INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS

Agenda item: 3	IOPC/APR12/**3/2/Rev.1**[1]	
Original: ENGLISH	18 April 2012	
1992 Fund Assembly	**92AES17**	
1992 Fund Executive Committee	**92EC55**	
1971 Fund Administrative Council	**71AC28**	●
1992 Fund Working Group 6	**92WG6/4**	
1992 Fund Working Group 7	**92WG7/1**	

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.
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 Union, 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 Union for BsF 53.5 million (£7.9 million[2]).
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 Union. The Master, the shipowner and the 1971 Fund appealed against the judgement.

[1] This document has been re-issued to correct a formatting error appearing on page 1 of the summary box of the original document. The dates from December 2006 – February 2009 were given incorrectly.

[2] The exchange rate used in this document (as at 5 March 2012) is £1 = BsF 6.81. The exchange rate used in Annex I, however, is the exchange rate as at 31 October 2011 (ie £1 = BsF 6.93).

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.
September 2009:	The Maritime Court of Appeal of Caracas dismissed the appeal in respect of the claim by the Puerto Miranda Union.
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 (£113 million); that the total amount available for compensation under the 1969 Civil Liability Convention (CLC) and the 1971 Fund Convention (60 million SDR) was equivalent to BsF 403 473 005 (£59.2 million); and that, in accordance with the judgement of the Maritime Court of Appeal, the limit of liability of the shipowner was BsF 2 844 983 (£424 000), and the compensation payable by the 1971 Fund should be BsF 400 628 022 (£58.8 million). The Master, shipowner and the 1971 Fund requested the Maritime Court of First Instance to reconsider the experts' report. 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.
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 (£424 000), and the 1971 Fund, although not a defendant, to pay BsF 400 628 022 (£58.8 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 appealed the decision.

Recent developments:

October 2011: FETRAPESCA requested the withdrawal of its claim from the Maritime Court of First Instance.

The Maritime Court of First Instance rejected FETRAPESCA's request to withdraw the claim.

November 2011: The Supreme Court rejected the 1971 Fund's request for leave to appeal the July 2011 judgement of the Maritime Court of Appeal in connection with the quantum of the loss.

March 2012: The Puerto Miranda Union submitted requests to the Maritime Court of First Instance to order the shipowner and the 1971 Fund to pay in accordance with the judgement of the Court of Appeal, and to order the Banco Venezolano de Credito to transfer to the Court the amount of the bank guarantee establishing the shipowner's limitation fund.

The 1971 Fund has appealed to the Constitutional Section of the Supreme Court against the judgement of the Supreme Court regarding the quantum of the loss.

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 £424 000)
STOPIA/TOPIA applicable	No
CLC + Fund limit	60 million SDR (BsF 403,473,005 or £59.2 million)
Compensation	No compensation paid
Standing last in the queue	N/A

<table>
<tr><td>Legal proceedings</td><td>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, not a defendant in the proceedings, participated as an interested third 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:
<table>
<tr><td>Quantified compensation, excluding costs</td><td>BsF 769 892 085</td><td>£113 million</td></tr>
<tr><td>Shipowner's liability
(3.6 million SDR)</td><td>BsF 2 844 983</td><td>£0.42 million</td></tr>
<tr><td>Compensation limit under the Conventions (60 million SDR)</td><td>BsF 403 473 005</td><td>£59.2 million</td></tr>
<tr><td>Payable by 1971 Fund
(Compensation limit under the Conventions minus shipowner's liability)</td><td>BsF 400 628 022</td><td>£58.8 million</td></tr>
</table>
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 was appealed by the 1971 Fund. The appeal was rejected. The 1971 Fund has appealed to the Supreme Court (Constitutional Section) against the decision of the Supreme Court on the quantum of the loss.

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. The claimant requested the Maritime Court of First Instance to withdraw the claim against the 1971 Fund but the Maritime Court of First Instance refused the request.</td></tr>
</table>

2 Background information

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

3 Decisions taken by the 1971 Fund Administrative Council at its March and October 2011 sessions

3.1 At its March 2011 session, the 1971 Fund Administrative Council gave instructions to the Acting Director not to make any payments in respect of this incident and that the Acting Director should continue to monitor the outcome of the legal actions in Venezuela.

3.2 At its October 2011 session, the 1971 Fund Administrative Council decided to reconfirm the instructions given to the Acting Director in March 2011.

3.3 The 1971 Fund Administrative Council also instructed the Acting Director to prepare a report on the points raised in the intervention by the Venezuelan delegation at its October 2011 session and on the legal basis for the 1971 Fund to refuse payment under Article X of the 1969 CLC, and to report back to the 1971 Fund Administrative Council at its next session.

4 Developments since October 2011

4.1 In October 2011, the FETRAPESCA fishermen's union requested the withdrawal of the claim to the Maritime Court of First Instance. In a decision issued later in October 2011, the Maritime Court of First Instance rejected FETRAPESCA's request.

4.2 In March 2012, the Puerto Miranda Union submitted a request to the Maritime Court of First Instance to order the Banco Venezolano de Credito to transfer to the Court the amount of the bank guarantee constituting the shipowner's limitation fund.

4.3 Later in March 2012, the Puerto Miranda Union submitted a request to the Maritime Court of First Instance to request the shipowner and the 1971 Fund to voluntarily comply with the provisions of the judgement by the Court of Appeal.

