling of this incident as it may deem appropriate.

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ANNEX

BACKGROUND INFORMATION – NISSOS AMORGOS

1 Incident

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. Venezuelan authorities have maintained that the actual grounding occurred outside the Channel itself. An estimated 3 600 tonnes of crude oil were spilled. 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.

2 Applicability of the Conventions

- 2.1 At the time of the incident the Bolivarian Republic of Venezuela was Party to the 1969 Civil Liability Convention (1969 CLC) and the 1971 Fund Convention. In June 1997, the Cabimas Criminal Court held that the shipowner's liability was limited to Bs3 473 million and that the 1971 Fund's limit of liability was 60 million SDR (Bs39 738 million or US\$ 83 million). The shipowner provided to the Court a bank guarantee in the sum of Bs3 473 million. In 1997 the Court accepted the guarantee as establishing a limitation fund under Article V of the 1969 CLC. This decision was subsequently rendered null and void by the Maracaibo Criminal Court of First Instance in a judgement of February 2010. That judgement was subsequently upheld by the Maracaibo Criminal Court of Appeal in March 2011.

3 Claims for compensation

3.1 Settled and paid claims

- 3.1.1 In April 1997, the Gard Club and the 1971 Fund set up a claims handling office in Maracaibo. Between 1997 and 2002, claims received by the office were settled for a total of Bs288.5 million plus US\$ 24 397 612 and these amounts were paid to the claimants.
- 3.1.2 The table below summarises the settled claims, which have all been paid in full.

Claimant	Category of claim	Settled and paid amount (Bs)	Settled and paid amount (US\$)
Petroleos de Venezuela S.A. (PDVSA)	Clean up		8 364 223
Instituto para el Control y la Conservación de la Cuenca del Lago de Maracaibo (ICLAM)	Preventive measures	70 675 468	
Shrimp fishermen and processors	Loss of income		16 033 389
Others	Property damage and loss of income	217 800 926	
Total		Bs288 476 394 (£42 000)	US\$24 397 612 (£15 million)

3.2 Outstanding claims

3.2.1 Three claims for compensation totalling US\$150.5 million, summarised in the table below, are pending before the courts in Venezuela.

Claimant	Category of claim	Claimed amount (US\$)	Court	Fund's position
Bolivarian Republic of Venezuela	Environmental damage	60 250 396	Supreme Court (Criminal section)	Time-barred and not admissible
Bolivarian Republic of Venezuela	Environmental damage	60 250 396	Supreme Court (Political administrative section)	Time-barred and not admissible
Three fish processors	Loss of income	30 000 000	Supreme Court (Political administrative section)	No loss proven
Total		150 500 792 (£93 million)		

3.2.2 Detailed information regarding the three pending claims is given in the Legal issues sections below.

4 Legal issues

4.1 The *Nissos Amorgos* incident gave rise to both criminal and civil proceedings. The criminal proceedings refer not only to criminal liability, but also to civil liability arising from the criminal action. This is summarised in the table below.

Liability	Issues/ claimants	Claimed amount (US\$)	Defendants	1971 Fund's position	Status of proceedings
Criminal	Criminal liability of the master of the <i>Nissos Amorgos</i>	-	Master	-	Criminal Court of Appeal decided the criminal action against the master was time-barred
Civil	Claim by the Republic of Venezuela in criminal proceedings	60 million	Master, shipowner and Gard Club	The 1971 Fund is a notified third party and has intervened in the proceedings	Criminal Court of Appeal's judgement accepted the Claim by the Republic of Venezuela in full. The Fund has appealed to the Supreme Court (Criminal section)
	Claim by the Republic of Venezuela in civil proceedings	60 million	Shipowner, Master and Gard Club.	The 1971 Fund was not notified of this action	No developments for several years. Duplication of the claim above, but not withdrawn
	Three fish processors	30 million	1971 Fund and Instituto Nacional de Canalizaciones (INC)	Defendant	No developments for several years.

