INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS

Agenda item: 3	IOPC/OCT11/**3/4**	
Original: ENGLISH	20 September 2011	
1992 Fund Assembly	**92A16**	
1992 Fund Executive Committee	**92EC53**	
Supplementary Fund Assembly	**SA7**	
1971 Fund Administrative Council	**71AC27**	●

INCIDENTS INVOLVING THE IOPC FUNDS – 1971 FUND

PLATE PRINCESS

Note by the Secretariat

Objective of document:	To provide the 1971 Fund Administrative Council with details of recent developments and an analysis of the judgement on liability of the Constitutional Section of the Supreme Tribunal of Venezuela, of 8 June 2011.
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 as an interested third party (first notification).
May 2006:	The 1971 Fund Administrative Council 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 as an interested third party for a second time (second notification).
April 2008:	The Maritime Court of First Instance accepted the amended claim by the Puerto Miranda Unión for BsF 53.5 million (£7.6 million[<1>]).
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.
February 2009:	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 this judgement.

[<1>] The exchange rate as at 30 August 2011 was £1 = BsF 7.00041

September 2009:	The 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 on liability to the Supreme Tribunal of Venezuela.
October 2010:	The Supreme Tribunal dismissed the appeal on liability 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.
November 2010:	The Maritime Court of First Instance appointed experts to calculate the quantum of compensation to be paid.
January 2011:	The experts appointed by the Maritime Court of First Instance issued their report quantifying the compensation, concluding that the losses suffered by the claimants amounted to BsF 769 892 085 (£110 million); 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 403 473 005 (£57.6 million); and that, in accordance with the judgement of the Maritime Court of Appeal, the limit of liability of the shipowner was BsF 2 884 983 (£400 000), and the compensation payable by the 1971 Fund should be BsF 400 628 022 (£57.2 million). The Master, shipowner and the 1971 Fund requested the Maritime Court of First Instance to reconsider the experts' report.
January 2011:	The Maritime Court of First Instance appointed two new experts to review the report of the original experts.
February 2011:	The 1971 Fund appealed against the judgement of the Supreme Tribunal on liability to the Constitutional Section of the Supreme Tribunal of Venezuela.
Recent developments:	
March 2011:	The new experts appointed by the Maritime Court of First Instance issued their report, confirming the conclusions of the original experts. The Maritime Court of First Instance accepted the experts' report and ordered the shipowner to pay BsF 2 844 983 (£400 000), and the 1971 Fund, although not a defendant, to pay BsF 400 628 022 (£57.2 million), plus costs. The Master, shipowner and the 1971 Fund appealed the judgement on quantum to the Maritime Court of Appeal.
June 2011:	The Constitutional Section of the Supreme Tribunal dismissed the 1971 Fund's appeal against the judgement of the Supreme Tribunal on liability.
July 2011:	The Maritime Court of Appeal dismissed the appeal on the quantum of compensation by the Master, shipowner and 1971 Fund against the decision of the Maritime Court of First Instance. The 1971 Fund requested leave from the Maritime Court of Appeal to appeal to the Supreme Tribunal. Leave to appeal was refused. The 1971 Fund has appealed this decision.
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 (BsF 2 844 983 or £400 000)
STOPIA/TOPIA applicable	No
CLC + Fund limit	60 million SDR (BsF 403,473,005 or £57.6 million)
Compensation	No compensation paid
Standing last in the queue	N/A
Legal proceedings	Two claims as follows: *Claim by the Puerto Miranda Unión* Plaintiffs: Fishermen's Union. Defendants: Shipowner and Master of the *Plate Princess.* The 1971 Fund, not a defendant in the proceedings, participated as a 3rd interested party. Judgement by the Maritime Court of First Instance condemned defendants and the 1971 Fund to pay compensation to be quantified by court experts. Appeals on liability to the Court of Appeal, the Supreme Tribunal and the Constitutional Section of the Supreme Tribunal were rejected. Experts appointed by Maritime Court of First Instance quantified compensation, inclusive of indexation and interest, and payment liabilities as follows:

