Agenda item: 3	IOPC/MAY14/**3/10**	
Original: ENGLISH	22 April 2014	
1992 Fund Assembly	**92AES18**	
1992 Fund Executive Committee	**92EC61**	
1971 Fund Administrative Council	**71AC31**	●
1992 Fund Working Group 7	**92WG7/3**	

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 *Nissos Amorgos* (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 proceedings before the Venezuelan courts* In June 1997, the Criminal Court of Cabimas held that the shipowner's liability was limited to 5.2 million SDR (Bs3 473 462 786 or 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). The shipowner's insurer provided a bank guarantee to the Court covering the shipowner's limit of liability. The Court accepted the guarantee as establishing a limitation fund under Article V of the 1969 Civil Liability Convention (1969 CLC). 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, in accordance with the 1971 Fund Convention, to intervene in those cases in which the compensation available under the 1969 CLC was insufficient. In their appeal all the defendants (the master, shipowner and Gard Club) requested that the Court recognise the shipowner's right to limit his liability. 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. In *obiter dicta*[1] in the judgement, it is 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. 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.

[1] *Obiter dicta*: A judge's opinion expressed in court or in a written judgement but not essential to the decision and therefore not legally binding as a precedent.

In May 2013 the Supreme Court rejected the appeal and upheld the judgement of the Court of Appeal. The judgement by the Supreme Court is now final.

Settled and paid claims

In April 1997, the Gard Club and the 1971 Fund set up a claims-handling office in Maracaibo. Between 1997 and 2002, admissible claims handled by the office 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.

All those private individuals, companies and State organisations who had suffered a loss as a result of the pollution were compensated for their losses by Gard Club and the 1971 Fund.

Outstanding claims

Three claims remain in Court, two by the Bolivarian Republic of Venezuela for US$60 million, duplicated and time-barred, and one by three fish processors for US$30 million.

Considerations by the 1971 Fund Administrative Council

In July 2003, 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.

At the same session, the 1971 Fund Administrative Council noted that the two claims presented by the Bolivarian Republic of Venezuela were duplications and that the Procuraduria General de la República (Attorney General) had accepted that this duplication existed.

In October 2005, 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 no legal action had been brought under Article 6.1 of the 1971 Fund Convention against the 1971 Fund within the six year period, which expired in February 2003.

In October 2013, the 1971 Fund Administrative Council decided that the 1971 Fund should not reimburse the Club for any payments made as a consequence of the Supreme Court judgement in respect of the claim by the Bolivarian Republic of Venezuela. It also decided that the Director should continue his discussions with the Gard Club relating to the accounting position in respect of joint costs and report to the Administrative Council at its next session, and instructed the Director to discontinue the defence of the 1971 Fund before the courts.

Recent developments: Following an examination of the accounting position in respect of joint costs incurred by the Gard Club and the 1971 Fund in respect of this case, the 1971 Fund has made an offer of US$344 090 to the Gard Club in payment of the 1971 Fund's contribution to the joint costs. The Gard Club has not accepted the offer.

In March 2014 a meeting took place with the International Group of P&I Associations (International Group) and the Gard Club where the Director informed the International Group and the Gard Club of the steps being taken towards the winding up of the 1971 Fund. The *Nissos Amorgos* incident was also discussed during this meeting.

On 19 March 2014, the 1971 Fund was served with a legal action brought by the Gard Club against the 1971 Fund in the High Court in London. In the legal action it is argued that in 1997 the 1971 Fund had entered into an agreement with the Gard Club to reimburse the Club in respect of the Club's liability to the Bolivarian Republic of Venezuela under the judgement of the Venezuelan courts.

Moreover, on 21 March 2014, the 1971 Fund was served with an application by the Gard Club to the High Court in London for a 'freezing injunction' which, if granted, would prevent the 1971 Fund from removing assets up to an amount of US$58 million.

The 1971 Fund is disputing the jurisdiction of the English courts to hear these matters since, pursuant to the Headquarters Agreement between the UK and the 1971 Fund and the implementing UK Statutory Instrument, the 1971 Fund's property and assets are immune from any form of provisional judicial constraint. The Fund also enjoys immunity from jurisdiction and execution within the scope of its official activities.

The Gard Club has also started a legal action against the 1971 Fund before the Maritime Court of First Instance in Caracas, Bolivarian Republic of Venezuela, requesting the Court to declare that the 1971 Fund should either pay the Bolivarian Republic of Venezuela the amount awarded in the judgement rendered by the Supreme Court of Venezuela or reimburse the Gard Club any amount it pays in excess of the shipowner's limit of liability and up to the 1971 Fund limit.

In the legal action the Venezuelan Court is requesting the Director to appear before the Maritime Court in Caracas to answer the Gard Club's action. As at 22 April 2014 this legal action has not been served on the 1971 Fund.

Action to be taken:

1971 Fund Administrative Council

Decide that the Director should not attend the Maritime Court in Caracas to answer the Gard Club's legal action.

1 Summary of the incident

Ship	*Nissos Amorgos*
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)[2][3] (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	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. In March 2014, the Gard Club brought a legal action against the 1971 Fund in the High Court in London. The Gard Club has also submitted an application for a 'freezing injunction' which, if granted, would prevent the 1971 Fund from removing assets up to US$58 million. The Gard Club also brought a legal action against the 1971 Fund before the Maritime Court of First Instance in Caracas, Bolivarian Republic of Venezuela. Three claims remain in court, two by the Bolivarian Republic of Venezuela for US$60 million, which are duplicated and time-barred, and one by three fish processors for US$30 million.

2 Introduction

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

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.

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[2] 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).

[3] 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.

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. The judgement by the Supreme Court is now final.

4 <u>Claims for compensation</u>

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$)
Petróleos 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		**288 476 394 (£42 000)**	**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**		

4.4 Claims by the Bolivarian Republic of Venezuela

4.4.1 The two claims presented by the Bolivarian Republic of Venezuela are duplications and the Procuraduría General de la República (Attorney General) accepted that this duplication existed.

Admissibility

4.4.2 The claim by the Bolivarian Republic of Venezuela 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 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.

4.4.4 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 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.

4.4.5 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.

4.4.6 The 1971 Fund argued 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, and that the Venezuelan State itself did not have an admissible claim since it had not suffered any loss.

Time bar

4.4.7 Under Article 6.1 of the 1971 Fund Convention, rights to compensation become time-barred unless an action has 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. No action was brought against the 1971 Fund within six years and therefore the claim by the Bolivarian Republic of Venezuela is time-barred.

4.4.8 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 in respect of 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.

5 Considerations by the 1971 Fund Administrative Council at its October 2013 session

5.1 Statement by the International Group of P&I Associations

The International Group of P&I Associations made the following statement at the October 2013 session of the 1971 Fund Administrative Council:

> This delegation has observations to make in connection with the *Nissos Amorgos* incident. We should be grateful if these could be recorded in full in the Record of Decisions and we have provided a copy to the Secretariat. Document IOPC/OCT13/3/3 requests the Administrative Council to decide whether the 1971 Fund should reimburse the Gard Club any amount paid as a consequence of a judgement by the Supreme Court of Venezuela. This request is made in the context of the recent judgement of the Supreme Court dismissing the appeals of the Club and the Fund and upholding a decision of the Maracaibo Court of Criminal Appeal.
>
> It is not the intention of this delegation to pre-empt the discussion which will take place tomorrow concerning the winding up of the 1971 Fund but inevitably some of the issues overlap.
>
> The International Group wrote to the Director and the Chairman of this Administrative Council at the end of last week setting out the International Group's position on the winding up of the 1971 Fund, with specific regard to the *Nissos Amorgos* case. It was hoped that this letter would allow this intervention to be as short as possible whilst ensuring those asked to decide on this matter had the detail of the Group's position in a document to which they could refer. Copies of that letter are available here today.
>
> The first consequence of the judgement of the Supreme Court is that steps are being taken to draw down on the limitation fund guarantee. When giving judgement, the Maracaibo Criminal Appeal Court stated that this bank guarantee provided by the Club did not constitute a limitation fund. It stated that it was simple security for the claim by the Venezuelan State, and that the judgement could therefore be enforced against it. Copies are available in this room today, in Spanish and in English, of the text of the guarantee, the petition by which it was offered to the Cabimas Court, and the order by which that Court accepted the guarantee and petition when releasing the ship, if delegates wish to view them. So far as the Club is concerned, the Court has wrongly appropriated a properly constituted limitation fund in favour of one party alone, to the exclusion of other parties with claims against it. Execution proceedings are now in progress to satisfy the judgement. At present these include steps to draw down from the bank guarantee, and it appears inevitable that this will be done without any account being taken of the Club having already paid claims up to the limitation amount, those claims having been paid by the Club according to the practice agreed between the Club and the Fund and outlined in 5.1 of the Note of the Secretariat. As a result, it is likely the Club will have to bear at least approximately twice the limitation amount and will therefore be faced with having overpaid over the CLC limit through no fault of the Club. This is exactly one of the scenarios that this delegation has been explaining to States in the context of the interim payments debate in the 1992 Fund Working Group that has been considering this delegation's concerns in that regard.
>
> It is the view of this delegation that, irrespective of the lack of merits of the claim (upon which both Club and Fund are agreed), execution of the Supreme Court judgement will result in the Gard Club having paid at least twice the limitation sum. A substantial proportion of that amount is attributable not to the judgement of the Supreme Court, but rather to the Club paying claims against the shipowner, the Club and the Fund which even the Fund considered were admissible and with its agreement.
>
> Delegates are therefore strongly urged against taking a decision, which will undermine the existing practice of the clubs to advance money prior to the distribution of the limitation fund in order to facilitate early payment of claims. It is submitted that the ruling in

Venezuela can in any event have no bearing on the accounting position between the Club and the Fund since there never has been any dispute between the Club and the Fund that the owner is entitled to limit liability.

Another possible consequence of the judgement of the Supreme Court is that the Court may look to the owner and the Club to satisfy the remainder of the judgement. If this were to happen the Club would seek reimbursement from the Fund for the sum in excess of the shipowner's limitation amount. The judgement of the Venezuelan Criminal Court in 2010, which was upheld by both the Criminal Court of Appeal and the Supreme Court, stated that the Fund is legally liable to pay. As is noted in the IOPC Funds 2012 Report of the Incident the Venezuelan courts appear to have envisaged that the Fund would reimburse the Club and it is the firm view of this delegation that the Fund does have an obligation to do so. It may be that the Fund disagrees with the existence of that obligation but its existence or otherwise is a matter which should be determined by the competent court should that prove necessary. Should the Administrative Council take the decision now before it, followed by a decision to commence the winding up of the 1971 Fund it will pre-empt that proper resolution and render it academic.

5.2 Decisions by the 1971 Fund Administrative Council

5.2.1 The 1971 Fund Administrative Council, whilst expressing sympathy for the shipowner and the Club in this case, decided that the 1971 Fund should not reimburse the Club any payments made as a consequence of the Supreme Court judgement (Criminal section) in respect of the claim by the Bolivarian Republic of Venezuela.