4.2 Details regarding the criminal and civil proceedings are provided below.

4.3 Criminal liability

- 4.3.1 Criminal proceedings were brought against the master of the *Nissos Amorgos*. In his pleadings to the Criminal Court in Cabimas the master maintained that the damage was substantially caused by deficiencies in Lake Maracaibo's navigation channel, amounting to negligence imputable to the Bolivarian Republic of Venezuela.
- 4.3.2 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.
- 4.3.3 In September 2000 the Criminal Court of Appeal decided not to consider the appeal but ordered the Criminal Court in Cabimas to send the file to the Supreme Court due to the fact that the Supreme Court was considering a request for 'avocamiento'^{<3>}.
- 4.3.4 In August 2004 the Supreme Court decided to remit the file on the criminal action against the master to the Criminal Court of Appeal in Maracaibo.
- 4.3.5 In a judgement rendered in February 2005, the Criminal Court of Appeal in Maracaibo held that it had been proved that the master had incurred criminal liability due to negligence causing pollution damage to the environment. The Court decided, however, that, in accordance with Venezuelan procedural law, since more than four-and-a-half years had passed since the date of the criminal act, the criminal action against the master was time-barred. In its judgement the Court stated that this decision was without prejudice to the civil liabilities which could arise from the criminal act dealt with in the judgement. In October 2006 the public prosecutor requested the Supreme Court (Constitutional Section) to revise the judgement of the Criminal Court of Appeal on the grounds that the Court had not decided in respect of the claim for compensation submitted by the public prosecutor on behalf of the Bolivarian Republic of Venezuela.
- 4.3.6 In a judgement rendered in March 2007 the Supreme Court (Constitutional Section) decided to annul the judgement of the Court of Appeal and send back the criminal file to the Court of Appeal where a different section would render a new judgement. In its judgement, the Supreme Court stated that the judgement of the Court of Appeal was unconstitutional since it had not decided on the claim for compensation submitted by the Bolivarian Republic of Venezuela that had been presented to obtain compensation for the Venezuelan State for the damage caused.
- 4.3.7 A different section of the Criminal Court of Appeal issued a new judgement in February 2008, confirming that the criminal action against the master was time-barred but preserving the civil action arising from the criminal act.
- 4.3.8 The developments concerning the civil action in the criminal proceedings, submitted by the Bolivarian Republic of Venezuela are detailed in the section on civil liability below.

4.4 Civil liability

Claims by the Bolivarian Republic of Venezuela

- 4.4.1 The Bolivarian Republic of Venezuela presented a claim for environmental damage for US\$60 250 396 against the master, the shipowner and the Gard Club in the Criminal Court in Cabimas.

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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 for 'avocamiento' is granted, the Supreme Court would act as a court of first instance and its judgement would be final.

- 4.4.2 The claim was based on a report on the economic consequences of the pollution, written by a Venezuelan university, in which the amount of damage had been calculated by the use of theoretical models. Compensation was 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); and
 - damage to the beach at a tourist resort (US\$16 948 454).
- 4.4.3 The 1971 Fund was notified of the criminal action and submitted pleadings in the proceedings. The progress of this action is detailed below.
- 4.4.4 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 Bolivarian Republic of Venezuela which concluded that the claim had no merit.
- 4.4.5 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 Bolivarian 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.
- 4.4.6 The Bolivarian 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, later increased to US\$60 250 396. The 1971 Fund was not notified of this civil action.
- 4.4.7 The two claims presented by the Bolivarian Republic of Venezuela were duplications since they were based on the same university report and relate to the same items of damage. The Procuraduría General de la República (Attorney General) admitted this duplication in a note submitted to the 1971 Fund's Venezuelan lawyers in August 2001.
- 4.4.8 At the 1971 Fund Administrative Council's 8th session held in June 2001, the Venezuelan delegation stated that the Bolivarian Republic of Venezuela had decided to withdraw the claim by the Bolivarian Republic of Venezuela that had been presented in the Civil Court of Caracas 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. As of October 2012, this claim had not been withdrawn.

Considerations by the Administrative Council on the claims by the Republic of Venezuela

- 4.4.9 In July 2003, the 1971 Fund 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. In particular it was 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. The 1971 Fund Administrative Council considered that the claims by the Bolivarian Republic of Venezuela did not relate to pollution damage falling within the scope of the 1969 CLC and the 1971 Fund Convention and that these claims should therefore be treated as not admissible.
- 4.4.10 The 1971 Fund Administrative Council noted that the two claims presented by the Bolivarian Republic of Venezuela were duplications and that the Procuraduría General de la República (Attorney General) had accepted that this duplication existed, as stated above.

- 4.4.11 At its October 2005 session the 1971 Fund Administrative Council endorsed the Director's view that the claims by the Bolivarian Republic of Venezuela were time-barred *vis-à-vis* the 1971 Fund since Article 6.1 of the 1971 Fund Convention requires that, in order to prevent a claim from becoming time-barred in respect of the 1971 Fund, a legal action has to be brought against the Fund within six years of the date of the incident and no legal action had been brought against the 1971 Fund by the Bolivarian Republic of Venezuela within the six-year period, which expired in February 2003.