4.4 In March 2012, the 1971 Fund appealed to the Constitutional Section of the Supreme Court against the decision of the Supreme Court denying leave to appeal. The outcome of the appeal is awaited.

5 Director's report on the points raised by the Venezuelan delegation at the October 2011 session of the 1971 Fund Administrative Council (document IOPC/OCT11/11/1, Annex II)

At the October 2011 session of the 1971 Fund Administrative Council, the Director was instructed to prepare a report on the points raised by the Venezuelan delegation in October 2011. The Director's report is attached at Annex II to this document.

6 Director's legal analysis

6.1 At the October 2011 session of the 1971 Administrative Council, the Director was instructed to prepare a report on the legal basis for the 1971 Fund to refuse payment under Article X of the 1969 CLC. His considerations appear below. The Director has also considered the provisions in Article 4, paragraph 5, of the 1971 Fund Convention regarding the principle of equal treatment under the Conventions, insofar as these relate to payments of compensation.

6.2 In connection with Article X of the 1969 CLC, the Director notes the following:

6.2.1 Article 8 of the 1971 Fund Convention provides:

> Subject to any decision concerning the distribution referred to in Article 4, paragraph 5, any judgement given against the Fund by a court having jurisdiction in accordance with Article 7, paragraphs 1 and 3, shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each Contracting State on the same conditions as are prescribed in Article X of the Liability Convention.

6.2.2 Article X of the 1969 CLC provides:

> 1. 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 its case.
>
> 2. A judgement recognized under paragraph 1 of this Article shall be enforceable in each Contracting State as soon as the formalities required in the State have been complied with. The formalities shall not permit the merits of the case to be re-opened.

6.3 Other International Conventions containing similar provisions

6.3.1 With respect to the fraud exception contained within Article X, the Director understands that it is not uncommon for international conventions providing for mutual recognition and enforcement of judgements, to contain a 'fraud exception' expressed in the same or similar terms to the 1969 CLC and 1971 Fund Convention.

6.3.2 The following International Conventions contain identical fraud exceptions to that in the 1969 CLC:

(a) The Convention on Civil Liability for Damage caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels 1989, Article 20;

(b) The Convention on Liability of Operators of Nuclear Ships and Additional Protocol 1962;

(c) International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea 1996, Article 40(1);

(d) The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001, Article 10(1);

(e) The Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal 1999, Article 21(1); and

(f) The Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources 1977, Article 12(1);

6.3.3 In addition, the Director understands that the Convention on a Code of Conduct for Liner Conferences 1974, Article 39 (2)(b) provides that a recommendation made under the Convention shall not be recognised or enforced if 'fraud or coercion has been used in the making of the recommendation' .

6.3.4 Similarly, the Convention on Choice of Court Agreements 2005 provides that recognition and enforcement may be refused if 'the judgement was obtained by fraud in connection with a matter of procedure'.

6.3.5 The Director understands that many other International Conventions which do not contain a fraud exception contain an exception where recognition and enforcement would be contrary to public policy in the enforcing State, for example:

(a) The Arrest Convention 1999 (Article 7(5));

(b) The European Convention on State Immunity 1972 (Article 20(2));

(c) The New York Convention on Recognition of Foreign Arbitral Awards 1959 (Article V(2)); and

(d) The European Judgements Regulation 44/2001 (Article 34(1)).

6.4 Fraud exception

6.4.1 With respect to Article X of the 1969 CLC, any judgement shall be recognised, subject to two exceptions, namely where the judgement was obtained by fraud, or where the defendant was not given reasonable notice and a fair opportunity to present its case.

6.4.2 The Director recalls his comments to the 1971 Fund Administrative Council in October 2010[<3>], where he stated that it was of great concern that the judgement of the Maritime Court of Appeal had accepted documentation which was known not to be genuine and to have been falsified for the purposes of obtaining compensation in support of the claim. He recalls that the experts appointed by the 1971 Fund had examined the sets of invoices produced as evidence of normal catch incomes and had concluded that they had been falsified. They were neither issued on the dates alleged, nor reflected the true expenditure incurred. He also noted that the witnesses at the hearing before the Maritime Court of First Instance had accepted that the invoices had been prepared after the spill while purporting to predate the incident. Notwithstanding this, the Maritime Court of Appeal accepted that the information in those documents should be used in the calculation of the losses.

6.4.3 In the Director's view, the fact that the documentation had been falsified, combined with the implausibility of the outcome of the compensation awarded to the claimants, renders the judgement unenforceable under Article X, paragraph 1(a).

6.4.4 The Director therefore considers that the 1971 Fund Administrative Council would be entitled to refuse payment on the grounds of Article X, paragraph 1(a) of the 1969 CLC.

6.5 Due process of law exception

6.5.1 The Director again recalls his comments to the 1971 Fund Administrative Council in October 2010[<4>]. Specifically the Director recalls that when the original claim was made in July 1997, no details of the losses were provided. Shortly after the spill had occurred, the 1971 Fund had appointed an expert who visited the terminal where the incident occurred and reported that no fishery or other resources were known to have been contaminated.

6.5.2 He also recalls that the 1971 Fund had no indication as to the alleged nature and extent of the damage and loss until April 2008, when the amended claim was submitted to the Maritime Court of First Instance. By that time, there was no possibility for the 1971 Fund to carry out any meaningful investigation into the damages detailed in the amended claim. Furthermore documentary evidence submitted by the claimants in support of their claim was not available to the 1971 Fund before the points of defence had to be submitted.