Quantified compensation, excl. costs	BsF 769 892 085	£110 million
Shipowner's liability (3.6 million SDR)	BsF 2 844 983	£0.4 million
Compensation limit under the Conventions (60 million SDR)	BsF 403 473 005	£57.6 million
Payable by 1971 Fund (Compensation limit under the Conventions minus shipowner's liability)	BsF 400 628 022	£57.2 million

The Maritime Court of First Instance confirmed the experts' findings on quantum and ordered the 1971 Fund to pay the amount calculated by the experts, plus costs. The 1971 Fund appealed to the Maritime Court of Appeal. The appeal was dismissed. The 1971 Fund requested leave from the Maritime Court of Appeal to appeal to the Supreme Tribunal. Leave was denied. The decision to deny leave to appeal has been appealed by the 1971 Fund.

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 the shipowner, Master and the 1971 Fund to pay compensation to be quantified by a court expert. The 1971 Fund has not yet been notified of the 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). The expert informed the 1971 Fund 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, 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 Unión 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 formally notified, as an interested third party, 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 Administrative 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, as an interested third party, of both claims for a second time. The notification did not provide any details of the alleged losses.

Amendment of Puerto Miranda Unión claim

2.10 There were no further developments until 4 April 2008 when the Puerto Miranda Unión 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 3.5 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 the 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.

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

2.16 In February 2009, the Maritime Court of First Instance issued its judgement in which it accepted the claim and ordered the Master, shipowner and 1971 Fund, although not a defendant[<2>], 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 Unión

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 was based on data obtained from the receipts presented by the claimants to support their losses. 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, 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.

Appeal to the Constitutional Section of the Supreme Tribunal

2.20 In February 2011, the 1971 Fund submitted an appeal to the Constitutional Section of the Supreme Tribunal. In its appeal the 1971 Fund 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

2.21 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 could not nominate an expert. The nomination by the Master and shipowner was rejected by the Maritime Court of First instance. The Master and shipowner nominated an alternative expert; this nomination was also rejected. The Master and shipowner appealed against this decision. The appeal was rejected. The Court then nominated the expert who should have been nominated by the Master and shipowner.

[<2>] The Venezuelan Court, in its interpretation of the Conventions, assumes that the 1971 Fund, having been notified, is obliged automatically to pay compensation.

Report by the court experts

2.22 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 (£110 million), including interest. This was made up as follows:

Item	Assessed amount (BsF)	Assessed amount (£)
Cost of replacing 7 540 nets	8 713 150	1.2 million
Cost of replacing one outboard motor	17 000	2 500
Loss of income fin-fish boat fishermen	704 664 482	101 million
Loss of income shrimp boat fishermen	21 624 680	3.1 million
Loss of income shrimp foot fishermen	6 708 064	1 million
Interest on cost of replacing nets and motor	28 164 709	4 million
Total	**769 892 085**	**110 million (approximate)**

2.23 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 (£57.6 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 2 844 983 (£400 000 million), 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 400 628 022 (£57.2 million).

2.24 The 1971 Fund requested the Maritime Court of First Instance to reconsider the court experts report 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 request and appointed two new experts to review the first experts' report.

Developments since March 2011

2.25 In March 2011, the new experts appointed by the Maritime Court of First Instance issued their report. In that report they confirmed the findings of the three original experts. Two days later, the Maritime Court of First Instance issued its judgement on the quantum of the loss. In that judgement the Maritime Court of First Instance dismissed the appeals by the Master, shipowner and the 1971 Fund against the reports issued by the three experts originally appointed by the Court and fixed the quantum of the loss as BsF 769 892 085 (£110 million). The Court ordered the Master, as agent of the shipowner, to pay BsF 2 844 983 (£400 000) and the 1971 Fund to pay BsF 400 628 022 (£57.2 million). The Court also ordered the Master and the 1971 Fund to pay costs. The Master and the 1971 Fund appealed the judgement on the quantum of compensation to be paid to the Maritime Court of Appeal.

