INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS

Agenda item: 3	IOPC/MAR11/**3/2**	
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1992 Fund Assembly	**92AES15**	
1992 Fund Executive Committee	**92EC51**	
Supplementary Fund Assembly	**SAES4**	
1971 Fund Administrative Council	**71AC26**	●
1992 Fund Working Group	**92WG6/2**	

INCIDENTS INVOLVING THE IOPC FUNDS – 1971 FUND

PLATE PRINCESS

Note by the Director

Objective of document:	To provide the 1971 Fund Administrative Council with details of recent developments and an analysis of the Supreme Tribunal judgement of 8 October 2010.
Summary of the incident so far:	
27 May 1997:	The *Plate Princess* spilled some 3.2 tonnes of crude oil in Puerto Miranda (Venezuela).
June 1997:	Two fishermen's trade unions, FETRAPESCA and Puerto Miranda Unión, presented claims in the Civil Court of Caracas against the shipowner and the Master for US$10 million and US$20 million respectively.
1997-2005:	No developments in respect of the claims.
October 2005:	The 1971 Fund was formally notified of the claims.
May 2006:	The 1971 Fund Administrative Council adhered to the text of the Conventions and decided that both claims were time-barred.
December 2006:	Both claims were transferred to the Maritime Court of First Instance in Caracas.
March 2007:	The 1971 Fund was formally notified of both claims for a second time.
April 2008:	Maritime Court of First Instance of Caracas accepted the amended claim by the Puerto Miranda Union for Bolivares Fuertes (BsF) 53.5 million.
June 2008:	The 1971 stated that the claim was time-barred.
November 2008:	The 1971 Fund argued that the documentation provided by the claimants did not demonstrate the damage and was in many instances falsified.
February 2009:	The Maritime Court of First Instance accepted the claim by the Puerto Miranda Unión. The Master, the shipowner and the 1971 Fund appealed against the judgement. The same court also accepted the claim by FETRAPESCA and ordered payment of damages in an amount to be quantified by court experts. The 1971 Fund was not formally notified of that judgement.
September 2009:	Maritime Court of Appeal of Caracas dismissed the appeal in respect of the claim by the Puerto Miranda Unión.
December 2009/January 2010:	The Master, shipowner and the 1971 Fund appealed the judgement of the Maritime Court of Appeal to the Supreme Tribunal of Venezuela.

Recent developments:	*Supreme Tribunal judgement in respect of the claims by Puerto Miranda Unión* In October 2010, the Supreme Tribunal dismissed the appeal by the Master, shipowner and the 1971 Fund and the file was returned to the Maritime Court of First Instance for quantification of the loss. *Appointment of court experts* The Maritime Court of First Instance appointed three experts in November 2010 to calculate the compensation to be paid. One expert was nominated by the Master and shipowner, one by the claimant and the third by the Court. Since the 1971 Fund was not a defendant, it could not nominate an expert. In making the appointments, the Court rejected the Master and shipowner's nominated expert and nominated an expert of its choosing. The Master and shipowner have appealed against the decision to the Maritime Court of Appeal. In January 2011, the experts appointed by the Maritime Court of First Instance issued their report quantifying the compensation according to the method set out in the judgement of the Maritime Court of Appeal. In their report the experts concluded that the losses suffered by the claimants amounted to BsF 769 892 085.34 (£111.6 million), including interest, even though the amount claimed was BsF 53.5 million (£7.6 million). The court experts calculated that the total amount available for compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention (60 million SDR) was equivalent to BsF 403 473 004.80 (£58.7 million). They concluded that, since the Maritime Court of Appeal had fixed the limit of liability of the shipowner as BsF 2 884 982.95 (£420 000), the compensation payable by the 1971 Fund should be BsF 400 628 021.85 (£58.3 million). The Master, shipowner and the 1971 Fund appealed against the experts' report to the Maritime Court of First Instance since the compensation calculated by the court experts overstated any conceivable losses. In January 2011, the Maritime Court of First Instance upheld the appeal and appointed two new experts to review the report. *Appeal to the Constitutional section of the Supreme Tribunal* In February 2011, the 1971 Fund appealed against the judgement of the Supreme Tribunal to the Constitutional section of the Supreme Tribunal of Venezuela.
Action to be taken:	1971 Fund Administrative Council: Information to be noted.

1 Summary of the incident

Ship	*Plate Princess*
Date of incident	27.05.97
Place of incident	Puerto Miranda, Lake Maracaibo, Venezuela
Cause of incident	Leakage of crude oil cargo into ballast during loading operation
Quantity of oil spilled	3.2 tonnes of crude oil
Area affected	Unknown
Flag State of ship	Malta
Gross Register tonnage (GRT)	30 423 GRT
P&I insurer	The Standard Steamship Owner's Protection & Indemnity Association (Bermuda) Ltd (the Standard Club)
CLC Limit	3.6 million SDR
STOPIA/TOPIA applicable	No
CLC + Fund limit	60 million SDR
Compensation	No compensation paid
Standing last in the queue	N/A
Legal proceedings	Two claims as follows: *Claim by the Puerto Miranda Union* Plaintiffs: Fishermen's Union Defendants: Shipowner and Master of the *Plate Princess* The 1971 Fund is not a defendant in the proceedings. Judgement by the Maritime Court of First Instance condemned defendants and the 1971 Fund to pay compensation to be quantified by court experts. Appeals to Court of Appeal and Supreme Tribunal rejected. 1971 Fund has appealed to the Constitutional section of the Supreme Tribunal. Experts appointed by Maritime Court of First Instance quantified compensation, inclusive of interest, as BsF 769 892 085.34 (£111.6 million) when the losses claimed totalled BsF 53.5 million (£7.6 million) plus interest. The court experts also concluded that the 1971 Fund should pay BsF 400 628 021.85 (£58.3 million), being the difference between 60 million SDR and the shipowner's limit of liability under the 1969 Civil Liability Convention. The 1971 Fund appealed to the Maritime Court of First Instance which upheld the appeal and appointed two additional experts to review the expert's report. *Claim by FETRAPESCA* Plaintiffs: Fishermen's Union Defendants: Shipowner and Master of the *Plate Princess* The 1971 Fund is not a defendant in the proceedings. Judgement by the Maritime Court of First Instance condemns shipowner, Master and the 1971 Fund to pay compensation to be quantified by Court expert. 1971 Fund not yet notified of judgement.