6.5.3 For these reasons the Director remains of the view that, given the circumstances, the 1971 Fund was not given reasonable notice and a fair opportunity to present its case and therefore considers that the 1971 Fund Administrative Council would also be entitled to refuse payment on the grounds of Article X, paragraph 1(b) of the 1969 CLC.

<3> Document IOPC/OCT10/3/3, paragraphs 5.7 and 5.8.
<4> Document IOPC/OCT10/3/3, paragraphs 5.12-5.14.

6.6 Equal treatment

6.6.1 In addition, Article 8 of the 1971 Fund Convention is conditional upon the provisions of Article 4(5) of the 1971 Fund Convention. The Director notes that Article 4, paragraph 5 of the 1971 Fund Convention provides:

> Where the amount of established claims against the Fund exceeds the aggregate amount of compensation payable under paragraph 4, the amount available shall be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under the Liability Convention and this Convention shall be the same for all claimants.

6.6.2 In this regard, the Director notes that FETRAPESCA has obtained a judgement by the Maritime Court of First Instance which condemns the 1971 Fund to pay compensation to be quantified by a court expert. FETRAPESCA has requested the withdrawal of the claim but the Court has rejected this request and therefore judgement in its favour remains valid even though the losses have not yet been quantified.

6.6.3 Under Article 4, paragraph 5, the aggregate amount available to pay compensation under the 1969 CLC and the 1971 Fund Convention ie 60 million SDR, shall be distributed such that the proportion shall be the same for all established claims. The proportion of the available compensation due to the two claimants will not be known until the losses suffered by FETRAPESCA have been established by a final judgement from a competent court.

6.6.4 Therefore, irrespective of the interpretation of the provisions of Article X of the 1969 CLC, it is the Director's opinion that the 1971 Fund Administrative Council should not, at the present time, authorise payment of the losses awarded to the Puerto Miranda Union.

6.7 Summary

6.7.1 The Director is therefore of the view that judgements of national courts are enforceable against the 1971 Fund, subject to the two exceptions namely, where the judgement was obtained by fraud or where the defendant was not given reasonable notice and a fair opportunity to present its case.

6.7.2 For the reasons explained above, the Director agrees with the 1971 Administrative Council's decision that Article X applies and that the 1971 Fund is therefore entitled to refuse payment.

6.7.3 The Director is also of the view that irrespective of its interpretation of Article X of the 1969 CLC, the 1971 Fund Administrative Council should not, at the present time, authorise payment of the losses awarded to the Puerto Miranda Union since the proportion of the available compensation due to the Puerto Miranda Union will not be known until the losses suffered by FETRAPESCA have been established.

7 Director's considerations

As instructed by the 1971 Fund Administrative Council in March 2011, and confirmed in October 2011, the Director continues to monitor the outcome of the legal proceedings in Venezuela and will report the Administrative Council of any further developments 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.

* * *

ANNEX I

BACKGROUND INFORMATION – PLATE PRINCESS

1 The incident

1.1 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.

1.2 An expert from the International Tanker Owners Pollution Federation Ltd (ITOPF) attended the site on 7 June 1997, 11 days after the spill, on behalf of the 1971 Fund and the Standard Steamship Owner's Protection & Indemnity Association (Bermuda) Ltd (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.

2 Impact

The expert was informed that oil was observed to drift towards the northwest, in the direction of a small stand of mangroves approximately one kilometre away. Oil was observed coming ashore in an area that was uninhabited.

3 Response operations

3.1 No clean-up work was carried out and it is understood that no fishery or other economic resources were known to have been contaminated.

3.2 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*.

4 Applicability of the Conventions

At the time of the incident Venezuela was Party to the 1969 Civil Liability Convention (1969 CLC) and the 1971 Fund Convention. In June 1997, the 1971 Fund Executive Committee considered that, if it were confirmed that the spilled oil was the same Lagotreco crude oil as was being loaded on to the *Plate Princess,* then it would appear that the oil, which apparently escaped into the ballast tanks via a defective coupling in the ballast line, had first been loaded into the cargo tanks. The Executive Committee took the view that the incident would in principle, therefore fall within the scope of the Conventions, as the oil was carried on board as cargo.

5 Claims for compensation

5.1 In June 1997, two fishermen's trade unions namely, FETRAPESCA and the Sindicato Unico de Pescadores de Puerto Miranda (Puerto Miranda Union), 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.

5.2 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.

6 Legal issues

6.1 Limitation proceedings

6.1.1 The limitation amount applicable to the *Plate Princess* under the 1969 CLC was estimated in 1998 to be SDR 3.6 million or Bs 2 845 million.

6.1.2 In 1997, a bank guarantee for this amount was provided by Banco Venezolano de Credito to the Criminal Court of Cabimas. In a judgement delivered in February 2009, the Maritime Court of First Instance in Caracas decided that the shipowner was entitled to limit its liability under the 1969 CLC to the amount of BsF 2.8 million, being the amount of the bank guarantee provided. This judgement was upheld by the Maritime Court of Appeal in September 2009 and the Venezuelan Supreme Court in 2010.