2.26 In June 2011, the Constitutional Section of the Supreme Tribunal dismissed the 1971 Fund's appeal on liability. The judgement issued by the Constitutional Section of the Supreme Tribunal is analysed in section 6 of this document.

2.27 In July 2011, the Maritime Court of Appeal dismissed the appeals submitted by the Master and 1971 Fund against the judgement of the Maritime Court of First Instance on the quantum of compensation. The 1971 Fund argued in its appeal, *inter alia*, that the quantum was excessive in relation to the normal income earned by fishermen in 1997 and violated Venezuelan procedural law (time bar arising from lack of prosecution (Perencion de Instancia)). The Maritime Court of Appeal rejected the arguments, stating that the experts had followed the parameters specified in its decision of September 2009.

2.28 The Master, shipowner and the 1971 Fund applied to the Maritime Court of Appeal for leave to appeal to the Supreme Tribunal. This was denied. The 1971 Fund has appealed this decision.

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 4 2 844 983 (£400 000).

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 (£57.6 million) and that the compensation payable by the 1971 Fund should be BsF 400 628 022 (£57.2 million). (BsF 403 473 004.80 minus BsF 2 844 983).

3.3 In a decision of March 2011 the Maritime Court of First Instance accepted the amounts calculated by the experts and ordered the 1971 Fund to pay BsF 400 628 022 (£57.2 million), plus costs. This figure was confirmed by the Maritime Court of Appeal in July 2011. The 1971 Fund is seeking leave to appeal the decision on quantum to the Supreme Tribunal.

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 evidence relating to the quantum of the loss of income.

Time bar

4.2 The 1971 Fund Administrative Council noted that the Maritime Court of Appeal had rejected the argument that the claim by Puerto Miranda Unión was time-barred, since 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 had held that these conditions had been satisfied and that the claim was not, therefore, 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 1971 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 Unión 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 a number of grounds. It was also 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

4.6 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

4.7 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 recognized and enforceable in each Contracting State on the same conditions as are prescribed in Article X of the [1969 Civil] Liability Convention.

4.8 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.

4.9 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.

4.10 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.

4.11 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, paragraph 1 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

4.12 The Venezuelan delegation made a statement in which it informed the Administrative Council that 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 presented by the Director 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.
- The decision on the bank guarantee was finally taken in 2005 which was why the 1971 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.

4.13 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

4.14 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 Unión had been submitted against the shipowner and Master, and not against the 1971 Fund, so at no time was the 1971 Fund a defendant.

4.15 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 CLC, which would be a difficult decision to take.

4.16 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.

4.17 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, paragraph 1 of the 1969 CLC might apply, and that therefore a final judgement might not be enforceable against the 1971 Fund.

1971 Fund Administrative Council Decision

4.18 The 1971 Fund Administrative Council instructed the Secretariat to examine the Supreme Tribunal Judgement and if appropriate, appeal to the Constitutional Section of the Supreme Tribunal. The 1971 Fund Administrative Council further instructed the Secretariat to provide the analysis of the Judgement by the Supreme Tribunal at its next session.

4.19 It was agreed that the Secretariat would take no further action without further instruction from the 1971 Fund Administrative Council.

5 Considerations by the 1971 Fund Administrative Council in March 2011

5.1 In March 2011, the Director submitted a document reporting on developments in the *Plate Princess* incident (document IOPC/MAR11/3/2) and requesting the 1971 Fund Administrative Council to give the Director such instructions as it deemed appropriate. Also in March 2011, the Venezuelan delegation submitted two documents (documents IOPC/MAR11/3/2/1 and IOPC/MAR11/3/2/2) requesting the Director to make prompt payments. A decision was, therefore, required from the Administrative Council as to whether the Director should be instructed to make prompt payment of compensation.

5.2 In response to a question from one delegation, the Acting Director stated that the Venezuelan Courts had considered the 1971 Fund's function to be simply as a source of payment, once the shipowner's limit had been reached.