2 Background information

2.1 On 27 May 1997, the *Plate Princess* spilled some 3.2 tonnes of crude oil whilst loading cargo at an oil terminal in Puerto Miranda (Venezuela). A report from a Maraven/Lagoven helicopter over-flight on the morning of the spill, less than three hours after the spill had been detected on the vessel, stated that no oil was seen at or near the terminal.

2.2 An expert from the International Tanker Owners Pollution Federation Ltd (ITOPF) attended the site on 7 June 1997, eleven days after the spill, on behalf of the 1971 Fund and the Standard Steamship

Owner's Protection & Indemnity Association (Bermuda) Ltd (the Standard Club). He reported that there were no signs of oil pollution in the immediate vicinity of where the *Plate Princess* had been berthed at the time of the incident. The ITOPF expert was informed that the oil had been observed to drift in a north-westerly direction on the flood tide, towards a small stand of mangroves approximately one kilometre away and had beached in an uninhabited area. The expert informed the 1971 Fund that no clean-up work had been carried out and that no fishery or other economic resources were known to have been contaminated.

2.3 In June 1997, two fishermen's trade unions namely, FETRAPESCA and the Sindicato Unico de Pescadores de Puerto Miranda (Puerto Miranda Unión) presented claims in the Civil Court of Caracas against the shipowner and the Master of the *Plate Princess* for estimated amounts of US$10 million and US$20 million respectively. Neither claim provided details of the losses covered. The claimed amounts were described in both claims as being included for procedural purposes, solely to comply with the requirements of Venezuelan legislation.

2.4 At the time of the incident, and for several years afterwards, the 1971 Fund had a claims handling office open in Maracaibo, not far from the allegedly affected area, dealing with claims arising out of the *Nissos Amorgos* incident. Throughout that time, the staff of the office had extensive contact with the local fishermen and their union representatives. At no time were the staff of the claims handling office, or the 1971 Fund, informed that extensive, or indeed any, losses had been suffered by the fishermen as a result of the spill from the *Plate Princess*.

2.5 In their claims, both FETRAPESCA and Puerto Miranda Union requested the Court to officially notify the Director of the 1971 Fund of the action in court. No such notification was made at that time and there were no developments in respect of these claims between 1997 and 2005. In view of the passage of time and the lack of developments, the 1971 Fund instructed its Caracas lawyers to close their file.

First notification

2.6 In October 2005, however, more than eight years after the spill occurred, the 1971 Fund was notified through diplomatic channels of the claims presented in the Civil Court in Caracas. No information was provided with the notifications as to the nature or extent of the losses alleged.

2.7 In view of the notifications received, the 1971 Fund Administrative Council reviewed the details of the incident at its May 2006 session, ie nine years after the incident took place. Whilst expressing sympathy with the victims of the incident and regretting that the time bar provisions had worked to their detriment, the Council stated that it was necessary to adhere to the current text of the Conventions and decided that both claims were time-barred in respect of the 1971 Fund.

2.8 In December 2006, both claims were transferred to the Maritime Court of First Instance, also in Caracas.

Second notification

2.9 In March 2007, nearly ten years after the incident, and following a request by the Maritime Court of First Instance, the 1971 Fund was formally notified of both claims for a second time. The notification did not provide any details of the alleged losses.

Amendment of Puerto Miranda Union claim

2.10 There were no further developments until 4 April 2008 when the Puerto Miranda Union submitted an amended claim against the Master and the shipowner. The 1971 Fund was not named as a defendant. The lawyers representing the claimants in connection with the amended claim were not those who had been involved in the formulation of the original claim. At that time there were a number of submissions by the lawyers acting for the Puerto Miranda Unión, attempting to notify the shipowner and Master.

2.11 The amended claim set out, in detail, the nature, extent and quantification of the losses alleged. The claim was for the cost of cleaning 849 boats and replacing some 7 814 packs of nets and two outboard motors. The nets were alleged to have been contaminated by oil to the extent that they were no longer usable. The claimant also alleged that the owners of the 849 boats and 304 foot-fishermen had suffered a total loss of income for a period of 187 calendar days (six months) as a result of being unable to fish because of a lack of equipment. The amended claim was for BsF 53.5 million (£7.6 million). The Maritime Court of First Instance of Caracas accepted the amended claim on 10 April 2008.

2.12 The amended claim made reference to a large number of documents submitted as evidence of the alleged loss and damage. Without access to these documents it was not possible for the 1971 Fund to review the claim. Through its Caracas lawyers, the 1971 Fund requested that the Court provide copies of the documents submitted by the claimants. However, the number of documents involved was such that it was beyond the capacity of the Court to copy them and the Court put the work in the hands of an outside contractor.