6.2 Claims by FETRAPESCA

6.2.1 In June 1997, FETRAPESCA presented a claim in the Criminal Court of Cabimas on behalf of 1 692 fishing boat owners, claiming an estimated US$ 10 060 per boat, ie a total of US$ 17 million. The claim was for alleged damage to fishing boats and nets and for loss of earnings. As of October 2011, there had been no developments on this claim.

6.2.2 In June 1997, FETRAPESCA also presented a claim against the shipowner and the master of the *Plate Princess* before the Civil Court of Caracas for an estimated amount of US$ 10 million. The claim was for the fishermen's loss of income as a result of the spill.

6.2.3 There were no developments in respect of this claim between 1997 and October 2005, when the 1971 Fund was formally notified through diplomatic channels of the claim presented in the Civil Court in Caracas.

6.2.4 In December 2006, the claim was transferred to the Maritime Court in Caracas.

6.2.5 In July 2008, the shipowner and the master of the *Plate Princess* requested the Maritime Court of Caracas to declare the claim by FETRAPESCA time-barred (*perención de instancia*) since the plaintiffs had not taken steps to duly pursue their claim in court. In a decision published later that month, the Court decided that the claim was not time-barred. The shipowner and the master appealed against this decision but, in October 2008, the Maritime Court of Appeal upheld the judgement of the Maritime Court of Caracas.

6.3 First Instance judgement in respect of claim by FETRAPESCA

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. In a subsequent clarification, the Maritime Court of First Instance stated that, if the established losses were greater than the shipowner's limitation amount, the 1971 Fund would be liable, under Article 5 of the 1969 CLC, to compensate the claimant. As of April 2012, the 1971 Fund had not been notified of the judgement.

6.4 Claim by the Puerto Miranda Union

6.4.1 In October 2005, 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.

6.4.2 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 to 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.

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

6.5 Maritime Court of First Instance in Caracas

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.

6.6 Amendment of Puerto Miranda Union claim

6.6.1 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 Union, attempting to notify the shipowner and master.

6.6.2 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. The Maritime Court of First Instance of Caracas accepted the amended claim on 10 April 2008.

6.6.3 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.

6.6.4 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.

6.6.5 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.

6.7 Hearing in respect of the claim by the Puerto Miranda Union

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.

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

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[<1>], 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.

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

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. [<2>]

6.10 Judgement by the Supreme Tribunal

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.

6.11 Appeal to the Constitutional Section of the Supreme Tribunal

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.

<1> The Venezuelan Court, in its interpretation of the Conventions, concludes that the 1971 Fund, having been notified, is obliged automatically to pay compensation.

<2> For an analysis of the considerations of the decision of the Maritime Court of Appeal at the 1971 Fund Administrative Council's October 2010 session, reference is made to the publication, Incidents Involving the IOPC Funds 2010, pages 66-67.

6.12 Appointment of court experts

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.

6.13 Report by the court experts

6.13.1 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, including interest. This is summarised in the table below.

Item	Assessed amount (BsF)
Cost of replacing 7 540 nets	8 713 150
Cost of replacing one outboard motor	17 000
Loss of income fin-fish boat fishermen	704 664 482
Loss of income shrimp boat fishermen	21 624 680
Loss of income shrimp foot fishermen	6 708 064
Interest on cost of replacing nets and motor	28 164 709
Total	**769 892 085 (£111 million)**

6.13.2 The experts also stated that the total amount available for compensation under the Conventions (60 million SDR) was equivalent to BsF 403 473 005. 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, 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.

6.13.3 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.

6.13.4 Shortly thereafter, in 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.

6.13.5 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.

6.14 Judgement of Maritime Court of First Instance on quantum

Also in March 2011, 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 at BsF 769 892 085. The Court ordered the master, as agent of the shipowner, to pay BsF 2 844 983 and the 1971 Fund to pay BsF 400 628 022. 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.

6.15 Judgement of the Constitutional Section of the Supreme Tribunal

6.15.1 In June 2011, the Constitutional Section of the Supreme Tribunal dismissed the 1971 Fund's appeal against the judgement of the Supreme Tribunal on liability.

6.15.2 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

6.16 Time bar

6.16.1 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:

> *"...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 pursuant to such Articles 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 III and VII (1) of the CLC, 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 time bar 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 time bar 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 time bar 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."

6.16.2 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 Union 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*).

6.16.3 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 that involve environmental matters. In this respect, the provision in question states:

> *'Article 95. <u>Proceedings shall not be declared time-barred in cases involving environmental matters</u>; 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."

6.17 <u>The requirement for the Courts to use 'logic and judgement' (*sana critica*)</u>

6.17.1 The 1971 Fund also appealed to the Constitutional Section of the 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.

6.17.2 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.

6.17.3 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, and 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.

6.18 Other issues

6.18.1 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.

6.18.2 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.

6.19 Judgement of Maritime Court of Appeal on quantum

6.19.1 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 (*perención 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, and instead confirmed the March 2011 judgement of the Maritime Court of First Instance, which had ordered the 1971 Fund to pay BsF 400 628 022 [<3>], plus costs.

6.19.2 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 appealed this decision.

7 Considerations by the 1971 Fund Administrative Council

7.1 March 2011

7.1.1 At the March 2011 session of the 1971 Fund Administrative Council, the Director submitted a document reporting on developments in the *Plate Princess* incident and requested 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 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.