5.3 The same delegation drew attention to the provisions of Article X, paragraph 1 of the 1969 CLC (see paragraph 4.8).

5.4 In that delegation's opinion, it was clear that the 1971 Fund had not been given a fair opportunity to present its case, as it had not received the documents in support of the claim in time to answer the case, but had nevertheless been obliged to file a defence. Furthermore, the delegation expressed the view that the decisions of the Venezuelan Court were unfair, and that the documents submitted by Venezuela had not convinced the delegation otherwise.

5.5 One delegation emphasised that this was a very important case, with implications for the entire compensation regime. Pointing out that the Fund regime represented an act of solidarity amongst Member States to provide compensation payments to victims of oil spill incidents, that delegation recalled that, on the previous day, the Director had drawn attention to the necessity for uniform application of the Conventions by national Courts, and had stressed that it was necessary for the various Conventions to be properly implemented and applied in the Member States which were signatories.

5.6 Noting the importance of Article X of the 1969 CLC, that delegation pointed out that sometimes national courts did not agree with the deliberations of the governing bodies and that it was accepted that this would occur. However, that delegation continued, in accepting the principle that the decisions of national courts were binding on the Funds, the governing bodies also had to be satisfied that due process had been followed, and that the Court procedures had been fair. In this instance, there was considerable doubt that this had been the case.

5.7 The same delegation noted that the Venezuelan delegation was of the view that the 1971 Fund had been given reasonable notice and opportunity to defend the claim. If, however, it was concluded that the process had not been fair, it was difficult to agree to instruct the Director to make prompt payment of claims. The same delegation stated that it had been troubled because it was recorded that the 1971 Fund Executive Committee had agreed in 1997 to make payments.

5.8 In response, the Acting Director stated that the question of the grant of the Director's authority to make payments was governed by Internal Regulations 7.4 and 7.5 (document 71FUND/EXC.55/15, paragraph 2.2). The Acting Director explained that the intention of those Regulations was to give the Director authority to settle claims up to a certain level if a spill occurred between meetings of the governing bodies. The Director would then seek authority to pay above that level at the next meeting of the Executive Committee. The Acting Director stressed that the decision of the 1971 Fund Executive Committee was not related to specific claims.

5.9 A large number of delegations indicated their agreement with the delegation that had considered the Venezuelan Court decisions to be unfair and that the documents submitted by Venezuela had not convinced that delegation otherwise. These delegations also stated that they considered that the 1971 Fund had not been given reasonable notice and a fair opportunity to present its case, and that the 1971 Fund Administrative Council should instruct the Director not to make payment of compensation.

5.10 A few delegations commented that, in their opinion, the incident was important because of the negative precedent it could set. Furthermore, in relation to the fraudulent documents, it appeared that proper procedure had not been followed.

5.11 One delegation stated that the Court procedures for requesting copies of documents provided to support the claim should have been known to the 1971 Fund's lawyers, and that the lawyers should have taken this into account, bearing in mind the problems that could be caused. That delegation further stated that the claim could not be time-barred if there had already been an agreement to pay. That delegation further pointed out that Article 7.6 of the 1971 Fund Convention stated that the Fund could not challenge a final judgement, even if it had not intervened in the proceedings. The same delegation stated that it could not understand why there was no money available to pay compensation, since Article 44.1(a) of the 1971 Fund Convention required that, if the Convention ceased to be in force, the Fund should meet its obligations in respect of any incident occurring before the Convention ceased to be in force. That delegation further stated that it supported the request by Venezuela that payment to the claimants should proceed.

5.12 Another delegation, with observer status to the 1971 Fund, supported these views, and stated that the decisions of courts in some jurisdictions appeared to be classified as acceptable, whereas, in others, they were not.

5.13 A further delegation, also with observer status to the 1971 Fund, questioned whether the 1971 Fund Administrative Council could review the findings of national courts, but noted that the principle of the time bar was important, and if the principle was disregarded, the financial stability of the compensation regime might be at risk.