Criminal Court of Appeal's judgement of February 2008

- 4.4.12 In the February 2008 judgement the Criminal Court of Appeal decided to send the file to a Criminal Court of First Instance, where the claim submitted by the Bolivarian Republic of Venezuela would be decided.

Master's plea of lack of jurisdiction

- 4.4.13 The master submitted pleadings to the Criminal Court of First Instance in Maracaibo in which he argued that the Court did not have jurisdiction and that the case should be transferred to the Maritime Court in Caracas.
- 4.4.14 In March 2009 the Criminal Court of First Instance issued a decision rejecting the plea of lack of jurisdiction. This decision was notified to the master, but not to the shipowner and his insurer or the 1971 Fund.
- 4.4.15 The 1971 Fund submitted pleadings arguing that, by not notifying the 1971 Fund of the decision, the Court had denied the Fund a proper defence. In its pleadings the Fund also submitted its conclusions, as follows:
- The claims by the Bolivarian Republic of Venezuela were time-barred in respect of the 1971 Fund;
 - All admissible claims for pollution damage had already been compensated by the Club and the Fund; and
 - The claim by the Bolivarian Republic of Venezuela was not admissible under the 1969 Civil Liability Convention and 1971 Fund Convention and the alleged damage was not proved.

Judgement of February 2010 by the Criminal Court of First Instance in Maracaibo

- 4.4.16 In a judgement rendered in February 2010 the Criminal Court of First Instance in Maracaibo held that the master, the shipowner and the Gard Club had incurred a civil liability derived from the criminal action and ordered them to pay to the Venezuelan State the amount claimed, namely US\$60 250 396.
- 4.4.17 The master, the shipowner and the Gard Club and the 1971 Fund appealed against the judgement.

Judgement by the Maracaibo Criminal Court of Appeal in March 2011

- 4.4.18 In March 2011, the Maracaibo Criminal Court of Appeal upheld the judgement of the Maracaibo Criminal Court of First Instance and dismissed the appeals by the master, the shipowner, the Gard Club and the submission by the 1971 Fund. In its judgement the Maracaibo Criminal Court of Appeal dealt mainly with the issues set out below.

Shipowner's limitation of liability

- 4.4.19 In its appeal, the master, shipowner and the Gard Club had requested that the Court recognise the shipowner's right to limit its liability, as set out in Article V, paragraph 1 of the 1969 CLC.
- 4.4.20 In its judgement, the Maracaibo Criminal Court of Appeal upheld the judgement of the Maracaibo Criminal Court of First Instance, stating that the Criminal Court of Cabimas was not a suitable forum for admitting a liability limitation fund since, at that time, it was not certain that a criminal offence had been committed and the damage had not been quantified. The judgement rejected the shipowner's request to limit its liability but decided that it would be for the shipowner and his insurer

to obtain reimbursement of the amount paid in compensation to the Venezuelan State from the 1971 Fund.

Time bar

- 4.4.21 In its appeal, the 1971 Fund pointed out that, under Article 6.1 of the 1971 Fund Convention, rights to compensation became time-barred unless an action had been brought under Article 4, or a notification made pursuant to Article 7.6, within three years of the date when the damage occurred but that in no case should an action be brought after six years from the date of the incident. The 1971 Fund further pointed out that no action had been brought against the 1971 Fund within six years and that the claim by the Bolivarian Republic of Venezuela was, therefore, time-barred.
- 4.4.22 The Maracaibo Criminal Court of Appeal dismissed this argument on the grounds that the 1971 Fund had been given notice within three years of the date when the damage occurred. The Court also pointed out that the lawyers of the 1971 Fund had attended hearings of the Criminal Court of Cabimas in 1997 and that it had been in a position to effectively intervene throughout the entire proceedings.
- 4.4.23 In its judgement, the Maracaibo Criminal Court of Appeal stated as follows:

“... when Article 6 of the Convention states ‘rights to compensation under Article 4 shall be extinguished unless action is brought thereunder or a notification has been made pursuant to Article 7, paragraph 6, within three years when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage...’ it uses the term ‘or’ as a disjunctive conjunction thereby denoting ‘difference, separation or alternative between two or more persons, things or ideas...’. From this it may be taken that the civil action would be time-barred three years from the date of the incident if no legal action or notification was made pursuant to Article 7 of the Fund Convention in the meantime, meaning that the civil action would be time barred in one case or the other. However, in the case in hand one of the circumstances established in the Article arises and it is not then possible to declare the time-bar of the civil action.”