2.13 Venezuelan legislation provides time limits for the submission of a defence and, to comply with these requirements, the 1971 Fund was forced to submit defence pleadings on 12 June 2008, despite not having received the copies of the documents submitted by the claimants. The defence submitted by the 1971 Fund stated, *inter alia*, that the claim was time-barred *vis-a-vis* the 1971 Fund.

2.14 On 4 August 2008 copies of the documents, 16 bundles in total, were received by the 1971 Fund. The 1971 Fund appointed experts to examine the claim and the supporting documents. On the basis of the report issued by its experts, the 1971 Fund submitted further pleadings in November 2008. In these pleadings the 1971 Fund argued that the documentation provided by the claimants did not demonstrate that damage allegedly suffered by the fishermen had been caused by the spill from the *Plate Princess* and that the documentation provided in support of the claim was of doubtful accuracy and had in many instances been falsified. The 1971 Fund also requested that the report by its experts be accepted as evidence. The Court rejected the request on the grounds that the report had not been submitted within the time limit provided by Venezuelan law. The 1971 Fund appealed against this decision on the grounds that the time limit was not sufficient for the Court to provide copies of the documentation and for the Fund's experts to review them. The appeal was rejected.

Hearing in respect of claim by the Puerto Miranda Unión

2.15 In January 2009 the hearing in connection with the revised claim took place. At the hearing, oral evidence was provided by a number of witnesses who were called by the plaintiffs to verify documents submitted as evidence with the amended claim and, in particular, receipts provided to support quantities of fish caught and prices of fish sold. During the hearing, the witnesses accepted that the receipts, which were dated February 1997, were not genuine and had in fact been created after the spill. The majority of witnesses nominated by the plaintiffs in their pleadings to support documents submitted in evidence, did not appear at the hearing. This prevented the Master, shipowner and 1971 Fund from either challenging or obtaining confirmation of that evidence. At the hearing the 1971 Fund submitted the arguments referred to in paragraphs 2.12 to 2.14.

First Instance judgement in respect of claim by the Puerto Miranda Union

2.16 In February 2009, the Maritime Court of First Instance issued its judgement of some 55 pages in which it accepted the claim and ordered the Master, shipowner and 1971 Fund to pay the damages suffered by the claimant, to be quantified by court experts. The Master, the shipowner and the 1971 Fund appealed against the judgement to the Maritime Court of Appeal.

First Instance judgement in respect of claim by FETRAPESCA

2.17 In February 2009, the Maritime Court of First Instance also accepted the claim by FETRAPESCA against the shipowner and the Master of the *Plate Princess* even though no documentation had been provided in support of the claim and the losses had not been quantified. The Court ordered the

payment of the damages suffered by the claimant, to be quantified by court experts. The 1971 Fund has not been notified of the judgement.

Judgement by the Maritime Court of Appeal in respect of the claim by the Puerto Miranda Union

2.18 In September 2009, the Maritime Court of Appeal of Caracas dismissed the appeal by the Master, shipowner and 1971 Fund and ordered the defendants to pay compensation to the fishermen affected by the oil spill, to be quantified by three court experts to be appointed. The method to be followed by the experts was set out in detail in the judgement. The method is based on data obtained from the receipts presented by the claimants to support their losses. During the First Instance Court hearing, the witnesses had admitted that these receipts had not been prepared on the date on the receipts but, rather, after the spill. They were therefore not genuine. The judgement also ordered the defendants to pay interest and costs. The Master, the shipowner and the 1971 Fund appealed against the judgement to the Supreme Tribunal.

Judgement by the Supreme Tribunal

2.19 In October 2010, shortly before the October 2010 session of the Administrative Council, the Supreme Tribunal rendered its judgement, rejecting the 1971 Fund's appeal and confirming the judgement of the Maritime Court of Appeal. Of the five judges comprising the Supreme Tribunal, four voted to reject the appeal and one abstained. The Supreme Tribunal judgement confirmed the decision that the losses should be determined by three court experts to be appointed.

3 Amount available for compensation

3.1 The limitation amount applicable to the *Plate Princess* under the 1969 Civil Liability Convention (1969 CLC) was determined by the Maritime Court of Appeal as BsF 2 844 992.95 (£420 000).

3.2 The court experts calculated that the total amount available for compensation under the 1969 CLC and the 1971 Fund Convention (60 million SDR) was equivalent to BsF 403 473 004.80 (£58.7 million). They concluded that, since the Maritime Court of Appeal had fixed the limit of liability of the shipowner as BsF 2 884 982.95 (£420 000), the compensation payable by the 1971 Fund should therefore be BsF 400 628 021.85 (£58.3 million). The Maritime Court of First Instance has not rendered its decision on what was the maximum amount available for compensation in respect of this incident under the 1971 Fund Convention.

4 Considerations by the 1971 Fund Administrative Council in October 2010

Analysis of the judgement of the Maritime Court of Appeal

4.1 At its October 2010 session, the 1971 Fund Administrative Council noted that the three most significant issues addressed in the judgement of the Maritime Court of Appeal were: the time bar, the link of causation and the falsified evidence relating to the quantum of the loss of income.

Time bar

4.2 The Administrative Council noted that the Maritime Court of Appeal had rejected the argument that the claim by Puerto Miranda Union was time-barred, and that the judgement had stated that the decision was based on the Court's interpretation of Article 6 and Article 7, paragraph 6 of the 1971 Fund Convention. It was also noted that, although the wording of the judgement of the Maritime Court of Appeal was not easy to follow, the Secretariat believed that the Court's interpretation was that for the time bar to be avoided and a final judgement to be enforceable against the 1971 Fund, an action needed to be taken only against the shipowner within three years, and that the Fund needed only to be notified so that it could make use of due process and the right to a defence. It was noted that the Maritime Court of Appeal reasoned that since the 1971 Fund was notified in time to intervene effectively in the proceedings, and since an action had been taken against the shipowner within three years, the claim was not time-barred.