Summary by the Chairman

5.14 The Chairman of the 1971 Fund Administrative Council, while recognising that the whole purpose of the Funds was to pay compensation and that it was never pleasant to deny payment of compensation to claimants, noted that 18 delegations, two of which had observer status to the 1971 Fund, had made submissions concerning the documents presented by the Director and the Venezuelan delegation.

5.15 The Chairman noted that a large majority of the delegations considered that the due process of law had not been followed in arriving at the judgements reached by the Venezuelan Courts, and furthermore that the 1971 Fund had not been given reasonable notice and a fair opportunity to present its case in accordance with Article 8 of the 1971 Fund Convention, and Article X of the 1969 CLC.

5.16 The Chairman proposed that the 1971 Fund Administrative Council instruct the Director not to make any payment in respect of the *Plate Princess* incident and to keep the Administrative Council advised of developments in the legal proceedings in the Venezuelan Courts.

1971 Fund Administrative Council Decision

5.17 The 1971 Fund Administrative Council decided to instruct the Director not to make any payments in respect of the *Plate Princess* incident and to keep the Administrative Council advised of developments in the legal proceedings in the Venezuelan Courts.

6 Analysis of the judgement of the Constitutional Section of the Supreme Tribunal

6.1 The issues dealt with in the judgement of the Constitutional Section of the Supreme Tribunal can be subdivided as follows:

- Time bar
- The requirement for the Courts to use logic and judgement (Sana Critica)
- Other issues

Time bar

6.2 The Constitutional Section of the Supreme Tribunal upheld the interpretation by the Supreme Tribunal of the time bar provisions of the 1971 Fund Convention. The Constitutional Section of the Supreme Tribunal argued as follows:

> However, analysing the content of article 6.1 of the 1971 Fund Convention as well as the reasoning of the Supreme Court, this Constitutional Court notes that the article referred to allows three different possibilities to be presented for the time bar of the claim and, at least as far as the first of these is concerned, its content is not so clear as to proceed with its automatic application - as the appellant suggests in its appeal - since there is an inconsistency as to against whom the time bar operates.
>
> In effect, the article referred to indicates in its first part that the right to obtain indemnification or compensation will expire '…unless an action is brought thereunder or a notification has been made … within three years from the date when the damage occurred …', but does not state against whom this is referring, if it is the owner of the ship, its guarantor or the Fund, so that to consider that it refers to the latter is not correct, since, had it been the intention of the States Party at the time of drafting the article referred to, this would have been expressly established.
>
> In view of this lack of precision, and since there is no other provision in the 1971 Fund Convention that defines the time bar point, it was reasonable to proceed - as the Supreme Court rightly considered - to interpret the article concerned considering, in the first instance, the content of articles 2, 4 and 7 of the Convention, due to the mention that these make to that provision, as well as the contents of articles 3.1 the 7 of the CLC Convention, since the payment of compensation anticipated in the Fund Convention originates from the situation that the victims of an oil spill at sea have not obtained full compensation from those obliged to pay under the CLC, in this case the shipowner, its insurer or any person that provided a financial guarantee.
>
> This being the case, and seeing that the right of compensation provided in article 4 of the Fund Convention relates to the right of the victim to obtain from the Fund full compensation when this has not been provided by those who caused the damage (the shipowner or the insurer), and taking into consideration that article 6.1 eiusdem indicates that the timebar on the right to compensation occurs if the legal action in the application of those articles has not been taken within three (3) years of the damage occurring; it is logical to conclude - as the

Supreme Court and lower courts rightly indicated - that the timebar referred to in the article concerned operates only if the victim had not taken any action against the shipowner or his insurer within three (3) years of the damage occurring in which case the Fund would not be responsible for the complementary compensation required by the lack of financial capacity or reduced compensation obtained from the party that directly caused the damage.

Consequently, if the victim takes its action within the three (3) years counting from the occurrence of the incident (oil spill) against the shipowner or his insurer, the Fund will not be able to use the timebar as a defence against the action taken for full payment of compensation for the damage suffered.