[<3>] The court experts calculated that the total amount available for compensation under the 1969 CLC and the 1971 Fund Convention (SDR 60 million) was equivalent to BsF 403 473 004.80 and that the compensation payable by the 1971 Fund should be BsF 400 628 022 (BsF 403 473 004.80 minus BsF 2 844 983).

7.1.2 A lengthy debate took place in response to the three documents presented to the Administrative Council and a number of clarifications were sought from the Director. Amongst these clarifications was the Director's explanation that, although the 1971 Fund Executive Committee had agreed in 1997 to make payments in respect of this case, the intention of Internal Regulations 7.4 and 7.5, which governed the grant of the Director's authority to make payments, 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 stressed that the decision of the 1971 Fund Executive Committee was not related to specific claims.

7.1.3 During the debate it was 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, one 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.

7.1.4 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.

7.1.5 Concern was expressed by a large majority of delegations who considered that 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.

7.1.6 Other points of view were also expressed, including a statement 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; that the claim could not be time-barred if there had already been an agreement to pay; and 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.

7.1.7 The question was raised as to 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. The request by Venezuela that payment to the claimants should proceed received support from a few delegations.

7.2 Decision by the 1971 Fund Administrative Council in March 2011

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.

7.3 October 2011

At the 1971 Fund Administrative Council's October 2011 session, the Director submitted a document in which he commented upon the most significant issues addressed in the judgement by the Constitutional Section of the Supreme Court Tribunal which had been given in June 2011, and on the enforceability of that judgement. In the document, the Director informed the Administrative Council as set out below.

7.4 Time bar issue

7.4.1 In its judgement, the Constitutional Section of the Supreme Tribunal had 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.

7.4.2 The Director maintained his view that the action to which Article 6, paragraph 1 of the 1971 Fund Convention referred, could be taken either against the 1971 Fund or against the shipowner. If the action was 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.

7.4.3 In the Director's opinion, the interpretation of Article 6 of the 1971 Fund Convention established by the Venezuelan courts could not 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.

7.4.4 The Director accepted that Article 6, paragraph 1 of the 1971 Fund Convention did not stipulate against whom the action referred to must be taken within three years. However, since the 1969 CLC set out the relationship between the victim of pollution damage and the shipowner and his insurer, it was 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 set out the relationship between the victim of pollution damage and the 1971 Fund, it was logical that any legal action required under that Convention would be against the 1971 Fund.

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

7.5 The application by the Courts of 'logic and judgement' (*sana critica*)

In his document, the Director noted 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.

7.6 The quantum of the assessment

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(£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 noted that this was 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* was therefore 22 times higher than in the *Nissos Amorgos*. Since the fishing concerned was an artisanal activity (the boats are small (in the majority less than 10m in length) and are normally crewed by two persons), the Director considered that the assessed loss far exceeded any real loss that could have occurred, even if activity had been suspended.

7.7 Calculation of the amount to be paid by the 1971 Fund

The Maritime Court calculated the limit of liability of the shipowner and the total amount available for compensation under the Conventions by 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 differed 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.

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

The Director recalled that at the 1971 Fund Administrative Council's 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 agreed 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 considered 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.

7.9 Director's considerations

7.9.1 Having reviewed the judgement of the Constitutional Section of the Supreme Court Tribunal, the Director agreed with the 1971 Fund Administrative Council that the claim by the Puerto Miranda Union was time-barred, 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 applied, as a result of which, a final judgement would not be enforceable against the 1971 Fund.

7.9.2 The Director, therefore, concluded that there were no grounds for the Administrative Council to change their previous instructions to the Director not to make any payments in respect of the *Plate Princess* incident.

7.9.3 The Director also highlighted that the 1971 Fund had 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, and was awaiting its decision.

7.9.4 In this regard, the Director noted that, in any event, no payment of compensation to the Puerto Miranda Union would be possible until the losses suffered by FETRAPESCA had been established by a final judgement from a competent court. Since the 1971 Fund had not yet been notified of the judgement of the Maritime Court of First Instance in respect of that claim and since it was likely that this judgement would be appealed by the 1971 Fund, the Director considered that it was not likely that any compensation payments would be made in respect of this incident for some time.

7.10 Statement by the Venezuelan delegation

Following the submission of the Director's document, the delegation of Venezuela made a statement that was annexed to the Record of Decisions of the October 2011 sessions of the 1971 Fund Administrative Council, where a number of points of detail were raised (see document IOPC/OCT11/11/1, Annex II).

7.11 Decision by the 1971 Fund Administrative Council in October 2011

7.11.1 The 1971 Fund Administrative Council decided to confirm its instructions given in March 2011 not to make any payments in respect of the *Plate Princess* incident and instructed the Director to continue to monitor the outcome of the legal actions in Venezuela.

7.11.2 The 1971 Fund Administrative Council also instructed the Director to prepare a report on the points raised in the intervention by the Venezuelan delegation and a report on the legal basis for the 1971 Fund to refuse payment under Article X of the 1969 CLC and to report back to the 1971 Fund Administrative Council at its next session.