4.3 It was noted that the Secretariat disagreed with the analysis of the Maritime Court of Appeal and shared the view of the 1971 Fund Administrative Council that claims for compensation arising from the incident were time-barred as Article 6, paragraph 1 of the 1971 Fund Convention stated that an action had to be brought, or notification made pursuant to Article 7, paragraph 6, within three years from the date when the damage occurred, without stating against whom an action was to be brought or to whom the notification was to be given. It was, however, recalled that Article 7, paragraph 6 stated that it was the Fund that must be notified, and in the Secretariat's view, this left no doubt that both the notification and the action referred to in Article 6, paragraph 1 must refer to the 1971 Fund.

4.4 It was recalled that the 1971 Fund Administrative Council had decided at its May 2006 session that the claims by FETRAPESCA and Puerto Miranda Union were time-barred as the 1971 Fund had neither been formally notified in accordance with Venezuelan legal requirements within three years from when the damage occurred, nor had an action been taken against the 1971 Fund within six years from the date of the incident.

Link of causation

4.5 It was noted that the Maritime Court of Appeal had held that there was a link of causation between the damage suffered by the fishermen and the spill from the *Plate Princess* on the following grounds:

- There had been a spill from the vessel;
- The fishermen's union had lodged a complaint with the Ministry of Energy and Mines on the day following the incident;
- The local press had reported that the spill had affected the hulls and gear of more than 700 boats;
- An inspection carried out by the Ministry of Energy and Mines and the Ministry of Agriculture together with the claimants concluded that the boats, nets and engines were contaminated;
- The defendants had not provided any evidence to show that the inspection reports were untruthful;
- Although the 1971 Fund had appointed an expert, the expert had ignored the announcement in the press that there were to be inspections;
- The receipts provided by the fishermen as evidence proved they supplied fish in accordance with their fishing permits;
- No evidence had been presented to show that there had been any other spill at the time that could have caused the damage;
- The shipowner had provided a bank guarantee to limit his liability under the 1969 CLC;
- The 1971 Fund had made reference to the spill in its 1997 Annual Report.

4.6 The Administrative Council noted that, although the Director took the view that it was for the national courts to ultimately decide whether there was a sufficiently close link of causation between the damage suffered and the contamination, the arguments used in the judgement of the Maritime Court of Appeal were weak and did not serve to prove there was a link of causation in this case.

Evidence of the quantum of loss of income

4.7 It was noted that the Maritime Court of Appeal had accepted sets of receipts which were formally identified by witnesses in the hearing before the Maritime Court of First Instance. It was further noted that the judgement by the Maritime Court of Appeal had stated that, since the witnesses had acknowledged the receipts, answered questions from the other parties and their statements showed no contradictions, this gave the Court sufficient reason to accept the receipts. The judgement by the Maritime Court of Appeal did not give any value to the statements made by the witnesses under cross-examination during the First Instance Court hearing that the receipts, although dated prior to the spill, had in fact been drafted after the event.

4.8 It was noted that the experts appointed by the 1971 Fund had examined the sets of receipts produced as evidence of normal catch incomes and had concluded that they had been falsified. It was further

noted that the receipts had not been issued on the dates alleged and that this had been accepted by the claimant's witnesses. Notwithstanding this, the Maritime Court of Appeal had accepted that the information in the receipts was to be used in the calculation of the claimants' losses.

4.9 The 1971 Fund Administrative Council noted that, in the Secretariat's view, it was of great concern that the judgement by the Maritime Court of Appeal had accepted documentation in support of the claim which was known not to be genuine and to have been falsified for the purposes of obtaining compensation from the shipowner, his insurer and the 1971 Fund. It was also noted that, in the Secretariat's view, if other national courts were to follow a similar line, the international compensation regime would not function as intended and would face difficulties surviving.

Recognition and enforceability of a final judgement

4.10 It was recalled that Article 8 of the 1971 Fund Convention stated that:

'..., any judgement given against the Fund by a court having jurisdiction in accordance with Article 7, Paragraphs 1 and 3, shall, ...be recognised and enforceable in each Contracting State on the same conditions as are prescribed in Article X of the [1969 Civil] Liability Convention. '

4.11 It was also recalled that Article X, paragraph 1 of the 1969 CLC stated that:

'Any judgement given by a Court with jurisdiction in accordance with Article IX which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any contracting State except:

(a) Where the judgement was obtained by fraud; or
(b) Where the defendant was not given reasonable notice and a fair opportunity to present his case. '

4.12 It was noted that the Secretariat was of the opinion that, in the circumstances, the 1971 Fund may not have been given reasonable notice and a fair opportunity to present its case.

4.13 In this regard, the following facts were noted:

- When the original claim was made against the Master and owner of the *Plate Princess* in July 1997, no details of any losses were provided;
- Shortly after the spill, the 1971 Fund had appointed an expert who visited the terminal where the incident occurred, but the expert reported to the 1971 Fund that he was unable to establish any losses resulting from the spill;
- The judgement by the Maritime Court of Appeal implied that the 1971 Fund expert should have seen the press articles and should have attended the inspections;
- Although the 1971 Fund experts and Secretariat were present in Venezuela in 1997 and there was a claims office open in Maracaibo in connection with the *Nissos Amorgos* incident, neither the 1971 Fund nor its experts were informed that inspections of damaged fishing boats and gear were to take place. Had the 1971 Fund or its experts been informed of these inspections, the 1971 Fund experts would, without doubt, have attended;
- The 1971 Fund had received no indication as to the nature and extent of the alleged damage and loss until April 2008, when an amended claim was submitted to the Maritime Court of First Instance;
- By that time, there was no possibility of the 1971 Fund carrying out any meaningful investigation into the alleged damages detailed in the amended claim;
- When the amended claim was submitted in April 2008, the only way in which the 1971 Fund could have investigated the extent of the loss was by analysing the documentary evidence presented by the claimants. However, this documentary evidence was not provided before the Points of Defence had to be filed at Court.