5.2.2 The 1971 Fund Administrative Council also decided:

- that the Director should continue his discussions with the Gard Club relating to the accounting position in respect of joint costs and report to the Administrative Council at its next session;
- that the claim submitted by the Bolivarian Republic of Venezuela before the Supreme Court (Political administrative section) in respect of the *Nissos Amorgos* incident was time-barred *vis-à-vis* the 1971 Fund and not admissible for compensation, and instructed the Director not to pay any compensation or reimbursement in respect of this claim and to discontinue the defence of the 1971 Fund before the courts; and
- that the claim submitted by three fish processors before the Supreme Court (Political administrative section) for loss of income in respect of the *Nissos Amorgos* incident had not been proven, and instructed the Director not to pay any compensation in respect of this claim and to discontinue the defence of the 1971 Fund before the courts.

6 Recent developments

6.1 Accounting position in respect of joint costs

The 1971 Fund has made an offer to the Gard Club in settlement of the joint costs for a sum of US$344 090. The Gard Club has not accepted the offer and has stated that since claims are still pending the percentages in terms of the distribution of costs could still change.

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

In March 2014 a meeting took place between the International Group of P&I Associations (International Group) and the Gard Club with the Director. The meeting was also attended by the Chairman of the 1971 Fund Administrative Council, the Chairman of the 1992 Fund Assembly and Mr Alfred Popp, former Chairman of the Consultation Group on the winding up of the 1971 Fund. The purpose of the meeting was to inform the International Group of the steps taken towards the winding up of the 1971 Fund and to discuss the *Nissos Amorgos* incident. At that meeting the Gard Club informed the 1971 Fund that the Club would bring legal actions against the 1971 Fund both in

London and in Venezuela. The International Group expressed disappointment since, in its view, the 1971 Fund should not pick and choose which judgements it considered to be reasonable and had chosen to avoid its obligations under the international regime by using legalistic excuses not to pay a judgement. This posed a real threat to the future of the compensation regime.

6.3 Claim by Gard Club against the 1971 Fund

Legal action in the United Kingdom

6.3.1 In March 2014, the Gard Club brought a legal action at the High Court in London against the 1971 Fund. In its action the Gard Club maintains that in 1997 the Club and the Fund had entered into a binding agreement, partly orally, partly in writing and partly by conduct, to apply practices developed pursuant to the Memorandum of Understanding (MoU) signed in 1980 between the 1971 Fund and the International Group of P&I Clubs to the oil pollution claims arising out of the *Nissos Amorgos* incident. In its action the Club requires the Fund to abide by a final reconciliation pursuant to the MoU upon the Club's payment of the amounts awarded to the Bolivarian Republic of Venezuela in the judgement of the Maracaibo Criminal Court of First Instance dated February 2010, confirmed by the Court of Appeal and Supreme Court, so as to ensure that the total compensation paid by the Club as a result of the incident does not exceed the shipowner/Club's liability limit under the 1969 CLC. The Club argues that the Fund is liable under the mentioned agreement to reimburse the Club in respect of the Club's liability to the Bolivarian Republic of Venezuela under the judgement of the Venezuelan courts.

6.3.2 The Club argues that the decision by the 1971 Fund Administrative Council not to reimburse the Club the amount of any payment made by it as a consequence of the judgement of the Supreme Court, will result in the Club paying compensation arising out of the incident in excess of the CLC limit contrary to the practice and procedure and in breach of the mentioned agreement. The Club requests the Court to declare that:

- in 1997, the 1971 Fund entered into a valid and binding agreement with the Gard Club;
- the 1971 Fund is required to abide by a final reconciliation pursuant to the agreement after the Bolivarian Republic of Venezuela's claim has been satisfied; and
- the 1971 Fund is liable to indemnify the Club in respect of the Bolivarian Republic of Venezuela's claim.

6.3.3 The Gard Club has also made an application to the High Court in London seeking a 'freezing injunction'. The injunction, if granted, would prevent the 1971 Fund from removing from the jurisdiction any assets belonging to the 1971 Fund up to US$58 million. The injunction is intended to ensure that funds remain within the jurisdiction to satisfy the Gard Club's claim in case it is successful.

Legal action in Venezuela

6.3.4 In March 2014, the Gard Club also initiated a legal action against the 1971 Fund before the Maritime Court of First Instance in Caracas. In its action the Club requests the Court to decide that the 1971 Fund is liable to pay to the Bolivarian Republic of Venezuela the amount awarded by the Supreme Court or, in case that the Bolivarian Republic of Venezuela was paid by the Gard Club, that the 1971 Fund should reimburse the Club any amount which exceeds the shipowner's limitation of liability up to the Fund's limit.

6.3.5 In its action, the Gard Club states that:

- the Criminal Court judgement was not rendered against the 1971 Fund, not because the Court considered that the 1971 Fund was not liable, but because the Fund was not a defendant but had instead been notified in accordance with Article 7.6 of the 1971 Fund Convention;
- the 1971 Fund is liable, as the judgement by the Criminal Court mentioned, in *obiter dicta*, that under Articles 2 and 4 of the 1971 Fund Convention, the Fund should intervene in cases where claims for pollution damage exceed the shipowner's liability limit;
- the Criminal Court judgement did not overturn the judgement of June 1997 that authorised the constitution of the shipowner's limitation fund and did not decide that the owner had no right to limit his liability;
- the relationship between the Club and the 1971 Fund is such that a judgement affecting the Club produces collateral effects which cannot be disputed in a new claim between the Club and the Fund;
- the 1971 Fund is, under Article 44 of the 1971 Fund Convention, obliged to meet all its obligations before it is wound up; and
- if the Fund does not assume its part of liability towards the Bolivarian Republic of Venezuela in accordance with the Criminal Court judgement, there is the risk that the judgement will not be executable because the owner has no assets, having complied with its obligations by paying the limitation fund. It is stated that the Club is entitled to limit its liability under Article VII.8 of the 1969 CLC irrespective of the actual fault or privity of the shipowner.

6.3.6 The Court has issued a request for the Director to attend the Maritime Court in Caracas within a period of between 20 days and five months to answer the legal action. It is expected that the legal action will be served on the 1971 Fund through diplomatic channels. As at 22 April 2014 the legal action has not been served on the 1971 Fund.

Contacts with the UK Government (Foreign and Commonwealth Office (FCO) and Department for Transport)

6.3.7 Article 5 of the Headquarters Agreements between the United Kingdom Government and the 1971 Fund provides:

Article 5

Immunity

(1) Within the scope of its official activities the Fund shall have immunity from jurisdiction and execution except:

(a) to the extent that the Fund waives such immunity from jurisdiction or immunity from execution in a particular case;

(b) in respect of actions brought against the Fund in accordance with the provisions of the Convention;

(c) in respect of any contract for the supply of goods or services, and any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation;

(d) in respect of a civil action by a third party for damage arising from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Fund or in respect of a motor traffic offence involving such a vehicle;

(e) in respect of civil action relating to death or personal injury caused by an act or omission in the United Kingdom;

(f) in the event of the attachment, pursuant to the final order of court of law, of the salaries, wages or other emoluments owed by the Fund to a staff member of the Fund;

(g) in respect of the enforcement of an arbitration award made under Article 23 of this Agreement; and

(h) in respect of a counter-claim directly connected with proceedings initiated by the Fund.

(2) The Fund's property and assets wherever situated shall be immune from any form of administrative or provisional judicial constraint, such as requisition, confiscation, expropriation or attachment, except insofar as may be temporarily necessary in connection with the prevention of, and investigation into, accidents involving motor vehicles belonging to, or operated on behalf of, the Fund.

6.3.8 The text of the Headquarters Agreement between the United Kingdom Government and the 1971 Fund is attached at Annex II.

6.3.9 In March 2014, the Director met with representatives of the FCO and the Department for Transport of the UK Government to inform them of the legal action brought by the Gard Club at the High Court in London and of the application to the Court seeking a 'freezing injunction'. During the meeting the Director sought the assistance of the FCO in order to assert the immunity of the 1971 Fund from the jurisdiction of the High Court in London.

6.3.10 The Director has also written to the FCO to request its assistance so that the High Court in London is aware that under the Headquarters Agreement the 1971 Fund, within the scope of its official activities, has immunity from jurisdiction and execution.

7 Director's considerations

7.1 The Director sympathises with the situation in which the Gard Club finds itself. Whereas in 1997 the Criminal Court in Cabimas held that the shipowner's liability was limited to some US$7.3 million, 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.

7.2 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.

7.3 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.

7.4 In addition the Director recalls that in 2003, the 1971 Fund Administrative Council decided that the claims by the Bolivarian Republic of Venezuela did not relate to pollution damage and that they were not admissible. He also recalls that in 2005, the Administrative Council also decided that the claims by the Bolivarian Republic of Venezuela were time-barred *vis-à-vis* the 1971 Fund. Furthermore, the Director notes that in October 2013, the Administrative Council decided that the 1971 Fund should not reimburse the Gard Club any amount paid as a consequence of the judgement by the Supreme Court of Venezuela.

7.5 In the Director's view, the legal actions by the Gard Club in London and in Venezuela are unfounded. There is no agreement, orally, in writing or by conduct, between the Gard Club and the 1971 Fund under which the Fund undertook to reimburse the Club any monies paid in respect of the claim by the Bolivarian Republic of Venezuela.

7.6 There is an agreement between the Gard Club and the 1971 Fund to make interim payments in respect of the *Nissos Amorgos* incident. This agreement has been applied to all the claims which were settled and paid by the Gard Club and the 1971 Fund. Under this agreement the Gard Club and the 1971 Fund have paid compensation for some US$24.4 million. All admissible losses arising from the *Nissos Amorgos* incident have therefore been compensated by the Gard Club and the 1971 Fund.

7.7 With respect to the issue of interim payments, the Director recalls that in late 2011 he and the International Group of P&I Associations requested an opinion from Mr Måns Jacobsson and the late Mr Richard Shaw on the legal basis of the practice of interim payments followed by the P&I Clubs and the IOPC Funds. The opinion was submitted to the 1992 Fund sixth intersessional Working Group at its April 2012 session. The text of the legal opinion on interim payments is attached at Annex III.

7.8 The Director notes in particular section 5 of the opinion which deals with the practice followed by the P&I Clubs and the IOPC Funds in making interim payments. Paragraph 5.7 states:

> The decisions as to whether claims are admissible and on the admissible quantum are taken by both the Fund and the shipowner/P&I Club. No payments are therefore made before both compensatory parties are in agreement on these points.

7.9 In the case of the *Nissos Amorgos* incident, all interim payments made by the Club and Fund were approved by both parties. The claim by the Bolivarian Republic of Venezuela could never have been approved by the 1971 Fund under the interim payment arrangements since it is not admissible for compensation and is time-barred against the 1971 Fund.