Implementation of the Conventions

- 4.4.24 The 1971 Fund appealed the judgement of the Maracaibo Criminal Court of First Instance on the grounds that those persons and organisations (private individuals, companies and State organisations) who had suffered a loss as a result of the pollution had been compensated for their losses by the Gard Club and the 1971 Fund. The Venezuelan State itself did not have an admissible claim since it had not suffered any loss and was not, therefore, entitled to compensation as claimed and as awarded by the Criminal Court of First Instance in Maracaibo. The 1971 Fund also appealed on the grounds that the amounts of compensation paid to victims had not been taken into consideration.
- 4.4.25 In its judgement, the Maracaibo Criminal Court of Appeal pointed out that the Maracaibo Criminal Court of First Instance had differentiated between ‘direct’ and ‘indirect’ victims, as established by the Environmental Criminal Law of Venezuela (Ley Penal del Ambiente), which provided that the Venezuelan State was the direct victim whereas those natural or corporate persons affected by the pollution were indirect victims. The Court stated that the Venezuelan State, as a direct victim, should be compensated for the environmental damage caused without making any pronouncement with respect to the indirect victims, since their claims had already been satisfied.

Award of compensation to Instituto para el Control y la Conservación de la Cuenca del Lago de Maracaibo (ICLAM)

- 4.4.26 In 1998, ICLAM, a Venezuelan State organisation responsible for monitoring and environmental control of Lake Maracaibo, submitted a claim in court for the cost incurred in carrying out a programme of water, sediment and marine animal life inspection, sampling and testing following the spill. The claim was assessed by the Gard Club and 1971 Fund at Bs70 675 467 and that amount was paid by the 1971 Fund. Following payment of the claim, ICLAM withdrew their claim from court and in 2005 the court confirmed (‘homologación’) the withdrawal.

- 4.4.27 Notwithstanding the payment made to ICLAM by the 1971 Fund and the subsequent withdrawal of its claim from the Court, the Maracaibo Criminal Court condemned the master, shipowner and Gard Club to pay Bs57.7 million (BsF 57 732). The 1971 Fund appealed on the ground that ICLAM had already been compensated.
- 4.4.28 The Maracaibo Criminal Court of Appeal rejected this appeal stating that a certain amount of money should be paid for the systematic monitoring of the affected area as, even though it was for the same purpose (as the payments made by the 1971 Fund), it was not for the same item, since one sum was paid in a transaction made in civil proceedings and the other for estimated court costs relating to the reparation of damages arising from the committing of a criminal offence.

The calculation of losses

- 4.4.29 The 1971 Fund also appealed on the grounds that the method of calculation of losses was not applicable under the 1969 CLC and 1971 Fund Convention in that, even if changes in the ecology of the area had occurred, it had not been demonstrated that these were due to the spill and that an abstract mathematical formula had been used in the calculation of the amount claimed and awarded.
- 4.4.30 The Maracaibo Criminal Court of Appeal stated that this argument constituted a strategy to transfer the civil proceedings derived from a criminal offence to one of purely maritime scope ignoring the pre-eminence of criminal law and the civil proceedings which arise from the establishment of criminal liability as a result of the committing of a crime.
- 4.4.31 The Maracaibo Criminal Court of Appeal dismissed the appeal on the grounds that the 1971 Fund should have indicated at the right time its disagreement with the methodology employed by the experts in whose report the amount of the alleged loss had been calculated. It should, however, be noted that the report submitted by the Public Prosecutor had been contested at the time by the 1971 Fund when the Fund had presented its expert's report at the Criminal Court in Cabimas.

The failure to examine the evidence submitted by the 1971 Fund

- 4.4.32 The 1971 Fund additionally appealed on the grounds that the Maracaibo Criminal Court of First Instance had not examined the evidence submitted by the defendants and the 1971 Fund but had taken into account only the experts' report submitted by the Public Prosecutor in 1997.
- 4.4.33 The Maracaibo Criminal Court of Appeal dismissed the appeal on the grounds that the Maracaibo Criminal Court of First Instance had examined all the elements on the record and that the judgement was in keeping with the Law.