4.14 The 1971 Fund Administrative Council noted that, in the Secretariat's view, the 1971 Fund may not have been given reasonable notice and a fair opportunity to present its case.

4.15 It was recalled that in its October 2009 session, the Administrative Council had taken the view that if a final judgement by the Venezuelan courts was entered against the 1971 Fund, the 1971 Fund had, under Article 8 of the 1971 Fund Convention, the obligation to comply with the provisions of the judgement. However, having reviewed the judgement of the Maritime Court of Appeal, the Secretariat was of the opinion that it was possible that sub-paragraph (b) of Article X of the 1969 CLC might apply, in which case, a final judgement might not be enforceable against the 1971 Fund.

Statement by the Venezuelan delegation

4.16 The Venezuelan delegation made a statement in which it informed the Administrative Council that, although it did not want to start a debate, it wished to briefly present certain aspects in reply to the document presented by the Director. The delegation stated that it regarded the wording of the document to be strong and that:

- In 1997 an application was presented in the Venezuelan Courts which interrupted the running of the time bar and a request was made to notify the Fund.
- The 1971 Fund was kept informed of the *Plate Princess* incident through documents presented by the Secretariat to meetings of the 1971 Fund Executive Committee and Administrative Council.
- Subsequently, the shipowner's lawyers sought to withdraw the bank guarantee which limited the liability of the shipowner and an 'avocamiento' was requested. This 'avocamiento' resulted in the Supreme Court of Justice considering whether the bank guarantee should be maintained or not, because the incident was an objective liability.
- The decision on the bank guarantee was finally handed down in 2005. That was why the Fund was formally notified after that date although the Fund had already been informed, as previously indicated, in 1997.
- The amount of the spill in the report to which the Director's document referred was quantified at a given moment around the vessel specifically, but subsequently it was found that other areas were affected around the local fishermen whose nets were contaminated.
- In 2006, evidence was submitted relating to the same 1997 claim, in other words, there was no other claim, and the evidence presented was the same as in the claim presented in 1997.
- The fishermen claiming in the *Nissos Amorgos* case were not the same as those claiming in the *Plate Princess* case.
- Whether or not the documents were fraudulent was a matter for decision by a court, and in three instances the Venezuelan courts decided that the documents were legitimate. The delegation offered to provide a full explanation.
- The Supreme Tribunal had pronounced in favour of the fishermen.
- The Venezuelan delegation had been waiting for the judgement before responding to the Director's document and requested that it be allowed to provide its response later.

4.17 The Venezuelan delegation concluded by saying that it would submit a document in reply to the document presented by the Director.

Interventions by other delegations

4.18 A delegation asked which time bar provision the 1971 Fund relied upon, prescription or caducity. The Secretariat stated that this was a difficult issue which the Fund had faced in a number of cases in the past. It further stated that, when the 1969 Civil Liability and 1971 Fund Conventions were first drafted, the original languages used were English and French, each text being equally authentic. The term used in English, was 'shall be extinguished' while in French, the term used was 's'éteignent'. The terms in the translation of the original text into Spanish were, in the case of the 1969 CLC, 'prescribirán', whereas in the 1971 Fund Convention, 'caducarán' had been used. It was further stated that 'prescripción', can be interrupted, whereas 'caducidad' cannot.

4.19 Several delegations recalled that the Venezuelan delegation had previously been requested to provide a detailed explanatory document in respect of this incident, and that although the Venezuelan delegation had undertaken to do so, nothing had as yet been received. In those delegations' view it was important that the Venezuelan delegation formally stated its position in writing.

4.20 One delegation asked whether the 1971 Fund had been named as a defendant in the proceedings. The Secretariat replied that both of the claims by FETRAPESCA and Puerto Miranda Union had been submitted against the shipowner and Master, and not against the 1971 Fund, so at no time was the 1971 Fund a defendant.

4.21 A number of delegations stated that the 1971 Fund Administrative Council would have to decide whether to instruct the Secretariat to pay compensation in accordance with a final judgement of a competent court or to invoke Article 8 of the 1971 Fund Convention and Article X, paragraph 1 of the 1969 Civil Liability Convention, which would be a difficult decision to take.

4.22 Other delegations expressed concern that the 1971 Administrative Council might be setting a dangerous precedent if it were to fail to comply with a final judgement from a national court in accordance with the 1971 Fund Convention.

4.23 It was stated by one delegation that the 1971 Fund had seemed to change its view in this regard. However the Secretariat stated that the analysis of the judgement by the Maritime Court of Appeal had led the Secretariat to conclude that it may be possible that sub-paragraph (b) of Article X of the 1969 CLC might apply, and that therefore a final judgement might not be enforceable against the 1971 Fund.

4.24 Several delegations also expressed concern that the judgement rendered by the Supreme Tribunal had rejected the 1971 Fund's appeal and had confirmed the Maritime Court of Appeal's judgement.

1971 Fund Administrative Council Decision

4.25 The 1971 Fund Administrative Council instructed the Secretariat, with the 1971 Fund's lawyers, to examine the Supreme Tribunal Judgement and if appropriate, appeal the Supreme Tribunal Judgement to the Constitutional Court.