7.10 In the Director's view, the agreement to fund interim payments cannot be extended to apply to claims which are not admissible and time-barred against the 1971 Fund. The Administrative Council has decided that the claim is not admissible and that it is time-barred *vis-à-vis* the 1971 Fund. It is therefore not possible for the Director to agree to pay a claim in breach of the instructions received by the 1971 Fund Administrative Council.

7.11 The Director notes that the Headquarters Agreement between the UK Government and the 1971 Fund provides that the 1971 Fund within the scope of its official activities has immunity from jurisdiction and execution and that the 1971 Fund's assets shall be immune from any form of provisional judicial constraint. The Director has written to the FCO requesting its assistance before the High Court and is awaiting a response.

7.12 The Director has been advised by the 1971 Fund's lawyers in the UK, as well as by Dr Rosalie Balkin and Professor Dan Sarooshi, that the 1971 Fund can rely on the immunity defence provided in the Headquarters Agreement. However, it is of course not known whether an English court will accept the 1971 Fund's plea of immunity and declare that it has no jurisdiction to hear the Gard Club's claim or to grant the Gard Club's application for a 'freezing injunction'. The 1971 Fund has never pleaded its immunity before the courts in the United Kingdom and therefore there is no precedent by which the outcome of the challenge by the 1971 Fund can be predicted.

7.13 The Director therefore intends to contest strongly the action brought by the Gard Club before the High Court against the 1971 Fund since he has been advised that the 1971 Fund has immunity. In addition, in the Director's view, the claim is unfounded and has no legal basis. The Director has submitted an application before the High Court in London requesting the Court to declare that it has no jurisdiction in respect of the Gard Club's claim and application for a 'freezing injunction'.

7.14 In respect of the legal action by the Gard Club against the 1971 Fund in Venezuela, as instructed by the 1971 Fund Administrative Council in October 2013, the 1971 Fund has discontinued its defence before the Venezuelan courts. Although the legal action in Venezuela has not been served on the 1971 Fund, the Director is aware that the Maritime Court in Caracas has requested the Director to attend the Court in Caracas to answer the Gard Club's action. In accordance with the instructions to discontinue the defence of the 1971 Fund before the Venezuelan Courts, the Director considers that it would serve no practical purpose for him to appear before the Venezuelan courts and recommends that the Administrative Council instruct him not to attend.

8 Action to be taken

1971 Fund Administrative Council

The 1971 Fund Administrative Council is invited:

(a) to take note of the information contained in this document;

(b) to decide that the Director should not attend the Maritime Court in Caracas to answer the Gard Club's action; and

(c) to give the Director such instructions in respect of the handling of this incident as it may deem appropriate.

* * *

ANNEX I

BACKGROUND INFORMATION – NISSOS AMORGOS

1 Incident

On 28 February 1997, 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. 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

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 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		**288 476 394**	**24 397 612**

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**		

3.2.2 Detailed information regarding the three pending claims is given in the criminal and civil proceedings sections below.

4 Criminal proceedings

4.1 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.

4.2 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 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'[4].

4.4 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.

4.5 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] 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.

4.6 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.

4.7 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.

4.8 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.

4.9 Claim by the Bolivarian Republic of Venezuela in the criminal proceedings

4.9.1 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.

4.9.2 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).

4.9.3 The 1971 Fund was notified of the criminal action and submitted pleadings in the proceedings. The progress of this action is detailed below.

4.9.4 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.

4.9.5 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.

Judgement by the Criminal Court of Appeal in February 2008

4.9.6 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

4.9.7 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.

4.9.8 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.

4.9.9 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 CLC and 1971 Fund Convention and the alleged damage was not proved.

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

4.9.10 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.

4.9.11 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.

4.9.12 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

4.9.13 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.

4.9.14 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

Shipowner's limitation of liability

4.9.15 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.

4.9.16 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

4.9.17 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.

4.9.18 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.

Implementation of the Conventions

4.9.19 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.

4.9.20 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)

4.9.21 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.

4.9.22 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. The 1971 Fund appealed on the grounds that ICLAM had already been compensated.

4.9.23 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

4.9.24 The 1971 Fund 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.

4.9.25 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 arose from the establishment of criminal liability as a result of the committing of a crime.

4.9.26 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

4.9.27 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.

4.9.28 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.

Judgement by the Supreme Court (Criminal section) in May 2013

4.9.29 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, dismissing the appeals by the master, the shipowner, the Gard Club and the 1971 Fund. This judgement is now final.

5 Civil proceedings

5.1 Claim by the Republic of Venezuela in the civil proceedings

5.1.1 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 has not been notified of this civil action.

5.1.2 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 Procuraduria General de la Republica (Attorney General) admitted this duplication in a note submitted to the 1971 Fund's Venezuelan lawyers in August 2001.

Considerations by the 1971 Fund Administrative Council on the claims by the Republic of Venezuela

5.1.3 At the 1971 Fund Administrative Council's eighth session held in June 2001, the Venezuelan delegation stated that the Bolivarian Republic of Venezuela had decided to withdraw its claim 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 at October 2013, this claim had not been withdrawn.

5.1.4 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.

5.1.5 The 1971 Fund Administrative Council noted that the two claims presented by the Bolivarian Republic of Venezuela were duplications and that the Procuraduria General de la Republica (Attorney General) had accepted that this duplication existed, as stated above.

5.1.6 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 in respect of 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.

5.2 Claims by fish processors

5.2.1 Three fish processors presented claims totalling US$30 million in the Supreme Court against the 1971 Fund and the Instituto Nacional de Canalizaciones. 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.

5.2.2 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.

5.2.3 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 at October 2013 there had been no developments in respect of these claims.

5.2.4 At its October 2013 session the 1971 Fund Administrative Council decided that since the loss of income had not been proven the 1971 Fund should not pay compensation in respect of this claim.

6 Other issues

6.1 Meetings with the Gard Club and the International Group of P&I Associations in 2013

6.1.1 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.

6.1.2 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.

6.1.3 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.

7 Considerations

7.1 Considerations by the 1971 Fund Administrative Council in October 2013

Statement by the International Group of P&I Associations

7.1.1 At the October 2013 session of the 1971 Fund Administrative Council the International Group of P&I Associations (International Group) stated that the first consequence of the judgement of the Supreme Court was that steps were being taken to draw down on the limitation fund guarantee and that in its judgement, the Maracaibo Criminal Appeal Court had stated that the bank guarantee provided by the

Club did not constitute a limitation fund but a simple security for the claim by the Venezuelan State, and that the judgement could therefore be enforced against it. In the view of the Gard Club the Court had wrongly appropriated a properly constituted limitation fund in favour of one party alone, to the exclusion of other parties with claims against it. The International Group stated that execution proceedings were in progress to satisfy the judgement and it appeared that account would not be taken of the Club having already paid claims up to the limitation amount, those claims having been paid by the Club according to the practice agreed between the Club and the Fund and that as a result, it was likely the Club would have to bear at least twice the limitation amount and would therefore be faced with having paid over the CLC limit through no fault of the Club. It was also stated that this was exactly one of the scenarios that this delegation had been explaining to States in the context of the interim payments debate in the 1992 Fund sixth intersessional Working Group.

7.1.2 The International Group also stated that in its view the ruling in Venezuela could have no bearing on the accounting position between the Club and the Fund since there had never been any dispute between the Club and the Fund that the shipowner is entitled to limit liability.

7.1.3 The International Group also stated that another possible consequence of the judgement of the Supreme Court was that the Court might look to the shipowner and the Club to satisfy the remainder of the judgement and that if this were to happen the Club would seek reimbursement from the Fund for the sum in excess of the shipowner's limitation amount. Reference was made to the fact that the judgement of the Venezuelan Criminal Court in 2010, upheld by both the Criminal Court of Appeal and the Supreme Court, had stated that the Fund was legally liable to pay.

Director's considerations

7.1.4 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.

7.1.5 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.

7.1.6 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.

1971 Fund Administrative Council decisions

7.1.7 The 1971 Fund Administrative Council, whilst expressing sympathy for the shipowner and the Club in this case, decided that the 1971 Fund should not reimburse the Club of any payments made as a consequence of the Supreme Court judgement (Criminal section) in respect of the claim by the Bolivarian Republic of Venezuela.

7.1.8 The 1971 Fund Administrative Council also decided:

(a) with respect to the *Nissos Amorgos* incident, to continue discussions with the Gard Club relating to the accounting position in respect of joint costs and to report to the Administrative Council at its next session;

(b) that the 1971 Fund had no legal obligation to reimburse the Gard Club any amounts paid as a consequence of the judgement by the Supreme Court of Venezuela, as already decided by the 1971 Fund Administrative Council in respect of the *Nissos Amorgos* incident;

(c) that the claim submitted by the Bolivarian Republic of Venezuela before the Supreme Court (Political administrative section) in respect of the *Nissos Amorgos* incident was time-barred in respect of the 1971 Fund and not admissible for compensation, and instructed the Director not to pay any compensation or reimbursement in respect of this claim and to discontinue the defence of the 1971 Fund before the courts; and

(d) that the claim submitted by three fish processors before the Supreme Court (Political administrative section) for loss of income in respect of the *Nissos Amorgos* incident had not been proven, and instructed the Director not to pay any compensation in respect of this claim and to discontinue the defence of the 1971 Fund before the courts.

8 Recent developments

In accordance with the decisions taken by the 1971 Fund Administrative Council at the October 2013 session, the 1971 Fund has discontinued its defence in the legal proceedings in relation with this case in Venezuela.

* * *

ANNEX II

Text as from 28 November 1996

Headquarters Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Oil Pollution Compensation Fund 1971

The Government of the United Kingdom of Great Britain and Northern Ireland and the International Oil Pollution Compensation Fund;

Desiring to define the status, privileges and immunities of the Fund and persons connected with it;

Have agreed as follows:

Article 1

Use of terms

For the purpose of this Agreement:

(a) "Convention" means the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage signed at Brussels on 18 December 1971[1];

(b) "Fund" means the International Oil Pollution Compensation Fund;

(c) "Government" means the Government of the United Kingdom of Great Britain and Northern Ireland;

(d) "representatives" means representatives of Contracting States to the Convention, and in each case means heads of delegations, alternates and advisers;

(e) "premises of the Fund" means the buildings or parts of buildings and the land ancillary thereto used for the official purposes of the Fund;

(f) "official activities of the Fund" includes its administrative activities and other activities undertaken pursuant to the Convention; and

(g) "staff member" means the Director and all persons appointed or recruited for full-time employment with the Fund and subject to its staff regulations, other than persons in the domestic service of the Fund and persons recruited locally and assigned to hourly rates of pay.

Article 2

Interpretation

This Agreement shall be interpreted in the light of the primary objective of enabling the Fund at its Headquarters in the United Kingdom fully and efficiently to discharge its responsibilities and fulfill its purposes and functions.

Article 3

Legal personality

The Fund shall have legal personality. It shall in particular have the capacity to contract, to acquire and dispose of movable and immovable property and to be a party in legal proceedings.