Claims by fish processors

- 4.4.34 Three fish processors presented claims totalling US\$30 million in the Supreme Court against the 1971 Fund and the Instituto Nacional de Canalizaciones (INC). The claims were presented in the Supreme Court because one of the defendants is an agency of the Bolivarian Republic of Venezuela and, under Venezuelan law, claims against the Republic have to be presented before the Supreme Court.
- 4.4.35 In November 2002, the Supreme Court decided to consolidate all civil claims pending in relation to the *Nissos Amorgos* incident. Therefore the civil claim by the Bolivarian Republic of Venezuela is now in the Supreme Court (Political administrative section), together with the claims by the three fish processors. The Supreme Court will act as a Court of First Instance and its judgement will be final.
- 4.4.36 In July 2003 the 1971 Fund Administrative Council noted that the claims by the fish processors had not been substantiated by supporting documentation and that they should therefore be treated as inadmissible.
- 4.4.37 In August 2003 the 1971 Fund submitted pleadings to the Supreme Court arguing that, as the claimants had submitted and subsequently renounced claims in the Criminal Court in Cabimas and the

Civil Court in Caracas against the master, the shipowner and the Gard Club for the same damage, they had implicitly renounced any claim against the 1971 Fund. The 1971 Fund also argued that not only had the claimants failed to demonstrate the extent of their loss, but the evidence they had submitted indicated that the cause of any loss was not related to the pollution. As of October 2012 there had been no developments in respect of these claims.

- 4.4.38 The master, shipowner and Gard Club have requested the Supreme Court (Political administrative section) to order the transfer of the shipowner's limitation fund, originally constituted in the criminal proceedings, to the Political administrative section of the Supreme Court where all the pending civil claims arising from the incident had been consolidated. As of October 2012, the Supreme Court (Political administrative section) had not decided on this request.

Document submitted by the International Group of P&I Associations

- 4.4.39 At the October 2012 session of the 1971 Fund Administrative Council, the International Group of P&I Associations (International Group) submitted document [IOPC/OCT12/3/3/1](#), drawing attention to the possible implications that the judgement by the Maracaibo Criminal Court of Appeal in March 2011 may have for the 1971 Fund.
- 4.4.40 The International Group stated that, following the establishment of a limitation fund in the Cabimas Criminal Court in accordance with Article VI of the 1969 CLC, the Court had accepted the owner's right to limit and had released the ship from arrest. It was also stated that there had been no allegation that the incident was attributable to actual fault or privity on the part of the owner. It was further stated that fourteen years after the decision of the Cabimas Court that the owner had the right to limit, the Maracaibo Criminal Court of Appeal had overturned the decision, holding that the shipowner did not have the right to limit liability.
- 4.4.41 The International Group also stated that admissible claims had been paid, firstly the shipowner paying up to the approximate CLC limitation sum, and subsequently payments being made by the 1971 Fund. It was also stated that if the Supreme Tribunal were to uphold the decision of the Maracaibo Criminal Court of Appeal the limitation fund guarantee would be encashed in partial satisfaction of the judgement and the shipowner would have paid twice the limitation fund. It was further stated that, in accordance with the practice adopted between the Club and the Fund, namely that an audit should be made at the end of the case to ensure that the various financial outgoings were correctly distributed between them, the Club would look to the Fund for reimbursement of any sum above the limitation amount.

5 Considerations

5.1 Shipowner's limitation

- 5.1.1 The Maracaibo Criminal Court of Appeal overturned the decision of the Cabimas Criminal Court of First Instance to grant the shipowner the right to limit its liability under the 1969 CLC. Article V.2 of the 1969 CLC provides that the shipowner is not entitled to limit its liability if the incident has occurred as a result of his actual fault or privity. Neither the Maracaibo Criminal Court of First Instance nor the Maracaibo Criminal Court of Appeal have held in their judgements that there had been actual fault or privity of the shipowner. There are therefore no grounds under the 1969 CLC upon which the shipowner should be denied the right to limit its liability. Nevertheless, as the proceedings stand at present, the shipowner has not established its right to limit its liability.
- 5.1.2 The judgement by the Maritime Court of Appeal also stated that it was for the shipowner and his insurer to obtain reimbursement of the amount paid in compensation to the Venezuelan State from the 1971 Fund. It could be inferred from the above, that the Court of Appeal considered that there was no need to hold the 1971 Fund liable, which would not be possible since the 1971 Fund was not a defendant in the proceedings, and that, in the Court's view, the shipowner and his insurer would subsequently approach the 1971 Fund to obtain reimbursement.
- 5.1.3 The Court's decision therefore appears not to be in accordance with the 1969 CLC and 1971 Fund Convention.