* * *

ANNEX II

Response to the Reply of the Venezuelan delegation to document IOPC/OCT11/3/4

INCIDENTS INVOLVING THE IOPC FUNDS – 1971 FUND

Plate Princess

1 Introduction

In its document entitled 'Reply of the Venezuen delegation to document IOPC/OCT11/3/4' (Annex II of document IOPC/OCT11/11/1 **(**Record of Decisions of the October 2011 Sessions of the IOPC Funds' governing bodies)), the Venezuelan delegation made a number of specific observations. These observations, and the Director's comments thereon, are as follows:

2 Venezuelan delegation's observations and the Director's comments

2.1 Observation N°1

'This delegation draws to your attention that this document again insists that the Fund was not a defendant in the Venezuelan legal proceedings, but it should be emphasized that the 1971 Fund participates in the proceedings in its capacity of an interested third party, as set out in Article 7, paragraph 6 of the Fund Convention, which does not require the Fund to be a defendant but only requires that it be notified of an action against the shipowner in order to be required to comply with the judgement handed down by the court.'

Director's comment

The Director agrees with the Venezuelan delegation that the 1971 Fund participated in the legal proceedings as a third party not as a defendant. Since the 1971 Fund was not a defendant in the proceedings, nor was the 1971 Fund formally notified in accordance with Venezuelan legal requirements within three years from when the damage occurred, nor was an action taken against the 1971 Fund within six years from the date of the incident, the claims against the 1971 Fund were time-barred under the 1971 Fund Convention.

This was the decision taken by the 1971 Fund Administrative Council in May 2006.

The opinion of the Secretariat on the interpretation of Article 7, paragraph 6 of the 1971 Fund Convention is set out in the Record of Decisions of the 1971 Fund Administrative Council session in October 2010 (document IOPC/OCT10/11/1, paragraphs 3.3.11 and 3.3.12).

2.2 Observation N°2

'In paragraph 2.11, there is a substantive error concerning the amount indicated in the document as the amount claimed, when the correct amount is BsF 53.5 million.'

Director's comment

There is a typographical error in paragraph 2.11. The correct figure, as mentioned by the Venezuelan delegation, is BsF 53.5 million. The correct figure is given in the summary box at the start of the document.

2.3 Observation N°3

'With regard to the matters addressed in paragraphs 2.12 to 2.15, the Constitutional Section of the Supreme Court of Justice decided on these matters in a judgement given on 8 June 2011, on the occasion of the extraordinary appeal filed by the Fund on 4 March 2011.'

Director's comment

Paragraphs 2.12 to 2.14 in document IOPC/OCT11/3/4 deal with the inability of the 1971 Fund to review the evidence submitted in support of the claim before it had to submit its defence to the Maritime Court of First Instance. The judgement of the Constitutional Court makes no reference to this issue. Paragraph 2.15 of document IOPC/OCT11/3/4 refers to the evidence given by witnesses at the hearing before the Maritime Court of First Instance.

2.4 Observation N°4

'With regard to paragraph 2.16 and the footnote to page 2, this delegation feels bound to point out that the Venezuelan Court does not make assumptions or interpret the Conventions with respect to a notification or claim against the Fund, but simply establishes literally what is set out in Article 7 of the 1971 Fund Convention, which requires only a notification of an action filed against the shipowner for the Fund to be obliged automatically to comply with the decision of the court concerned.'

Director's comment

The footnote referred to by the Venezuelan delegation states:

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

In the view of the Director, any judgement by a court that involves a matter of law is based on the court's interpretation of that law. With regard to the word 'assumes', the intended meaning might have been clearer had the word 'concludes' been used instead of 'assumes'.

2.5 Observation N°5

'With regard to paragraph 2.17, on 7 October 2011, the claimants withdrew the action against the Fund. A certified copy of the withdrawal order is filed with the Secretariat for the information of the delegations.'

Director's comment

The Secretariat has been informed by its Venezuelan lawyers that, on 7 October 2011, the claimants requested the Maritime Court of First Instance to withdraw the claim but that, on 17 October 2011, the court refused the request on the grounds that a judgement had already been issued. A certified copy of the withdrawal order has not been received by the Secretariat.

2.6 Observation N°6

'With regard to paragraph 2.21, we wish to inform you that the court rejected the expert nominated by the shipowner because the expert was not domiciled in the place where the incident occurred in accordance with the legal provisions of our sovereign State. On the second occasion, the shipowner again nominated the same expert who had been rejected by the court, and the court, as established by law, had to reject the nomination again and an expert had to be appointed directly by the Court.'

Director's comment

The shipowner first nominated as an expert one of the authors of the experts' report that was rejected by the Maritime Court of First Instance on the grounds that it had not been submitted in time. When this person was rejected by the Court as an expert for the quantification of the loss, the shipowner nominated a resident of Maracaibo with considerable knowledge of the local fishing industry. The Court also rejected this person on the grounds quoted by the Venezuelan delegation.

2.7 Observation N°7

'In paragraph 2.22, we point out that there are no details of the loss of profit concerning the shrimp fishermen, fin-fish fishermen and foot fishermen.'

Director's comment

Paragraph 2.22 of document IOPC/OCT11/3/4 sets out the court experts' conclusions as to the amount of compensation to be paid to the claimants. The Venezuelan delegation is correct to point out that there are no details of the fishermen's loss of profit. This is because the court experts considered only the lost sales allegedly suffered by the fishermen, without deducting saved costs.

2.8 Observation N°8

'With respect to paragraph 2.26, this Assembly is informed that in June 2011, the Constitutional Court rejected the appeal filed by the Fund in which it alleged, inter alia, that the judgment had been unfair, the claims were time-barred and that due process had not been followed. In this respect, there is no other appeal that can be made against the judgment which ordered the Fund to pay the Venezuelan victims affected by the Plate Princess incident.'