[1] Treaty Series N° 95 (1978) Cmnd. 7383

Article 4

Premises

(1) The Government shall take all appropriate steps to protect the premises of the Fund against any intrusion or damage and to prevent any disturbance of the peace of the Fund or impairment of its dignity.

(2) The Government undertake to assist the Fund in the acquisition of premises by gift, purchase or lease or in the hire of premises at such time as they may be needed.

(3) The Government shall do their utmost to ensure that the premises shall be supplied with necessary public services including electricity, water, sewerage, gas, post, telephone, telegraph, drainage, collection of refuse and fire protection and that such public services be supplied on reasonable terms. In case of interruption or threatened interruption of any such services, the Government shall take all reasonable steps to ensure that the Fund is not prejudiced.

Article 5

Immunity

(1) Within the scope of its official activities the Fund shall have immunity from jurisdiction and execution except:

(a) to the extent that the Fund waives such immunity from jurisdiction or immunity from execution in a particular case;

(b) in respect of actions brought against the Fund in accordance with the provisions of the Convention;

(c) in respect of any contract for the supply of goods or services, and any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation;

(d) in respect of a civil action by a third party for damage arising from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Fund or in respect of a motor traffic offence involving such a vehicle;

(e) in respect of civil action relating to death or personal injury caused by an act or omission in the United Kingdom;

(f) in the event of the attachment, pursuant to the final order of court of law, of the salaries, wages or other emoluments owed by the Fund to a staff member of the Fund;

(g) in respect of the enforcement of an arbitration award made under Article 23 of this Agreement; and

(h) in respect of a counter-claim directly connected with proceedings initiated by the Fund.

(2) The Fund's property and assets wherever situated shall be immune from any form of administrative or provisional judicial constraint, such as requisition, confiscation, expropriation or attachment, except insofar as may be temporarily necessary in connection with the prevention of, and investigation into, accidents involving motor vehicles belonging to, or operated on behalf of, the Fund.

Article 6

Archives

The Archives of the Fund shall be inviolable. The term archives includes all records, correspondence, documents, manuscripts, photographs, films and recordings belonging to or held by the Fund.

Article 7

Flag and emblem

The Fund shall be entitled to display its flag and emblem on the premises and means of transport of the Fund and of the Director.

Article 8

Exemption from taxes

(1) Within the scope of its official activities, the Fund, its property and assets, and its income including contributions made to the Fund under the Convention, shall be exempt from all direct taxes including income tax, capital gains tax and corporation tax. The Fund shall be granted relief from municipal rates levied on its official premises with the exception of the proportion which, as in the case of diplomatic missions, merely constitutes payment for specific services rendered. Municipal rates shall in the first instance be paid by the Government and the proportion which represents payments for specific services rendered shall be recovered by them from the Fund.

(2) The Fund shall be accorded a refund of car tax and value added tax paid on the purchase of new motor cars of United Kingdom manufacture and, where it is readily identifiable, value added tax paid on the supply of goods or services of substantial value, necessary for the official activities of the Fund. In this connection it is envisaged that claims for refund will be made only in respect of goods or services supplied on a recurring basis or involving considerable quantities of goods or services or involving considerable expenditure. No refund shall be made in respect of any claim for goods or services where the value of the goods or services does not amount in the aggregate to £100 sterling or more.

Article 9

Exemption from customs and excise duties

(1) Goods whose import or export by or on behalf of the Fund is necessary for the exercise of its official activities shall be exempt from all customs and excise duties and other charges (except mere payments for services) and from all prohibitions and restrictions on import or export.

(2) The Fund shall be accorded a refund of the customs and excise duties and value added tax paid on the importation of hydrocarbon oils purchased by it and necessary for the exercise of its official activities.

Article 10

Exemption from taxes and duties

Exemption in respect of taxes or duties under Article 8 or Article 9 of this Agreement shall not be granted in respect of goods or services which may be purchased or imported for the personal benefit of a staff member of the Fund.

Article 11

Re-sale

Goods which have been acquired under Article 8 or imported under Article 9 of this Agreement shall not be given away, sold, hired out or otherwise disposed of unless the appropriate authorities have been notified in advance and any necessary duties and taxes paid.

Article 12

Funds, currency and securities

Without prejudice to Article 34(7) of the Convention, the Fund may receive, acquire, hold and dispose of freely any kind of funds, currencies or securities.

Article 13

Communications

(1) The Government shall permit and protect unrestricted communication on the part of the Fund for all official purposes. The Fund may employ all appropriate means of communication, including messages in code or cypher. However, the Fund may install and use a wireless transmitter only with the consent of the appropriate authorities. The Director shall permit the inspection of wireless transmitting apparatus at all reasonable times by the appropriate authorities.

(2) No censorship shall be applied to official communications of the Fund by whatever means of communication.

Article 14

Circulation of publications

The circulation of publications and other information material sent by or to the Fund within the scope of its official activities shall not be restricted in any way.

Article 15

Representatives

(1) Representatives shall enjoy, while exercising their functions and in the course of their journeys to and from the place of meeting, the following privileges and immunities:

(a) immunity from arrest and detention and from seizure of their personal luggage, except when found committing, attempting to commit, or just having committed an offence;

(b) immunity from jurisdiction (even after the termination of their mission) in respect of acts, including words written or spoken, done by them in the exercise of their functions; this immunity shall not however apply in the case of a motor traffic offence committed by a representative nor in the case of damage caused by a motor vehicle belonging to or driven by him;

(c) inviolability for all their official papers and documents;

(d) exemption for themselves and their spouses from all measures restricting entry, from charges for visas and from registration formalities for the purpose of immigration control;

(e) unless they are residents of the United Kingdom for the purpose of exchange control, the same exchange control treatment as is accorded to diplomatic agents; and

(f) the same facilities as regards their personal luggage as are accorded to officials of foreign Governments on temporary official missions.

(2) The provisions of the preceding paragraph shall be applicable irrespective of the relations existing between the Governments which the persons referred to represent and the Government of the United Kingdom and are without prejudice to any special immunities to which such persons may be entitled.

(3) The privileges and immunities described in paragraph (1) of this Article shall not be accorded to any representative of the Government or to any citizen of the United Kingdom and Colonies.

(4) Privileges and immunities are accorded to representatives in order to ensure complete independence in the exercise of their functions in connection with the Fund. It is expected that a Member State will waive the immunity of its representative where the immunity would impede the course of justice and where it can be waived without prejudicing the purposes for which it was accorded.

(5) In order to assist the Government to implement the provisions of this Article, the Fund shall as far as possible inform the Government of the names of representatives in advance of their arrival in the United Kingdom.

Article 16

Director

In addition to the privileges and immunities provided for in Article 17 of this Agreement, the Director, unless he is a citizen of the United Kingdom and Colonies or a permanent resident of the United Kingdom, shall enjoy the privileges and immunities (other than priority for telecommunications) to which a diplomatic agent in the United Kingdom is entitled.

Article 17

Staff members

Staff members of the Fund:

(a) shall have (even after they have left the service of the Fund) immunity from jurisdiction in respect of acts done by them in the exercise of their functions, including words written or spoken; this immunity shall not however apply in the case of a motor traffic offence committed by a staff member nor in the case of damage caused by a motor vehicle belonging to or driven by him;

(b) shall, together with members of their families forming part of their households, be exempt from any obligations in respect of military service, provided that this exemption shall not apply to any person who is a citizen of the United Kingdom and Colonies;

(c) shall enjoy inviolability for all their official papers and documents;

(d) shall enjoy exemption from all measures restricting immigration, from charges for visas and from registration formalities for the purpose of immigration control; and members of their families forming part of their households shall enjoy the same facilities;

(e) Unless they are citizens of the United Kingdom and Colonies or permanently resident in the United Kingdom shall be accorded the treatment in matters of exchange control which is accorded to a diplomatic agent in the United Kingdom: and

(f) unless they are citizens of the United Kingdom and Colonies or permanently resident in the United Kingdom, shall, at the time of the first taking up of their post in the United Kingdom, be exempt from customs and excise duties and other such charges (except mere payments for services) in respect of import of their furniture and personal effects (including one motor car each) in their ownership or possession or already ordered by them and intended for their personal use or for their establishment. Such goods shall normally be imported within three months of their first entry into the United Kingdom, but in exceptional circumstances an extension of this period may be granted. The privilege shall be subject to the conditions governing the disposal of goods imported into the United Kingdom free of duty and to the general restrictions applied in the United Kingdom to all imports.

Article 18

Experts

In the exercise of their functions in connection with the Fund or in carrying out missions for the Fund, experts, other than staff members, shall enjoy the following to the extent necessary for the carrying out of their functions, including during journeys made in carrying out their functions and in the course of such missions:

(a) even after they have ceased to be employed by the Fund immunity from jurisdiction in respect of acts done by them in the exercise of their functions, including words written or spoken, except in the case of a motor traffic offence committed by an expert or in the case of damage caused by a motor vehicle belonging to or driven by him;

(b) inviolability for all their official papers and documents; and

(c) unless they are citizens of the United Kingdom and Colonies or permanently resident in the United Kingdom, the treatment in matters of exchange control which is accorded to a diplomatic agent in the United Kingdom.

Article 19

Income tax

(1) From the date on which a tax is imposed by the Fund for its benefit on salaries and emoluments paid by the Fund to staff members, such salaries and emoluments shall be exempt from United Kingdom income tax; the Government shall retain the right to take these salaries and emoluments into account for the purpose of assessing the amount of taxation to be applied to income from other sources.

(2) In the event that the Fund operates a system for the payment of pensions and annuities to its former staff members, the provisions of paragraph (1) of this Article shall not apply to such pensions and annuities.

Article 20

Social security

When the Fund has established its own social security scheme or has joined that of another international organization under conditions laid down in the staff regulations of the Fund, those staff members of the Fund who are not citizens of the United Kingdom and Colonies or permanently resident in the United Kingdom, shall with respect to services rendered for the Fund be exempt from the provisions of any social security scheme established by the law of the United Kingdom.

Article 21

Object of privileges and immunities

Waiver

(1) The privileges and immunities accorded in this Agreement to staff members and experts are provided solely to ensure in all circumstances the unimpeded functioning of the Fund and the complete independence of the persons to whom they are accorded.

(2) The Director has the right and the duty to waive such immunities (other than his own) when he considers that such immunities are preventing the carrying out of justice and when it is possible to dispense with them without prejudicing the interests of the Fund. In respect of the Director, the Assembly or the Executive Committee may waive his immunities.

Article 22

Co-operation

The Fund shall co-operate at all times with the appropriate authorities in order to prevent any abuse of the privileges and immunities and facilities provided for in this Agreement. The right of the Government to take all precautionary measures in the interests of its security shall not be prejudiced by any provision in this Agreement.