In view of the reasoning set out, this Constitutional Court concludes that the Supreme Tribunal's interpretation of article 6.1 of the 1971 Fund Convention, was correct in law. For that reason, the allegation of supposed violation of the rights to the defence, to due process and the principle of safe law used by the appellant, lacks foundation.

6.3 In its appeal to the Constitutional Section of the Supreme Tribunal, the 1971 Fund had also argued that, in addition to being time-barred under the provisions of the 1971 Fund Convention, the claim by the Puerto Miranda Unión was in any event time-barred under Venezuelan law as a result of lack of action by the claimant for a period of twelve months (*perención de instancia).*

6.4 The Constitutional Section of the Supreme Tribunal stated that the analysis of this argument was unnecessary since the use of time bar was inadmissible in the type of legal process concerned on the grounds that the action concerned environmental matters. In this connection, the Constitutional Section of the Supreme Tribunal stated:

> … taking into consideration that spillage of oil in the sea is an undoubted factor in upsetting the ecological balance which totally changes the biodiversity of the various species which inhabit that environment, in the majority of cases causing irreparable damage to the ecosystem concerned, this Constitutional Section considers that legal proceedings instituted for the purpose of obtaining compensation or indemnification for the damage suffered on the occasion of such incidents, in essence involve judgements which concern aspects relating to the environment, which touches on a human right recognized in the Constitution.
>
> In this respect, article 95 (ex article 19, paragraph 16 of the Act of 2004) of the Organic Law of the Supreme Court of Justice states, as one of the grounds for inadmissibility of the time bar, proceedings which involve environmental matters. In this respect, the provision in question states:
>
> > 'Article 95. Proceedings shall not be declared time-barred in cases involving environmental matters; or in the cases of claims which are intended to punish offences against human rights, public assets or trafficking in narcotic drugs and psychotropic substances.'
>
> This being the case, and taking into consideration that the subject of the claim in these proceedings derives from an incident in which environmental matters are involved (spillage of oil in the sea) this Constitutional Section considers it unnecessary to analyse the claim for time bar argued by the requesting party, since in this type of proceedings, this form of time bar of the proceedings, as an anomalous mechanism for terminating the proceedings, is inadmissible.

The requirement for the Courts to use 'logic and judgement' (Sana Critica)

6.5 The 1971 Fund also appealed to the Constitutional Section of Supreme Tribunal on the grounds that its right to the protection of the courts had been violated since the Court had ignored the requirement under Venezuelan maritime procedural law for the court to exercise logic and judgement (sana critica) when evaluating the evidence, since documents had been accepted as valid when clearly they were not while other documents had been rejected on technicalities when clearly they were valid.

6.6 The Constitutional Section of the Supreme Court dismissed this argument on the grounds that the system of evaluating the evidence using logic and judgement (sana critica) was not the only system that should be used. The Court stated that the Judge, at the time of examining a particular item of evidence, should abide by any special regulations concerning the evaluation of the particular form of evidence or, in the absence of a special regulation, follow the requirements set out in the Civil Procedure Code. Only in the absence of an express rule for its evaluation is the system of logic and judgement (sana critica) applicable.

6.7 The Court went on to say that the Supreme Tribunal acted correctly when rejecting the appeal in this connection since the public documents, the private administrative documents, as well as the documents emanating from third parties accepted during the process, did not have to be evaluated by the rules of the logic and judgement (sana critica) alluded to in maritime procedural law, but by the specific rules established in the Civil Procedure Code, which were applicable in preference to Maritime procedural law.

Other issues

6.8 The 1971 Fund had also appealed on the grounds that the lower instance courts had accepted information contained in certain documents presented by the claimants as evidence without question, had failed to take into account the oral evidence given by witnesses who had appeared at the hearing of the Maritime Court of First Instance in February 2009, and had evaluated the losses in an amount exceeding the amount claimed.

6.9 The Constitutional Section of the Supreme Tribunal dismissed these arguments on the grounds that it considered that there had not been any 'grotesque infractions' of interpretation of the Constitution. It stated further that it considered that the requested revision of the judgement of the Supreme Tribunal would not contribute to the uniformity of the interpretation of the rules and principles of the Constitution.