5.2 Time bar

- 5.2.1 The Maracaibo Criminal Court of Appeal had concluded that the act of notification of the 1971 Fund and presence of the lawyers acting on behalf of the Fund at hearings that took place in 1997 was sufficient to interrupt the time bar, irrespective of the fact that no action had been taken against the 1971 Fund within six years of the incident occurring as required under Article 6.1 of the 1971 Fund Convention. The Maracaibo Criminal Court of Appeal had also concluded that, providing notice was given as specified in the first sentence of Article 6.1 of the 1971 Fund Convention, it was not necessary for the provisions of the second sentence to be fulfilled in order for the time bar to be avoided. In other words, providing the 1971 Fund had been formally notified of an action against the shipowner within three years of the damage occurring, it was not necessary for an action to be brought against the 1971 Fund within six years.
- 5.2.2 The legal actions by the Bolivarian Republic of Venezuela in the Civil and Criminal Courts were brought against the shipowner and the Gard Club, not against the 1971 Fund. The 1971 Fund was therefore not a defendant in these actions and, although the Fund intervened in the proceedings brought before the Criminal Court in Cabimas, the actions could not have resulted in a judgement against the Fund. At its October 2005 session the 1971 Fund Administrative Council endorsed the Director's view that the claims by the Bolivarian Republic of Venezuela were time-barred *vis-à-vis* the 1971 Fund since Article 6.1 of the 1971 Fund Convention required that, in order to prevent a claim from becoming time-barred in respect of the 1971 Fund, a legal action had to be brought against the Fund within six years of the date of the incident. No legal action had been brought against the 1971 Fund by the Bolivarian Republic of Venezuela within the six-year period, which expired in February 2003.

5.3 Implementation of the Conventions

The decisions of the Maracaibo Criminal Court of First Instance and Criminal Court of Appeal appear to be based on consideration of the Environmental Criminal Law of Venezuela (Ley Penal del Ambiente) rather than on the provisions of the 1969 CLC and 1971 Fund Convention.

5.4 Award of compensation to ICLAM

ICLAM had incurred costs in connection with the incident and the claim submitted by them in this connection had been settled, paid and withdrawn from court. The payment to ICLAM ordered by the Court was also described as 'court costs relating to the reparation of damages arising from the commission of a crime'. Since ICLAM had not, as far as the 1971 Fund is aware, suffered any costs in connection with the court action here concerned, it would appear that the payment ordered was equivalent to a fine and, as such, was not admissible for compensation under the Conventions.

5.5 Liability of the 1971 Fund to pay compensation

- 5.5.1 The judgement of the Maracaibo Criminal Court of First Instance, as upheld by the Maracaibo Criminal Court of Appeal, was a judgement against the master of the *Nissos Amorgos*, the shipowner and the Gard Club. It was not a judgement against the 1971 Fund, which was only a third party to the proceedings, and the judgement did not order the 1971 Fund to pay compensation.
- 5.5.2 The judgement was subject to appeal to the Supreme Tribunal and, potentially, to the Constitutional Section of the Supreme Tribunal. If, however, the judgement of the Venezuelan courts became enforceable on the shipowner and the Gard Club, the question would arise as to whether any compensation is payable by the 1971 Fund. In this connection, the purpose of the 1971 Fund Convention is, *inter alia*, that the 1971 Fund pays victims of oil pollution compensation of established losses in excess of the amount available under the 1969 CLC. The Venezuelan courts have, however, denied the shipowner the right to limit its liability and ordered the shipowner to pay the full amount of the loss established by the Maracaibo Criminal Court of First Instance. It can be inferred from the judgement that the shipowner and his insurer would subsequently approach the 1971 Fund to obtain reimbursement.

- 5.5.3 The 1971 Fund Administrative Council may, therefore, have to decide, in the future, whether the shipowner or his insurer has the right to seek compensation from the 1971 Fund in excess of the shipowner's limitation amount as calculated under the 1969 CLC.
- 5.5.4 That judgement is not yet final and the master, the shipowner, the Gard Club and the 1971 Fund have appealed to the Supreme Tribunal. As of October 2012 the Supreme Court (Criminal Section) had not yet delivered its judgement.
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