Article 23

Arbitration

The Fund shall, at the instance of the Government, submit to an arbitration tribunal any dispute, other than one between the Fund and a staff member:

(a) arising out of damage caused by the Fund or involving any other non-contractual responsibility of the Fund, in respect of which the Fund can claim immunity from jurisdiction under this Agreement and that immunity has not been waived; or

(b) involving a staff member or expert of the Fund, in which the person concerned can claim immunity from jurisdiction under this Agreement and that immunity has not been waived.

Article 24

Notification of appointment. Identity cards

(1) The Fund shall inform the Government when a staff member or expert takes up or relinquishes his post. Furthermore the Fund shall from time to time send to the Government a list of all staff members and experts. In each case the Fund shall indicate whether a staff member is a citizen of the United Kingdom and Colonies or permanently resident in the United Kingdom.

(2) The Government shall issue to all staff members and experts on notification of their appointment, a card bearing the photograph of the holder and identifying him as a staff member. This card shall be accepted by the appropriate authorities as evidence of identity and appointment. The Fund shall return the card to the Government when the holder relinquishes his duties.

Article 25

Modification

At the request either of the Government or of the Fund consultations shall take place respecting the implementation, modification or extension of this Agreement. Any understanding, modification or extension may be given effect by an Exchange of Letters between a representative of the Government and the Director (after approval by the Assembly).

Article 26

Disputes

Any dispute between the Government and the Fund concerning the interpretation or application of this Agreement or any question affecting the relations between the Government and the Fund which is not settled by negotiation or by some other agreed method shall be referred for final decision to a panel of three arbitrators. One of those arbitrators shall be chosen by Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs, one shall be chosen by the Director and the third, who shall be the Chairman of the Tribunal, shall be chosen by the first two arbitrators. Should the first two arbitrators fail to agree upon the third within one year of their own appointment, the third arbitrator, at the request of the Government or of the Fund, shall be chosen by the President of the International Court of Justice.

Article 27

Entry into force and termination

(1) This Agreement shall enter into force on signature.

(2) This Agreement may be terminated by agreement between the Government and the Fund. In the event of the Headquarters of the Fund being moved from the territory of the United Kingdom, this Agreement shall, after the period reasonably required by such transfer and the disposal of the property of the Fund in the United Kingdom, cease to be in force.

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Interim payments within the international regime established by the Civil Liability and Fund Conventions

Study undertaken by Måns Jacobsson and Richard Shaw

1 Scope of the study

1.1 We have been instructed by the Director of the International Oil Pollution Compensation Funds (IOPC Funds) and the International Group of P&I Clubs ("the International Group") to address the following issues:

A) The practice that has been followed by the P&I Clubs and the IOPC Funds in making interim payments under the 1992 Civil Liability Convention and the 1992 Fund Convention, and previously under the 1969 Civil Liability Convention and the 1971 Fund Convention;

B) The problems faced by the P&I Clubs when making interim payments;

C) The possible solutions to the problems identified in B) above.

1.2 It has also been suggested that it would be useful if our report addressed the following points when proposing solutions:

1) All efforts should be made to avoid a problem regarding overpayments;

2) The possibility that claimants have to pay back what they are not entitled to may work in some circumstances, but not in all and there may be political problems arising from such an approach;

3) If overpayment occurs, and claimants do not/cannot pay back the overpayment, it may have to be that the Fund and the P&I Club may have to share the liability for the "overpayment".

1.3 A meeting was held on 24 January 2012 between ourselves and representatives of the IOPC Funds' Secretariat and of the International Group of P&I Clubs at which the various issues involved were discussed.

2 Introductory remarks

2.1 During the discussions that have taken place in the governing bodies and the 6th Intersessional Working Group established by the 1992 Fund Administrative Council, there appears to have been a general consensus that the practice followed by the IOPC Funds and the P&I Clubs belonging to the International Group regarding interim payments should be maintained in the future.

2.2 The purpose of the present study is therefore to consider what options exist that could facilitate interim payments, in particular in cases where the aggregate amount of

the established claims will exceed the total amount available for compensation, or where there is a risk that this could occur.

2.3 The main issue that will have to be addressed is how to ensure that the present procedures where interim payments are made to claimants can be continued and at the same time ensure that the P & I Club involved and the 1992 Fund do not find themselves in a situation of overpayment, i.e. where one of them or both, when all claims have been settled and paid, have paid in excess of the maximum amount of their respective legal obligations under the Civil Liability Convention and the Fund Convention.

2.4 Overpayment can generally be avoided by "cautious" assessments of the claims presented and of the likely total of the admissible claims, with the addition of a reasonable safety margin, resulting in a prudent decision on the level of interim payments. This is the approach taken in the past by the Funds and the P&I Clubs. This approach has worked well in practice in incidents to which the Civil Liability and Fund Conventions have applied, with only very rare exceptions. It cannot be ruled out, however, that in spite of a very careful and prudent estimate of the total amount of all established claims it emerges later that that the estimate was too low and consequently the level of interim payments set by the governing body of the 1992 Fund was too high.

2.5 The Rules of the P&I Clubs in the International Group allow for a measure of discretion in the settlement of claims, whereas the IOPC Funds simply cannot act outside the terms of the applicable international conventions. The governing bodies of the 1992 Fund will however, as has been the case in the past, be called upon to interpret these Conventions in the light of their object and purpose (see Article 31(1) of the Vienna Convention on the Law of Treaties 1969).

2.6 In various documents that have been presented to the Working Group references have been made to the uncertainties of the decisions of national courts on the application and interpretation of the Civil Liability and Fund Conventions, in particular on questions regarding subrogation.

2.7 Our study has been based on the assumption that the Conventions have been correctly implemented into the law of the Contracting State in question and that the Conventions and the implementing legislation are interpreted and applied correctly by the competent national courts.

3 Provisions in the Conventions relating to interim payments

3.1 The 1969 and 1971 Civil Liability Conventions contain no provision relating to interim payment of claims. Article V paragraph 4 contains the bare statement:

> *"The [shipowner's limitation] fund shall be distributed among the claimants in proportion to the amounts of their established claims."*

3.2 Of relevance to interim payments are also Article V, paragraphs 5 and 6 of the Civil Liability Conventions which provide:

"5. If before the *[limitation]* fund is distributed the owner or any of his servants or agents or any person providing him insurance or other financial security has as a result of the incident in question, paid compensation for pollution damage, such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention.

6. The right of subrogation provided for in paragraph 5 of this Article may also be exercised by a person other than those mentioned therein in respect of any amount of compensation for pollution damage which he may have paid but only to the extent that such subrogation is permitted under the applicable national law."

The question of subrogation will be considered under section 9 below.

3.3 The only reference to interim payments in the 1992 Fund Convention is in Article 18 paragraph 7 which reads:

"The functions of the Assembly shall be:

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7. to approve settlements of claims against the Fund, to take decisions in respect of the distribution among claimants of the available amount of compensation in accordance with Article 4, paragraph 5, *and to determine the terms and conditions according to which provisional payments in respect of claims shall be made with a view to ensuring that victims of pollution damage are compensated as promptly as possible;"* (emphasis added).

3.4 In this context reference should be made to Article 235, paragraph 2 of the United Nations Convention on the Law of the Sea 1982 which emphasizes the importance of prompt payment of compensation in respect of damage caused by pollution of the marine environment. That provision reads:

"States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction."

4 Previous consideration by the governing bodies of the issue of interim payments

4.1 The issue of the procedure for interim payments was raised by the International Group of P&I Clubs in February 1999. It was proposed that when there was a risk that the total amount of the established claims would exceed the maximum amount of compensation available under the applicable Civil Liability and Fund Conventions and the payments therefore had to be pro-rated, the Fund should from the outset participate in the payment to each claimant in proportion to the estimated respective ultimate liabilities of the Club and the Fund.

4.2 The Executive Committees of the 1971 Fund and 1992 Fund decided however that the existing practice and procedures did not require any change (documents 71FUND/EXC.60/17, paragraph 4.14 and 92FUND/EXC.2/10, paragraph 4.15.).

5 Practice followed by the P&I Clubs and the IOPC Funds in making interim payments

5.1 Despite the very limited support for interim payments in the text of the Civil Liability and Fund Conventions, the making of such payments has become an established practice, which has never been challenged by any Contracting State, and could therefore be considered a *"subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;"* as provided in Article 31 (3) (b) of the Vienna Convention on the Law of Treaties 1969. This practice could be summarized as follows.

5.2 The policy of the 1971 and the 1992 Funds has been to start paying compensation only after the shipowner's insurer had made compensation payments up to the limitation amount applicable to the ship in question.

5.3 This procedure appears to have worked without any major complications in those cases where it was clear from the outset that the aggregate amount of the established claims would not exceed the total amount available under the applicable Civil Liability and Fund Conventions. In these cases, which constitute the great majority of the cases in which the IOPC Funds have been involved over the years, claimants have from the outset been paid the full amount of their established claim, first by the P&I Club involved and, after the aggregate of the Club's payments has reached the limitation amount, by the 1971 Fund or the 1992 Fund, as the case may be.

5.4 A more difficult situation has arisen in those cases where the aggregate amount of the established claims was expected to exceed the total amount available for compensation under the applicable Civil Liability and Fund Conventions, or where there was a risk that this could occur. In such cases the governing body of the Fund involved has decided, after consultation with the P&I Club involved in the incident, to limit the Fund's payments to a specific percentage of the established amount of each claim representing a conservative estimate of each claimant's prospective share of the amount available for compensation. This percentage is customarily referred to as the "level of payments". The estimate of the maximum of the established claims has been made on the basis of reports by technical experts engaged jointly by the Fund and the P&I Club.

5.5 The shipowner/P&I Club has normally agreed to pay claims at the same percentage as the one set by the Fund's governing body[1] and has continued to make such payments until the shipowner's limitation amount under the applicable Civil Liability Convention has been reached. The Fund's pro-rated payments have commenced only when the shipowner's payments have reached the applicable limit under that Convention.

[1] In respect of some incidents the shipowner/P&I Club agreed to pay a number of small claims for the total established amount of their respective claims or made interim payments without pro-rating in order to mitigate financial hardship to vulnerable claimants.

5.6 In most cases where pro-rating has been applied, the percentage set by the governing body at an early stage of the incident has later been increased, sometimes in several stages, in the light of a more accurate assessment by the joint experts of the total amount of the admissible claims. All such decisions by the Fund's governing body have been taken after consultation with the P&I Club. When a decision on an increase of the payment level has been taken, the claimants who had received payments at the lower percentage have received an additional payment corresponding to the difference between the lower and the higher percentage without having to make a request for such payment.

5.7 The decisions as to whether claims are admissible and on the admissible quantum are taken by both the Fund and the shipowner/P&I Club. No payments are therefore made before both compensatory parties are in agreement on these points.