7 Director's considerations

Summary of relevant facts

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

- 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, 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 Unión was amended in April 2008, ie 11 years after the spill. No evidence in support of the alleged loss had been presented before the submission of the amended claim.

Constitutional Section of the Supreme Tribunal - Time bar

7.2 The Director notes that, in its judgement, the Constitutional Section of the Supreme Tribunal has rejected the appeal by the 1971 Fund concerning the time bar on the same grounds as those employed by the Supreme Tribunal and 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 maintains his view, expressed in document IOPC/MAR11/3/2, that the action to which Article 6, paragraph 1 of the 1971 Fund Convention, can be taken either against the 1971 Fund or against the shipowner. If the action is against the shipowner then the claimant, to prevent the claim becoming time-barred must formally notify the 1971 Fund of that action within three years.

7.4 In the Director's opinion, the interpretation of Article 6 of the 1971 Fund Convention established by the Venezuelan courts 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.

7.5 As also set out in document IOPC/MAR11/3/2, 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.

7.6 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.

Constitutional Section of the Supreme Tribunal – The application by the Courts of 'logic and judgement' (Sana Critica)

7.7 The Director notes with concern that the Constitutional Section of the Supreme Tribunal considered that logic and judgement (sana critica) should only be employed by the court when determining the quantum of the loss in the absence of any special regulations concerning the evaluation of evidence or, in the absence of any special regulations, those set out in the Civil Procedure Code.

The quantum of the assessment

7.8 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 Unión as BsF 769 892 085 (£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. Assessment of the claims in the *Nissos Amorgos* incident indicated that, in 1997, the average annual catch sale income per shrimp boat was US$17 400 (£11 000). The amount calculated by the Court experts in the *Plate Princess* is therefore 22 times higher than in the *Nissos Amorgos*. 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.

Calculation of the amount to be paid by the 1971 Fund

7.9 The limit of liability of the shipowner and the total amount available for compensation under the Conventions had been calculated by the Maritime Court using SDR/Bolivar exchange rates applicable

on dates differing by 14 years. Since the Bolivar had depreciated relative to the SDR by some 750% in the intervening period, the amounts ordered by the Court to be paid by the shipowner or his insurer and the 1971 Fund differ substantially from the amounts that would have applied had the shipowners' limitation amount and the amount of compensation available under the Conventions been converted from SDR to the national currency using exchange rates applicable on the same date.

The provision of reasonable notice and a fair opportunity for the 1971 Fund to present its case

7.10 At its March 2011 session, a number of delegations expressed doubt that the 1971 Fund had been given reasonable notice and a fair opportunity to present its case, as required under Article X of the 1969 CLC. The Director agrees with those delegations, not only because the documents provided as evidence by the claimants in support of their claim were not available to the 1971 Fund prior to the time limit for submission of defence pleadings but because it would have been impossible to adequately investigate and defend a claim submitted in detail some 11 years after the damage occurred even if sufficient time had been allowed by the Court for the documentary evidence to be analysed prior to submission of defence pleadings. The Director considers this to be particularly the case since, in the view of the expert who had examined the documentation, it was clear that many of those documents submitted in evidence had been falsified.

Director's conclusions

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

7.12 The Director's view, as expressed at the Administrative Council meetings in October 2010 and March 2011, 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, paragraph 1 of the 1969 CLC applies, in which case, a final judgement would not be enforceable against the 1971 Fund. The Director, therefore, concludes that there are no grounds for the Administrative Council to change their instructions to the Director not to make any payments in respect of the *Plate Princess* incident.

7.13 The 1971 Fund has appealed to the Maritime Court of Appeal against its decision to refuse leave of appeal to the Supreme Tribunal in connection with the quantification of loss. The 1971 Fund is awaiting its decision.

7.14 The Director notes that, in any event, no payment of compensation to the Puerto Miranda Unión would 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 would be made in respect of this incident for some time.

7.15 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.

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; and

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