4.26 The 1971 Fund Administrative Council further instructed the Secretariat to provide the analysis of the Judgement by the Supreme Tribunal at its next session.

4.27 It was agreed that the Secretariat would not take any further action without further instruction from the Administrative Council.

5 Analysis of the judgement of the Supreme Tribunal

5.1 In the Director's view, the two most significant issues, from the point of view of the 1971 Fund, dealt with in the judgement of the Supreme Tribunal were; the time bar and the evidence of quantum of the loss of income. The Supreme Tribunal did not consider the issue of link of causation and therefore confirmed the decision of the Maritime Court of Appeal in that respect.

Time bar issue

5.2 The 1971 Fund appealed against the time bar decision on the grounds that it was first notified of this claim in October 2005, ie more than eight years after the spill had occurred, and again in March 2007, ie nearly ten years after the incident. The 1971 Fund, in its defence to the claim, argued that since the two notifications of the claim were made more than three years after the damage occurred and since an action had not been taken against the 1971 Fund within six years of the incident, the claim was time-barred under Article 7, paragraph 6, and Article 6 respectively of the 1971 Fund Convention.

5.3 Article 6, paragraph 1, states:

> *Rights to compensation under Article 4 or indemnification under Article 5 shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 7, paragraph 6, within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage.*

5.4 The Supreme Tribunal argued that Article 6 of the Convention was imprecise, since it did not define to whom it referred, whether it was an action brought against the 1971 Fund, the shipowner or guarantor. The Supreme Tribunal noted that, if Article 6 was interpreted as meaning an action against the 1971 Fund, then the time bar would have operated whereas the Maritime Court of Appeal had held that the provision in Article 6 referred to a legal action in the general sense, ie against any one of the parties liable for the damage.

5.5 The Supreme Tribunal argued that the Conventions were interwoven in the form of a cascade, where one Article referred to another Article; in the 1971 Fund Convention Article 6 referred to Article 4, the latter to Article 2, and all were related to the Civil Liability Convention. The Supreme Tribunal stated that the only conclusion that could be drawn was that the actions to which Article 6 of the 1971 Fund Convention referred concerned those taken by the victims directly against those responsible for the damage, which, by application of the Civil Liability Convention, Articles III and VII, paragraph 8, were the shipowner and the insurer or other person providing financial security.

5.6 The Supreme Tribunal stated that, for the Fund not to be able to allege successfully that the action was time-barred, it was sufficient for the victims to have initiated an action within three years following the damage against the owner of the ship or its insurer.

5.7 The Supreme Tribunal stated that Article 6, paragraph 1, provided two possibilities for the three-year time bar to operate which were either that: 1) more than three years since the damage occurred had elapsed without the victims bringing a legal action against those liable, or 2) notification had not been made, under Article 7 paragraph 6, in accordance with the legal formalities; it was not necessary for both conditions to be satisfied. The Supreme Tribunal considered that since the second possibility, ie notification under Article 7, paragraph 6, required the 1971 Fund to be notified of an action against the shipowner, and that since Article 6, paragraph 1 of the 1971 Fund Convention was silent as against whom an action was brought, the first possibility must, in the view of the Supreme Tribunal, refer to an action against the shipowner.

5.8 The Supreme Tribunal concluded that the claim submitted was not time-barred since an action against the shipowner had been brought within three years of the date when the damage occurred.

Evidence of quantum of the loss of income

5.9 In its appeal to the Supreme Tribunal, the 1971 Fund argued that the Maritime Court of Appeal had accepted as valid the receipts as evidence of species and quantities caught, despite the evidence of the witnesses having shown them to be unreliable.

5.10 The Supreme Tribunal rejected the 1971 Fund's appeal on the grounds that the Maritime Court of Appeal had used its discretion, as it was entitled to under Venezuelan Law.

5.11 One of the five judges appointed to the Tribunal abstained from voting on the grounds that he considered that the losses suffered had not been established by the plaintiffs as required by Venezuelan Law and public policy.

Translation of section of the Supreme Tribunal judgement relating to the time bar issue

5.12 The judgement by the Supreme Tribunal is 364 pages long. Translations into English and French of the section of the judgement addressing the time bar issue have been made and are available from the Secretariat upon request, as is the original text in Spanish relating to this same issue.

6 Developments since the October 2010 session of the Administrative Council

Appeal to the Constitutional Section of the Supreme Tribunal

6.1 The 1971 Fund, in consultation with its Venezuelan lawyers, has submitted an appeal to the Constitutional Section of the Supreme Tribunal. In its appeal the 1971 Fund has requested that the decisions of the Supreme Tribunal and the Maritime Court of Appeal be overturned on the grounds that they contravened the applicable Venezuelan Law, principles and constitutional doctrine with regards to, *inter alia*, the time bar of the action against the 1971 Fund, the time bar due to the claim lapsing for lack of prosecution and the evaluation of the evidence.

Appointment of court experts

6.2 At a hearing in November 2010, the Maritime Court of First Instance appointed three experts to carry out the quantification of compensation to be paid to the claimant using the method established by the Maritime Court of Appeal. At the hearing, the Master and shipowner nominated one expert and the claimant a second expert. The Court nominated the third expert. Since it was not a defendant, the 1971 Fund did not nominate an expert. The nomination by the Master and shipowner was rejected by the Maritime Court of First instance on the grounds that the person concerned did not live in the area in which the damage had occurred, a requirement of Venezuelan Law. As an alternative, the Master and shipowner nominated an expert with knowledge of the local fishing sector. This nomination was not accepted by the Maritime Court of First Instance since the expert did not live in the municipality of Miranda. The Master and shipowner have appealed against this decision. At the date of this document, no decision had yet been taken by the Court.