5.8 A reconciliation between the Fund and the P&I Club takes place when all claims have been settled (by agreement or final judgement) and paid, and a "balancing payment" is made by the Fund or the Club (as the case may be) to the other compensating party so that the total of the compensation payments by the Club equals the limitation amount. [2]

5.9 In the *Prestige* case however, the 1992 Fund Executive Committee decided that the 1992 Fund should, in view of the particular circumstances of that case, make payments to claimants from the outset, although the P&I Club involved would not be paying compensation directly to claimants. The reason for its position given by the P&I Club was that if the Club were to make payments to claimants in line with past practice it was, according to legal advice received, highly likely that these payments would not be taken into account by the Spanish courts when the limitation fund constituted by the shipowner was distributed, with the result that the Club could end up paying twice the limitation amount. The Club decided therefore to pay the limitation amount into the court (document 92FUND/EXC.21/5, paragraphs 3.2.19 and 3.2.34).

6 Concerns expressed by the P&I Clubs

6.1 The International Group has indicated that the issue which gives rise to concern on the part of the P&I Clubs is whether, if interim payments are made by the Club, it can rely on the competent court setting off the amounts paid against the limitation fund which has been constituted (or which may later have to be constituted). It has suggested that the proportion of an (interim or final) payment made by the Club but attributable to the Fund might be considered by the court as not relating to a legal liability of the shipowner/Club under the Civil Liability Convention and that that proportion of the payment would not therefore be set off against or be recoverable from the limitation fund.

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[2] The costs incurred for the handling of the compensation claims (e.g. costs of operating claims offices and fees of surveyors and technical experts) are paid outside the maximum amount available for compensation. The distribution of such costs between the Fund and the Club is made in the context of the reconciliation, in accordance with the respective amounts of their ultimate liability for the incident, as set out in the Memorandum of Understanding between the International Group, on the one part, and the 1992 Fund and the Supplementary Fund, on the other part, signed on 19 April 2006 (document 92FUND/A/ES.11/6, Annex, paragraph 4B).

6.2 The International Group has further expressed concern that in some jurisdictions the subrogation rights taken from the recipient of an interim payment would not be recognised by the court administering a limitation fund constituted by the P&I Club by payment of the limitation amount into the court. The court might therefore not permit the Club to be reimbursed or credited for such interim payments however carefully the subrogation clause in the receipt and release document signed by the claimant has been drafted. The International Group has argued that in such cases the P&I Club involved might have to pay the limitation amount twice.

6.3 The International Group has mentioned that a variant of this question is whether, if these payments are made up to the limitation amount, the court will in due course return the limitation fund to the P&I Club/shipowner. The International Group has maintained that these questions arise particularly when it is proposed that the Club make payments for greater amounts than could safely be paid if the Civil Liability Convention alone applied.

6.4 The International Group has stated that this question has been of concern mainly in cases where there was considered to be a risk of the amount available for compensation being insufficient to pay admissible claims in full. Consequently the question should in the International Group's view be addressed on the assumption that the court would be asked to return the limitation fund in circumstances where the claimants had not been fully compensated. The International Group has stated that in these circumstances it was to be expected that the claimants would not have entered into final settlements (pending clarification of any final balance they may be entitled to receive), and that they would not necessarily agree to withdraw their claims, or consent to the release of the limitation fund. The issue is therefore in the International Group's view whether the court would make an order for release of the limitation fund despite any opposition from claimants.

6.5 The International Group has drawn attention to the fact that the risk of overpayment, which existed also in respect of incidents to which the 1969 Civil Liability Convention applied, has become a greater problem as a result of the entry into force of the 1992 Civil Liability Convention, since the shipowner's limitation amount is much higher under the 1992 Convention than under the 1969 Convention, for large tankers as high as 89 770 000 SDR (approximately US$139 million). The International Group has also referred to the fact that a major part of the liability insurance for large tankers is reinsured in the insurance market, as set out below:

(a) The P&I Club concerned provides the first US$ 8 million;

(b) The International Group (all 13 P&I Clubs Group Members) provides a further US$52 million through a pooling arrangement.

(c) The insurance market provides through a reinsurance policy the balance up to the shipowner's limitation amount, this balance amounting to US$79 million for large tankers.

7 Proposals by the International Group of P&I Clubs

7.1 The International Group has proposed that the existing established practice in respect of interim payments be recognized in a formal manner which may be drawn to the attention of the competent court administering the shipowner's limitation fund. The International Group has submitted that when a P&I Club makes interim payments in accordance with the current practice, based on the estimated entitlements of claimants under the 1992 Civil Liability and Fund Conventions and the level of payments decided by the Fund's governing body, and continues to do so until the shipowner's limitation amount under the 1992 Civil Liability Convention is reached, it would do so on its own behalf to the extent of the proportion for which it is responsible and on behalf of the 1992 Fund for the remainder. Likewise once the shipowner's limitation amount has been reached, the 1992 Fund's payments would be made partly on its own behalf and partly on behalf of the Club.

7.2 The International Group has expressed the view that consequently the competent court should, in any distribution of the limitation fund, take into account not only the interim payments made by the P&I Club but all interim payments made under the compensation regime, including those made by the 1992 Fund. The International Group has recognized, however, that the suggested treatment of interim payments in the distribution of the limitation fund is not reflected in the Civil Liability Convention.

7.3 The International Group has also suggested that P&I Clubs' risk of overpayment would be reduced if the Fund were to participate in the compensation payments from the outset, i.e. that interim payments to each claimant were made separately by the 1992 Fund and the P&I Club involved.

7.4 The International Group has pointed out that the P&I Clubs are under no obligation under the 1992 Civil Liability Convention to make interim payments of compensation and that the risk of overpayment could be overcome by the Club involved simply following the procedures laid down in that Convention and establishing a limitation fund in the competent court. The Group has recognized that this could, however, result in the funds provided by the Club not being available to the claimants for a considerable period of time, and that in such circumstances interim payment of victims' claims would be more difficult to arrange.

8 Scenarios relevant to the issues under consideration

8.1 It is submitted that the issues involved only concern both the P&I Clubs and the 1992 Fund in cases where pollution damage is caused in a State party to both the 1992 Civil Liability Convention and the 1992 Fund Convention. In our view there are then two situations to be considered:

(a) If it is clear from the outset that the aggregate amount of the established claims will stay within the total amount of compensation available under the 1992 Conventions the present practice does not give rise to any risk of overpayment for the P&I Club or the Fund. Although the Club would pay more than its share of the individual claims until it reaches the limitation amount

applicable to the shipowner under the Civil Liability Convention, and could therefore be considered having made an "overpayment", this "overpayment" would only be of a temporary nature. There would therefore be no real problem, since the Club and the Fund would make the necessary adjustment of the payments between them in the context of the reconciliation procedure referred to above. There could however be a problem for the Club to get the court to release any funds or bank guarantee deposited without undue delay.

(b) If the aggregate amount of the established claims exceeds the total amount available under the 1992 Conventions, or there is a risk of this happening, a P&I Club making interim payments could run the risk of overpayment if the percentage at which payments set by the Fund's governing body after consultation with the P&I Club were set at too high a level. It appears that this is the main case to be considered.

8.2 It should be noted that decisions on the distribution of the limitation fund are taken by the court (or other competent authority) with which the limitation fund was constituted. If that court considers that there is a risk, even very small, that the total of the established claims will exceed the amount of the limitation fund, the court may very well decide not to make any payments out of the limitation fund until the admissible amounts of all claims have been established and as a consequence thereof the total amount of the established claims is known. Only at that stage is it possible for the court to calculate the proportion of the limitation fund due to each claimant. In theory the court would be entitled to make interim payments to claimants on the basis of an estimate of the total amount of the established claims, but we consider that it is unlikely that any judge would be willing to exercise this power.

8.3 It has not been considered necessary to deal specifically in this study with the cases where also the Supplementary Fund Protocol applies to the incident, since the issues would be the same as those set out under (a) and (b) in paragraph 8.1 above. The only difference would be that the total amount available for compensation would be much higher than under the 1992 Conventions, and consequently the risk of the aggregate of the established claims exceeding the total amount available for compensation would be significantly smaller.

8.4 More complex problems could arise in cases where pollution damage is caused in more than one State and not all the affected States are parties to the same treaty instruments, but our study has been limited to incidents where pollution damage is caused in only one State.

9 Issues relating to subrogation

9.1 The area of the law which relates to subrogation appears simple in theory, but is difficult in application. Moreover the way in which it is applied appears to differ between common law and civil law jurisdictions. The important references to

subrogation appear in Article V, paragraphs 5 and 6 of Civil Liability Conventions,[3] the text of which is set out in Section 3 above.

9,2 Most rights of subrogation arise when one party pays a claim and takes over the rights of the claimant against third parties. The classic example of this in the field of maritime law is in the case of a cargo insurance. When the cargo insurer settles and pays a claim under a cargo insurance policy, he takes over all the rights of the insured, including rights of action against a third party. Those rights are usually recorded in a standard form "letter of subrogation" signed by the cargo receiver.

9.3 In the provisions relating to subrogation in the Civil Liability Convention referred to above, the meaning is somewhat different. A shipowner who has paid a pollution damage claim acquires by subrogation the rights of the claimant under that Convention against his own limitation fund. The provisions do not specify the form required to give effect to that acquisition of rights. It is arguable that no formal document is required, but that the acquisition takes place by operation of law by virtue of the Convention and/or the statute incorporating it into the law of the State where the pollution damage occurred.

9.4 In practice the standard forms of receipt and release used by the P&I Clubs and Funds incorporate an express transfer of the claimants rights against the Funds and the shipowner/Club, respectively. The wording included in the forms used by the Clubs and the Funds in common law jurisdictions, which is standard in marine insurance practice, is well understood by judges in these jurisdictions. In incidents that have occurred in civil law jurisdictions the Clubs and the Funds have incorporated corresponding clauses prepared by their lawyers in the country concerned.

9.5 In view of the very different legal traditions in different jurisdictions concerning the wording of such clauses, it is considered that it would not be appropriate to prepare standard clauses in respect of subrogation. These clauses will have to be drafted by the P&I Club's and the Fund's lawyers on a case-by-case basis, but these lawyers will no doubt be inspired by clauses used previously by them, or used by the P&I Clubs and the Funds in other States with similar legal systems.

10 Analysis of various options

10.1 Amendments to the Conventions

10.1.1 The problems discussed above could be resolved by formal amendments to the 1992 Civil Liability and Fund Conventions, should there be a political will on the part of States to do so. Provisions could for instance be inserted in the Civil Liability Convention to the effect that interim payments should be taken into account in the constitution and distribution of the shipowner's limitation fund and that any amount or guarantee deposited by the shipowner/Club for the purpose of establishing the limitation fund should be reduced by the amount of the interim payments so made. The issue of who should bear the financial risk in an overpayment situation could also be

[3] These provisions are similar in substance and wording to the corresponding provisions in the Convention relating to the Limitation of the Liability of Owners of Sea-going Ships 1957 (Article 3.3) and the Convention on Limitation of Liability for Maritime Claims 1976 (Article 12).

addressed in the revised Conventions as well as the question of whether claimants would be under an obligation to repay part of the amounts received in compensation if so required to ensure equal treatment of all claimants without the aggregate amount of the compensation payments exceeding the total amount available for compensation under the 1992 Conventions.