Director's comment

It is correct that no further appeal can be made in the Venezuelan courts on the matter of the 1971 Fund's liability to pay compensation. However, the matter of the quantification of the amount of compensation to be paid is subject of an appeal to the Constitutional Court.

2.9 Observation N°9

'With respect to paragraph 2.27, there is an error, in that the appeal filed before the Court of Appeal only related to the excessive amount in relation to the normal incomes earned by the fishermen in 1997. The Fund's legal representative only requested that the quantum that the IOPC Fund was ordered to pay should be reconsidered, and there was nothing whatsoever in the appeal with respect to the claim being time-barred, since those allegations were exhausted with the extraordinary appeal in the Constitutional Court in the Appeal for Review which was refused on 8 June 2011 by the Venezuelan Supreme Court of Justice.'

Director's comment

The Venezuelan delegation is correct. The 1971 Fund's appeal referred to did not include reference to the time-bar issue.

2.10 Observation N°10

'In paragraph 2.28, with regard to the refusal by the Maritime Court of Appeal to allow the Fund to file a new extraordinary appeal requesting reconsideration of the quantum ordered to be paid by the Fund to the victims of the incident, the Court denied that request because Venezuelan law does not allow any extraordinary appeal for that type of claim. However, the Fund decided to request the Supreme Court of Justice to reconsider the quantum, and the decision of the Supreme Court of Justice on this application is pending.'

Director's comment

The Venezuelan delegation is correct. The Supreme Court has since rejected the 1971 Fund's appeal.

2.11 Observation N°11

'With respect to paragraph 3.1, there is a substantive error in the amount of the compensation fixed by the Maritime Court of Appeal, the correct amount being BsF 2 844 983.'

Director's comment

There was a typographical error in the paragraph concerned. The correct figure is BsF 2 844 983. The figure is quoted correctly in the summary box of the document at section 1.

2.12 Observation N°12

'With regard to paragraph 4.11, in the October 2009 session, this delegation demanded the payment of compensation to those affected by the Plate Princess spill, because the victims had obtained a final judgement not subject to appeal. The Acting Director of the IOPC Funds, invoking Article X of the 1969 CLC, requested leave to file an extraordinary appeal in the Supreme Court of Justice against the final judgment. Nevertheless, the Director told the Assembly that the decision in the highest Venezuelan courts, with respect to extraordinary appeals, would be binding on the 1971 Fund, by virtue of Article 8 of the 1971 Fund Convention. For that reason, the Fund has exhausted the only two extraordinary appeals allowed in Venezuelan legislation (see document IOPC/OCT09/3/2/1).'

Director's comment

The Acting Director did not invoke Article X of the 1969 CLC as a reason for appealing to the Supreme Court. The 1971 Fund based its appeal to the Supreme Court, *inter alia*, on the issues of time bar, link of causation, and evidence of quantum. The Acting Director stated that, 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.

2.13 Observation N°13

'In paragraph 4.13, in the IOPC Fund Assembly held in Morocco, in March 2011, the Bolivarian Republic of Venezuela submitted document IOPC/MAR11/3/2/1 to the governing bodies of the Funds. This is a document which clarifies all the observations formulated by the various committees in which the Plate Princess incident has been discussed.'

Director's comment

The Director confirms that the Secretariat received the document concerned.

2.14 Observation N°14

'With respect to paragraphs 4.14 to 5.17, the matters therein were the subject of the appeal for review filed by the Fund in the Constitutional Section of the Venezuelan Supreme Court of Justice, which was refused on 8 June 2011, on the grounds, inter alia, that the proceedings had complied with due process and the principle of legal certainty, that the claim was not time-barred, that there had been no violation of the right of defence and that the judgement was not unfair.'

Director's comment

The 1971 Fund's appeal to the Constitutional Section of the Supreme Court was rejected. The analysis of the Court's comments by the Venezuelan delegation is, however, to some extent subjective. The Constitutional Section of the Supreme Court does not deal with matters of 'fairness' as referred to by the delegation but on matters related to the Constitution and the rule of law.

2.15 Observation N°15

'With regard to paragraphs 7.2 to 7.7, we reiterate our comments at the beginning of this document: the Fund was not a defendant in the Venezuelan legal proceedings. The 1971 Fund participated in the proceedings in its capacity of an interested third party, as set out in Article 7, paragraph 6 of the Fund Convention, which does not require the Fund to be a defendant but only requires that it be

notified of an action against the shipowner in order to be required to comply with the judgement handed down by the Court.'

Director's comment

The Director notes again the delegation's interpretation of Article 7, paragraph 6, of the 1971 Fund Convention. The Secretariat's view is set out in document IOPC/OCT10/11/1, paragraphs 3.3.11 and 3.3.12 (see also the Director's comment on Observation N°1).