Report by the court experts

6.3 In January 2011, the court experts presented their report in which they concluded that the compensation to be paid to the claimants, was BsF 769 892 085.34 (£111.6 million), including interest. This was made up as follows:

Item	Assessed amount (BsF)	Assessed amount (£)
Cost of replacing 7 540 nets	8 713 150.00	1.3 million
Cost of replacing 1 outboard motor	17 000.00	2 500
Loss of income fin-fish boat fishermen	704 664 482.37	102.1 million
Loss of income shrimp boat fishermen	21 624 680.00	3.1 million
Loss of income shrimp foot fishermen	6 708 064.00	1.0 million
Interest on cost of replacing nets and motor	28 164 708.97	4.1 million
Total	**769 892 085.34**	**£111.6 million**

6.4 The experts also stated that the total amount available for compensation under the Conventions (60 million SDR) was equivalent to BsF 403 473 004.80 (£58.7 million). This was calculated on the basis of the exchange rate applicable on 8 October 2010. The experts further noted that, in its judgement, the Maritime Court of Appeal had fixed the limit of liability of the shipowner at BsF 2 884 982.95 (£420 000), this being the amount of the Civil Liability limitation fund established in 1997. On that basis, the experts declared that the compensation payable by the 1971 Fund was BsF 400 628 021.85 (£58.3 million).

6.5 The 1971 Fund appealed against the court experts' report to the Maritime Court of First Instance on the grounds that the assessed compensation was excessive and exceeded the limits set in the judgement of the Maritime Court of Appeal. In January 2011 the Maritime Court of First Instance upheld the appeal. The Maritime Court of First Instance has appointed two new experts and stated that it will consider their opinion to decide on the appeal before fixing the amount of compensation to be paid.

7 Director's considerations

Summary of relevant facts

7.1 In considering the developments in this incident, the Director recalls the following:

- The oil spilled was 20 barrels, approximately 3.2 tonnes, as stated in the documentation prepared immediately after the spill.
- There is no record of any clean-up operations having been conducted.
- A visit by an expert from ITOPF to the terminal concerned ten days after the spill indicated that no fisheries or other economic resources had been contaminated or affected.
- Notwithstanding the small amount of oil spilt, it is alleged that fishing gear of 849 boats and 304 foot fishermen was so badly damaged that it was a total loss.
- In 1997, at the time of the spill, the 1971 Fund had opened a claims handling office in Maracaibo to deal with claims arising from the *Nissos Amorgos* incident. Maracaibo is close to Puerto Miranda and the 1971 Fund and its experts were in frequent contact with fishermen's representatives (FETRAPESCA) over a number of years. At no time were the 1971 Fund or its experts informed that there had been losses incurred by fishermen in Puerto Miranda, just across Lake Maracaibo.
- Court actions were commenced against the Master, shipowner and insurer of the *Plate Princess* shortly after the spill.
- The 1971 Fund was formally notified for the first time of the claims pursued in court in October 2005, ie eight years after the spill.
- The 1971 Fund was notified for a second time in March 2007, ie almost ten years after the spill.
- No legal action has been taken against the 1971 Fund. The 1971 Fund is not a defendant in the proceedings.
- The claim by the Puerto Miranda Union was amended in April 2008, ie 11 years after the spill. No evidence in support of the loss was submitted before then.
- Documentation, comprising several thousand pages, was made available to the 1971 Fund in August 2008.
- In accordance with Venezuelan legislation, the 1971 Fund had to submit its defence of the claim to the Court in June 2008, ie before the 1971 Fund received copies of the documentation submitted in support of the claim.
- When the 1971 Fund received the copies of the documentation in support of the claim, experts were appointed to examine it. The experts found that many of the documents submitted had been falsified.
- The 1971 Fund's experts report was submitted to the Court but the Court refused to accept the report as evidence since it had not been submitted within the time limits applicable under Venezuelan Law.
- A number of witnesses who were cross-examined by the Court admitted that the receipts they had provided as evidence to support the claimants' losses had not been prepared on the date of the receipts but, rather, after the spill. They were therefore not genuine. The receipts were nevertheless used by the Court in the quantification of the losses.
- Many witnesses nominated by the claimants did not appear at the hearing and therefore the 1971 Fund was prevented from challenging their evidence.
- It is alleged that the fishermen were not able to replace their damaged gear for some six months. There has been no satisfactory explanation as to why it took this length of time to replace the nets.

Time bar

7.2 The Director notes that, in its judgement, the Supreme Tribunal has rejected the appeal by the 1971 Fund on the same grounds as that employed by the Maritime Court of Appeal, namely that, to avoid the time bar, it was necessary only to take a legal action against the shipowner or his insurer within three years from the date of the damage.

7.3 The Director further notes that the Supreme Tribunal stated in its judgement that Article 6, paragraph 1, of the Convention was imprecise in that it does not define against whom the action referred to in the Article has to be brought.

7.4 The Director further notes that the Supreme Tribunal considers that Article 6, paragraph 1, refers to two possibilities for avoiding the time bar. The Director agrees with the Supreme Tribunal that a claimant, to avoid time bar, must either bring an action under Article 4 or notify the 1971 Fund of an action brought against the shipowner or its guarantor within three years of the damage. The claimant does not have to do both.