10.1.2 It is not likely, however, that the process for amendment of the Conventions will be reopened in the near future. We have therefore not considered this option further.

10.2 Assembly Resolution

10.2.1 Another option to be considered is whether the problems raised by the P&I Clubs, or some of them, could be solved or reduced by means of a Resolution adopted by the 1992 Fund Assembly.

10.2.2 An Assembly Resolution, even one adopted unanimously by all States parties to the 1992 Fund Convention, would not be binding on national courts, but would only constitute an element to be taken into account by the court for the purpose of the interpretation of the relevant provisions of the Conventions, on the basis that the Resolution would be evidence of a subsequent agreement between the States parties regarding the interpretation of the treaty and the application of its provisions (see Vienna Convention on the Law of Treaties 1969, Article. 31.3(b)).

10.2.3 The issues involved in this study mainly relate to provisions in the 1992 Civil Liability Convention, and a significant number of States parties to that Convention (at present 18) are not parties to the 1992 Fund Convention. These States would not therefore be entitled to participate in the 1992 Assembly's decision to adopt such a Resolution. The only fora in which all States parties to the 1992 Civil Liability Convention could take part in decisions relating to that Convention are the competent bodies of the International Maritime Organization (IMO), i.e. the IMO Legal Committee and the IMO Assembly. It would probably be very difficult to get consensus within IMO for the adoption of a Resolution on the interpretation and application of the provisions in the 1992 Civil Liability Convention dealing with issues discussed in this report

10.2.4 Notwithstanding the limited legal effects of a 1992 Fund Assembly Resolution, such a Resolution could be of value in setting out the position of the 1992 Fund and its Member States on specific issues of interpretation and application of the 1992 Conventions.

10.2.5 If the concerns of the P&I Clubs had related to a real or perceived incorrect application or interpretation by national courts of certain provisions of the 1992 Conventions, in particular those on subrogation and distribution of the limitation fund, these issues could have been addressed in the Resolution in the form of a recommendation by the States parties to national courts. This appears however not to be the Clubs' concern. The issue is rather that a correct interpretation and application of the provisions in the Civil Liability Convention on subrogation and on the distribution of the limitation fund may result in so-called "overpayment" by the Club concerned.

10.2.6 The problem is that a strict interpretation and application of the provisions in the Civil Liability Convention on distribution of the limitation fund would render the

making of interim payments to victims virtually impossible. Moreover the pragmatic approach to such payments which has been followed by the P&I Clubs and the Funds hitherto could result in the Clubs being unable to take credit for the full amount of such payments in the distribution of a limitation fund if such a fund has been constituted. This gives rise to the risk of "double payment" referred to by the Clubs.

10.2.7 We consider that there is no legally binding solution to this problem within the framework of the present text of the Conventions. An Assembly Resolution inviting the national courts to apply certain provisions in a manner that is contrary to their wording would not in our opinion be a viable option.

10.2.8 It would however in our view be of value if the 1992 Fund Assembly in a Resolution, after recalling the practice followed by the P&I Clubs and the IOPC Funds for interim payments, emphasized the importance for victims of oil pollution, and in particular for victims with limited financial resources, e.g. many claimants in the fisheries and tourism sectors, that interim payments should be made. Such an Assembly Resolution could also include an endorsement of a Memorandum of Understanding between the 1992 Fund and the International Group of P&I Clubs, to be attached to the Resolution, dealing with the issues discussed in section 10.3 below.

10.3 Memorandum of Understanding

10.3.1 The practice followed over the years by the P&I Clubs and the IOPC Funds in making interim payments has been described in section 5 above. Although this practice has been reported to the governing bodies on a number of occasions, it has not been set out in any formal document.[4]

10.3.2 It is suggested that the procedures followed by the P&I Clubs and the Funds be described in some detail in a Memorandum of Understanding to be approved by the 1992 Fund Assembly. The approval could be given in the form of an Assembly Resolution in order to give the Memorandum greater authority.

10.3.3 The Memorandum could also address another issue which has given rise to concern on the part of the P&I Clubs, namely the fact that there is no provision in the 1992 Fund Convention corresponding to Article V.5 in the 1992 Civil Liability Convention giving the shipowner/P&I Club subrogation rights against the 1992 Fund for compensation payments made in excess of their liability under the 1992 Civil Liability Convention. The absence of such a provision in the Fund Convention has not caused any difficulty in the past, since all claims are examined and approved by both the P&I Club and the Fund and no payments are made by the Club before such approval has been given by the Fund. In order to meet the concern of the P&I Club a statement could be inserted in the Memorandum to the effect that the 1992 Fund would accept the Club's right of subrogation against the Fund for such payments, provided that the

[4] The 2006 Memorandum of Understanding between the International Group and the Funds referred to in footnote 2 does not contain any provisions on interim payments. It is simply stated that the P&I Clubs and the Funds shall co-operate throughout with the aim of ensuring that, within the legal framework of the 1992 Civil Liability Convention, the 1992 Fund Convention and the Supplementary Fund Protocol, compensation is paid as promptly as possible.

assessment of the claims and the ensuing payments have been approved by he Fund.

10.3.4 Such a Memorandum of Understanding would only be a contractual arrangement between the Fund and the P&I Clubs and would not be binding on a court in the process of the distribution of the limitation fund, nor would it change the Club's subrogation rights against the 1992 Fund for amounts it has paid to claimants in excess of its liability under the 1992 Civil Liability Convention. The Memorandum could however be presented by the Club involved in an incident to the court in charge of the distribution of the limitation fund, if the Club considers it useful to do so, so as to make the court aware of the previous practice, and of the fact that interim payments will continue even after they have reached the limitation amount under the Civil Liability Convention.

10.3.5 The court could also be invited by the P&I Club involved to recognise that the arrangement set out in the Memorandum of Understanding has as its sole objective the recording of a practical arrangement between the Club and the Fund which renders possible the prompt payment of the claims of victims of pollution damage. The Club could draw the court's attention to Article 18.7 of the 1992 Fund Convention which refers to interim payments and inform the court that these arrangements constitute the "subsequent practice" of States parties referred to in Article 31.3(b) of the Vienna Convention on the Law of Treaties.

10.4 Approaches proposed by the International Group

10.4.1 As set out in section 7 above, the International Group has submitted that the current practice implies that when a P&I Club makes interim payments up to the shipowner's limitation amount, it does do so on its own behalf to the extent of the proportion for which it is responsible under the Civil Liability Convention and on behalf of the 1992 Fund for the remainder. Likewise the International Group has maintained that once the shipowner's limitation amount has been reached and the Fund takes over the making of interim payments, these payments are made partly on its own behalf and partly on behalf of the Club. The International Group has also indicated the consequences that this approach in its view would have for the distribution of the limitation fund, namely that the court should take into account not only the interim payments made by the Club for the shipowner's/Club's account, but also interim payments made by the Fund, to the extent that these were made for the account of the shipowner/Club.

10.4.2 Although the International Group has on previous occasions made the 1992 Fund aware of its interpretation of the legal significance of interim payments as between the P&I Club involved and the 1992 Fund, the governing bodies of the IOPC Funds have not taken any position on this issue.

10.4.3 As the International Group has recognized, the suggested approach to the distribution of the limitation fund is not reflected in the text of the 1992 Civil Liability Convention. An acceptance of this approach by a governing body of the 1992 Fund governing would therefore not be binding on a court administering the limitation fund.

10.4.4 It would nevertheless be of interest to consider the consequences of an agreement between the International Group and the 1992 Fund along the lines proposed by the Group.

10.4.5 It should first be noted that such an agreement would not give the Club full protection against "overpayments". It would however reduce the financial consequences for the Club in an overpayment situation, since a proportion - and in many cases probably a major proportion - of the payments would from the outset have been made on behalf of the 1992 Fund. Conversely, the 1992 Fund would risk having to face an overpayment situation at an earlier stage than would otherwise be the case, since payments would from day one be considered having been made partly on behalf of the Fund.

10.4.6 An important question is whether an acceptance of the approach set out in paragraph 10.4.1 above could result in the 1992 Fund having to participate in the proceedings relating to the constitution and distribution of the limitation fund set up by the shipowner/P&I Club under Article V.3 of the 1992 Civil Liability Convention. The Funds have not in the past considered it appropriate to take part in these proceedings since they relate only to the Civil Liability Convention, except to the extent that the Funds have taken steps pursuant to Article V.2 to challenge the shipowner's right to limit his liability. It is difficult to predict how a court administering the limitation fund which has been informed of the approach set out in paragraph 10.4.1 would act in this regard.

10.4.7 If an agreement on the approach set out in paragraph 10.4.1 above were to be concluded between the International Group and the 1992 Fund, it should in our view only apply to payments of claims where the 1992 Fund has accepted their admissibility in principle under the 1992 Conventions and approved the admissible amounts. Furthermore, the payments must not exceed the percentage level of payments set by the 1992 Fund's governing body.

10.4.8 It would be important that the P&I Clubs would invoke such an agreement only in cases where it would be reasonable to expect that the aggregate amount of the established claims exceeded the shipowner's limitation amount. This is so because the 1992 Fund should not need to take part in the assessment and approval of claims in respect of incidents which would not be expected to require compensation payments by the Fund. Such an agreement could otherwise result in a significantly increased workload for the IOPC Funds' Secretariat.

10.4.9 As mentioned above, the International Group has submitted that the P&I Clubs' risk of overpayment would be reduced if the Fund were to participate in the compensation payments from the outset, i.e. that interim payments to each claimant were made separately by the 1992 Fund and the P&I Club involved. Such an approach might be easier to understand for the court administering the limitation fund. This approach would however necessitate an estimate from the outset of the proportion to be paid by the Club and the Fund respectively, and an adjustment would most likely have to be made once all claims have been settled and paid in the context of the reconciliation procedure between the Club and the Fund referred to above. A major drawback with this approach would be that each claimant would receive two payments,

one from the Club and another from the Fund, and would have to sign two receipt and release documents, and such a procedure could be difficult for claimants to understand. This approach would also result in a significant increase in the administrative work for both the 1992 Fund and the P&I Club, in particular in major incidents giving rise to thousands of claims, many for fairly modest amounts. For these reasons we consider that this approach would significantly complicate the procedure for interim payments and would be less efficient than the practice hitherto followed by the P&I Clubs and the IOPC Funds. The observations set out in paragraph 10.4.5 above are also relevant to this approach.

10.4.10 Another approach would be to provide in the Memorandum of Understanding between the Funds and the International Group that interim payments could be made in alternate tranches by the P&I Club and the 1992 Fund. For example, the Club would make interim payments up to say £10 million (first tranche), the 1992 Fund would then make payments totaling £10 million (second tranche), the Club would subsequently make payments for another £10 million (third tranche), and so on. The Club's payments would stop when the aggregate of its payments reached the shipowner's limitation amount, and the final distribution of the payments between the Club and the Fund would be adjusted by reconciliation when all claims have been settled.

10.4.11 The fundamental question is whether the approaches discussed in this section would be in conformity with the 1992 Civil Liability and Fund Conventions.

10.4.12 Under Article 4.1(c) of the Fund Conventions, the Fund shall pay compensation to those suffering pollution damage who are unable to obtain full compensation under the applicable Civil Liability Convention, because the damage exceeds the shipowner's limitation amount. As mentioned above, the policy of the Funds has been to start paying compensation only after the P&I Club concerned has paid up to the shipowner's limitation amount. We consider that the above provision does not prohibit payments by the Fund at an earlier stage, provided that it is reasonably clear that the aggregate amount of the established claims arising out of the incident will in fact exceed the shipowner's limitation amount. This was also recognized by the 1992 Fund Executive Committee in the *Prestige* case, where it decided that the Fund should make payments to claimants from the outset, although the P&I Club involved would not pay compensation directly to claimants (paragraph 5.9 above).

10.4.13 It is recognized that the three approaches to interim payments discussed in this section might not be consistent with the precise wording of the 1992 Civil Liability and Fund Conventions. However, in the interpretation of an international treaty account should be taken of its object and purpose, which in the case of the 1992 Conventions is to provide prompt compensation to victims of oil pollution. In our view an efficient system of interim payments is of great importance in this regard.

10.4.14. In the light of what is stated in paragraphs 10.4.12 and 10.4.13 above, we are of the view that all three approaches to interim payments discussed in this section would be compatible with the 1992 Civil Liability and Fund Conventions. It would be for the competent governing bodies of the IOPC Funds to decide whether any of these three approaches (or a combination of them) should be accepted, in the light of their

advantages and disadvantages for the IOPC Funds and the P&I Clubs and their benefits to claimants.

10.4.15 It would be for the International Group to decide whether the position taken by the governing bodies of the IOPC Funds is acceptable to the Group and for the individual Club to decide in each case, in the light of the position taken by the governing bodies, whether and, if so, to what extent it is prepared to make interim payments relating to a specific incident.

10.5 Steps taken by Member States to facilitate interim payments

10.5.1 It will be recalled that in a number of incidents, States where the oil pollution damage occurred have in various ways taken steps which have made interim payments by the P&I Club and the Fund possible, or have enabled the Club and the Fund to make interim payments at a higher percentage than otherwise would have been possible.

10.5.2 In a number of cases the State concerned has undertaken to "stand last in the queue", i.e. undertaken not to pursue its claims for compensation against the Fund or against the shipowner/P&I Club/limitation fund if and to the extent that the presentation of such claims would result in the total amount of all claims arising out of the incident exceeding the maximum amount of compensation available under the 1992 Civil Liability and Fund Conventions.

10.5.3 Undertakings of this kind by the State involved have greatly facilitated the making of interim payments by the P&I Clubs and the IOPC Funds. Since the decision on whether to give such an undertaking and on its scope is taken by the State involved, this issue has not been considered further in this report.

10.6 Could claimants be required to repay part of the funds received in compensation?

10.6.1 It would from a legal point of view be possible to insert in each release and receipt document to be signed by the claimants a provision to the effect that he or she undertakes to repay the difference between the interim payment received and the sum finally calculated to be due to that claimant when the admissible amounts of all claims have been determined. That calculation would of course be based on the principle that all claimants should receive equal treatment and that the total payments to all claimants should not exceed the total amount available for compensation under the applicable Conventions. A similar clause is already included in the release and receipt documents used by the Funds and the Clubs, to the effect that that the claimant undertakes to repay any amount received which has been based on an incorrect or fraudulent claim.

10.6.2 It is suggested that this option could be considered in relation to States, public authorities and major companies. It would however in our view be politically and psychologically difficult to include such a provision in release and receipt documents regarding payments to other claimants. It is even conceivable that a national court would not enforce such a clause, considering it unreasonable to impose that clause on a claimant, for example a fisherman or a small business in the tourism industry, who at the time of signing the document may have been in a situation of severe financial hardship. It would also be very delicate for the Fund to enforce a judgment for recovery

against claimants belonging to these categories who have in good faith used the funds received. In many cases such claimants may not be able to reimburse the money received.

10.6.3 It appears therefore that this option would not be a solution to the problem of overpayments but could be considered in respect of certain major claimants to reduce the financial consequences of overpayments having been made.

10.7 Would the 1992 Fund Assembly be entitled to levy additional contributions in an overpayment situation?

10.7.1 The Funds' governing bodies have traditionally taken a very conservative approach when setting the level of payments in a situation where pro-rating of claims is found to be necessary. The estimate of the maximum aggregate of the established claims has always been made in such a way that there would be a considerable safety margin. It is nevertheless possible that, once the admissible amounts of all claims have been determined, it is established that the percentage was set at too high a level, and that consequently an equal treatment of all claimants would result in the total amount of compensation available under the relevant Conventions being exceeded. The Fund would then face two conflicting treaty obligations, namely on the one hand to ensure that all claimants are treated equally and receive the same percentage of their established claims (art. 4.5), and on the other hand that the total compensation payments should not exceed the maximum amount available for compensation under the 1992 Conventions, i.e. 203 million SDR (art. 4.4(a)).

10.7.2 The question is whether the 1992 Fund Assembly would be empowered to levy contributions to cover any excess payments that were to result from the competent governing body having, in spite of a very careful and prudent analysis of the level of the established claims and the addition of a reasonable safety margin, set the percentage of the compensation payments at a level which, with hindsight, i.e. when the established amounts of all claims had been determined, was too high.

10.7.3 Under Article 12.1(i)(b) and (c) of the 1992 Fund Convention the basis on which contributions are to be levied shall be an estimate of payments to be made by the Fund for the satisfaction of claims against the Fund due under Article 4. Pursuant to Article 4.4(a) (as amended) the aggregate amount payable by the 1992 Fund is limited to 203 million SDR minus the amount actually paid by the shipowner/insurer under the 1992 Civil Liability Convention.

10.7.4 In our opinion the 1992 Fund Assembly would not have the power to raise contributions to finance compensation payments over and above the maximum amount payable under the 1992 Fund Convention. It follows that, if interim payments have been made to claimants which later turn out to be have been made at a higher percentage than the available funds would allow, claimants whose claims are paid towards the end of the payment procedures would not receive the same percentage of their established claims as those claimants who received their payments earlier.

11 Conclusions

11.1 There appears to be a general consensus as to the importance of the practice followed by the IOPC Funds and the P&I Clubs in making interim payments of compensation being maintained in the future. Such practice is in our view in line with the object and purpose of the international compensation regime, namely to ensure prompt and adequate compensation to victims of tanker oil spills. This objective has been repeatedly emphasized by the governing bodies of the IOPC Funds and by the P&I Clubs.

11.2 There is however no provision in the Civil Liability Conventions or the Fund Conventions which obliges the shipowner/P&I Club and/or the IOPC Funds to make interim payments to claimants. The only reference to interim payments in the Conventions is in Article 18, paragraph 7 of the Fund Conventions which empowers the Fund Assembly to determine the conditions according to which provisional payments to claimants shall be made. That paragraph indicates the objective of the Fund Convention that victims of pollution damage should be compensated as promptly as possible

11.3 The existing practice of the P&I Clubs and Funds in making interim payments, as set out in section 5 of this report, has been reported on a number of occasions to the Funds' governing bodies and no Contracting State has challenged this practice. This practice could therefore in our view be considered a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", which should be taken into account in the interpretation of the Civil Liability and Fund Conventions, as provided in Article 31.3(b) of the Vienna Convention on the Law of Treaties.

11.4 The concerns expressed by the P&I Clubs as well as other issues discussed in this report could be resolved by formal amendments to the 1992 Civil Liability and Fund Conventions, but in our opinion it is not likely that the process for revising the Conventions will be reopened in the near future.

11.5 In this report three different approaches to interim payments have been discussed, namely:

a) The International Group's contention that when a P&I Club makes interim payments, it does so partly on its own behalf and partly on behalf of the 1992 Fund, and that interim payments made by the Fund are partly made on the Fund's behalf and partly on behalf of the Club.
b) Interim payments might be made in alternate tranches by the P&I Club and the 1992 Fund.
c) Interim payments to each claimant might be made separately by the 1992 Fund and the P&I Club involved.

We consider that all these approaches would be compatible with the 1992 Fund Convention. It would be for the competent governing bodies of the IOPC Funds to decide whether any of these three approaches (or a combination of them) should be accepted, in the light of their advantages and disadvantages for the IOPC Funds and the P&I Clubs and the benefits to claimants.

11.6 It would be for the International Group to decide whether the position taken by the governing bodies of the IOPC Funds is acceptable to the Group and for the individual Club to decide in each case, in the light of the position taken by the governing bodies, whether and, if so, to what extent it is prepared to make interim payments relating to a specific incident.

11.7 With respect to the approach set out in paragraph 11.5.c) above under which interim payments to each claimant would be made separately by the P&I Club and the 1992 Fund, we consider that such an approach would significantly complicate the procedure for interim payments and would be less efficient than the practice hitherto followed by the P&I Clubs and the IOPC Funds as described in section 5.

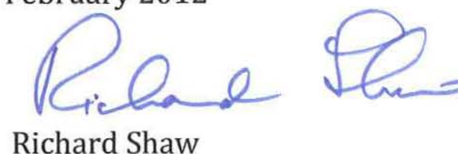
11.8 Concerns have been expressed by the International Group as to the manner in which the existing practice for interim payments followed by the P&I Clubs and the Funds would be taken into account by the courts administering the limitation fund constituted under the Civil Liability Convention. In particular, it is feared that that such a court may decline to give the shipowners/Clubs credit for interim payments made by them and specifically the proportions of the payments which in the Group's view are made on behalf of the 1992 Fund. We consider that there is no legally binding solution to this problem within the framework of the present text of the Conventions, but a measure of protection may be afforded if our recommendation in paragraph 11.9 is followed.

11.9 We recommend that the practice of the shipowners, P&I Clubs and Funds in making interim payments be recorded in Memorandum of Understanding to be approved by the 1992 Fund Assembly in an appropriately worded Resolution. This Memorandum could, if thought appropriate, be laid by the shipowner/P&I Club concerned before the court administering the limitation fund as authoritative evidence of the existing practice.

11.10 It would be possible from a legal point of view to insert in each release and receipt document to be signed by the claimants a provision to the effect that he or she undertakes to repay the difference between the payment received and the sum finally calculated to be due to that claimant when all claims have been settled. In our opinion this approach would not be a solution to the problem of overpayments, but could be considered in respect of certain major claimants to reduce the financial consequences of overpayments.

11.11 We consider that the 1992 Fund Assembly does not have the power to raise contributions to finance compensation payments over and above the maximum amount payable by the 1992 Fund under the 1992 Fund Convention.

Malmö and London on 8 February 2012



Måns Jacobsson Richard Shaw