7.5 The Director does not agree with the Supreme Tribunal, however, that the action to which Article 6 of the Conventions refers concerns one taken by the victims directly against those responsible, namely the shipowner and the insurer. In the view of the Director, the action referred to in Article 6, paragraph 1, can be taken either against the 1971 Fund or against the shipowner. If the action is against the shipowner then the claimant must formally notify the 1971 Fund of that action.

7.6 In the Director's opinion, the interpretation of Article 6 established by the Supreme Tribunal cannot be correct since, if all a claimant had to do to avoid the time bar was take an action against the shipowner within three years of the damage occurring, there would have been no need to include a clause requiring him to formally notify the 1971 Fund of that action within the same time period.

7.7 The Director accepts that Article 6, paragraph 1 of the 1971 Fund Convention does not stipulate against whom the action referred to must be taken within three years. However, since the 1969 CLC sets out the relationship between the victim of pollution damage and the shipowner and his insurer, it is logical that any legal action required under that Convention would be actions against the shipowner and/or his insurer. Similarly, since the 1971 Fund Convention sets out the relationship between the victim of pollution damage and the 1971 Fund, it is logical that any legal action required under that Convention would be against the 1971 Fund.

7.8 The Director agrees with the view of the Administrative Council that the correct interpretation of Article 6, paragraph 1 of the 1971 Fund Convention is that the action to be brought within three years is an action against the 1971 Fund and that the notification to be made is of the action against the shipowner or its insurer referred to in Article 7, paragraph 6, of the 1971 Fund Convention.

Evidence of quantum of the loss of income

7.9 The Director is of the opinion, as expressed to the Administrative Council in October 2010, that it is of great concern that the judgement of the Venezuelan Courts had accepted documentation in support of the claim which was known not to be genuine and to have been falsified for the purposes of obtaining compensation from the shipowner, its insurer and the 1971 Fund. He takes the view that if other national courts were to follow a similar line, the international compensation regime would not function as intended, and would face difficulties surviving.

Court experts' report

7.10 The Director notes that the court experts appointed by the Maritime Court of First Instance assessed the compensation to be paid to the fishermen represented by the Puerto Miranda Union as BsF 769 892 085.34 (£111.6 million). Of this amount, BsF 726.3 million (£105.3 million) concerned six months' loss of catch income from 849 boats. The Director notes that this is equivalent to an income for each boat of BsF 1 669 756 (£243 000) per year. Since the fishing concerned is an artisanal activity (the boats are small (in the majority less than 10m in length) and are normally crewed by two persons), the Director considers that the assessed loss far exceeds any real loss that could have occurred, even if activity had been suspended.

7.11 The Director further notes that in the court experts' report, the amount available for compensation (60 million SDR), has been converted to Bolivares Fuertes using the exchange rate prevailing on 8 October 2010, whereas the shipowner's limit of liability has been converted into Bolivares Fuertes using the exchange rate as at the date on which the limitation fund was established in 1997. In the Director's view, the shipowner's limit and the total amount of compensation available under the Conventions should be calculated in the national currency using the rate of exchange on the same

date, not using dates ten years apart which substantially distorts the distribution of compensation payable under the 1969 CLC and the 1971 Fund Convention.

7.12 The Director also notes that the court experts concluded that the 1971 Fund should pay to the claimants the difference between the amount to be paid by the shipowner and the total amount of compensation available under the Conventions. The Director notes, however, that, under the provisions of Article 4, paragraph 5 of the 1971 Fund Convention, when the amount of established claims against the Fund exceeds the aggregate amount of compensation payable, the amount available shall be distributed in such a manner that the amount of compensation actually recovered by the claimant shall be the same for all claimants. Since the amount of compensation calculated by the court experts exceeded the aggregate amount of compensation payable under the Conventions and since there is a claim by FETRAPESCA which may be accepted by the Venezuelan Courts, it is not yet possible to calculate the compensation that would be payable to the Puerto Miranda Unión.

8 Funds available to pay claims arising from the *Plate Princess* incident

8.1 Payments of claims and claims-related expenditure up to 1 million SDR in respect of the *Plate Princess* incident is payable from the 1971 Fund General Fund. Any amount in excess of 1 million SDR would require the establishment of a Major Claims Fund for this incident.

8.2 Should there be a need to pay compensation in the region of some £58 million as established in the court experts' report, a Major Claims Fund for this incident would have to be established. The 1971 Fund would have to levy substantial contributions. These contributions would need to be based on oil receipts from contributors in 1971 Fund Member States for the year 1996, ie the year preceding the incident.

9 Director's conclusions

9.1 The Director agrees with the 1971 Fund Administrative Council that the claim by the Puerto Miranda Union is time-barred.

9.2 The Director's view, as expressed at the Council meeting in October 2010, is that the 1971 Fund was not given reasonable notice and a fair opportunity to present its case and that sub-paragraph (b) of Article X of the 1969 CLC applies, in which case, a final judgement would not be enforceable against the 1971 Fund.

9.3 The 1971 Fund has appealed to the Constitutional Section of the Supreme Tribunal and the 1971 Fund is awaiting its decision.

9.4 The Director notes that no payment of compensation to the Puerto Miranda Union will be possible until the losses suffered by FETRAPESCA have been established by a final judgement from a competent court. Since the 1971 Fund has not yet been notified of the judgement of the Maritime Court of First Instance in respect of that claim, and since it is likely that this judgement will be appealed by the 1971 Fund, the Director considers that it is not likely that any compensation payments will be made in respect of this incident for some time.

9.5 Once a final decision has been reached in the Venezuelan Courts, the Director will, before taking any further action, report the issue to the 1971 Fund Administrative Council again with a view to receiving further instructions.

10 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; and

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