2.16 Observation N°16

'With respect to paragraphs 7.8 and 7.9, comparison of the amounts between Nissos [Amorgos]and Plate Princess, at the foot of the page, the Fund establishes the conversion of the Bolivar in Pounds sterling at 7.00041 Bolivars to the Pound. In comparing the data to which the Director refers, it is clear that there is an error in the Director's estimate, since the average annual income per shrimp boat with respect to the Nissos Amorgos (£11 000), compared with the average annual income per shrimp boat in the Plate Princess case, based on the average set out in the supplementary expert report at Bs110 330 for six months (see page 95 of the IOPC Fund submission in the appeal for review) which on an annual basis is equivalent to Bs220 660, which in Pound sterling is equal to £31 521.01 as the average annual income, we calculate that the quantum is only 2.85 times higher than the Nissos Amorgos, and not 22 times, as the Director states. Thus, if we consider that, as clearly established in paragraph 7.9, that the Bolivar has depreciated by some 750% since the date of the incident, then there is no doubt that the amount claimed per shrimp boat for the Plate Princess compared with the Nissos Amorgos, would be much lower, as the increase would be only 285%.'

Director's comment

In paragraph 7.8 of document IOPC/OCT11/3/4, the Acting Director stated 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 (£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.

The income amount referred to by the Director, BsF 1 669 756 (£243 000) per boat per year, was the average income per boat for the 849 boats identified in the claim. The figure quoted by the Venezulan Delegation, £31 521.01, however, relates to only 196 out of the total 849 boats. Those 196 boats fished for shrimp. The remaining 653 boats fished for fin-fish. The losses calculated by the court experts for the fin-fish boats was the equivalent of £300 900 per year per boat, nearly ten times the figure obtained for the shrimp catching boats. The Director considers not only that the catch income for fin-fish boats is implausibly high but also that it seems most unlikely that the income from the two types of fishing would be so dissimilar. If that were the case, no one would fish for shrimp.

2.17 Observation N°17

'With regard to the statement in paragraph 7.10, concerning whether the Fund was notified in a reasonable time or had been given sufficient opportunity to present its case, this was decided by the extraordinary appeal for review filed by the Fund in the Constitutional Section of the Supreme Court of Justice of the Bolivarian Republic of Venezuela. The Court rejected the claims and confirmed that the Fund must pay the victims of the Plate Princess incident.'

Director's comment

For the reasons stated in paragraph 7.10, the Director remains of the view that, irrespective of the judgements of the Venezuelan courts, the 1971 Fund was not given reasonable notice and a fair opportunity to present its case, as required under Article X of the 1969 CLC.

2.18 Observation N°18

'In paragraph 7.11, we again reiterate that, with respect to time-bar, the governing bodies of the IOPC Fund authorised the filing of an extraordinary appeal for review before the Constitutional Section of the Supreme Court of Justice of the Bolivarian Republic of Venezuela. The Supreme Court of Justice, with respect to the appeal for review, decided that there was no time bar with respect to the claim by the Puerto Miranda Fishermen's Union against either the IOPC Fund or the shipowner.'

Director's comment

The Venezuelan Delegation correctly notes that the Supreme Court decided that the claim by Puerto Miranda Union was not time-barred. However the Director notes that, in his opinion, 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.

2.19 Observation N°19

'With respect to paragraph 7.12, we reiterate our comments indicated above in paragraph 4.11. With respect to this point, it is important to recall that in October 2009, the Director was of the opinion that the Fund should file an extraordinary appeal in the Supreme Court of Justice, because he considered that the IOPC Fund had not been given sufficient time to present its defence. On that occasion, the Director informed the Assembly that if, in the highest Venezuelan Court, the extraordinary appeals were decided against the Fund, the Fund would be obliged to comply with the judgement. In 2010, the Administrative Council of the Fund again authorised the Secretariat to file one last extraordinary appeal for review as allowed in the Venezuelan legal system, because it considered that the decision of the courts was unfair, that due process had not been followed and the claim was time-barred. This final appeal was submitted by the Fund's legal representative on 4 March 2011. In the March 2011 session, held in Morocco, the 1971 Fund Administrative Council decided not to approve any payment and to await the decision in the extraordinary appeal for review filed by the Fund in the Constitutional Section of the Supreme Court of Justice. The Constitutional Section of the Supreme Court of Justice of the Bolivarian Republic of Venezuela, in a judgement dated 8 June 2011, refused the extraordinary appeal for review, among the other allegations made by the IOPC Fund, on the grounds that the claim was not time-barred and that due process had been followed.

As the Fund had exhausted all the ordinary and extraordinary appeal processes, the final decision on those appeals, which ordered the Fund to pay compensation to the Venezuelan fishermen, is binding on the Fund, in application of the international Conventions, thus to disobey the judgement would be to violate the international treaty.'

Director's comment

The Director notes the opinion of the Venezuelan delegation but maintains his view, as expressed in connection with paragraph 7.10, that, irrespective of the judgements of the Venezuelan courts, the 1971 Fund was not given reasonable notice and a fair opportunity to present its case, as required under Article X of the 1969 CLC.

2.20 Observation N°20

'With respect to paragraph 7.13, the Maritime Court of Appeal refused the Fund's application to file a new extraordinary appeal for review in the Civil Section of the Supreme Court of Justice, because under Venezuelan law, an extraordinary appeal to evaluate or request reconsideration concerning the quantum of loss is not permitted.'

Director's comment

The Director notes that the Court of Appeal rejected the 1971 Fund's request for leave to appeal to the Supreme Court in connection with the judgement relating to the quantum of the loss. The 1971 Fund appealed this decision to the Supreme Court. The Supreme Court denied leave to appeal and the 1971 Fund has appealed to the Constitutional Section of the Supreme Court.

2.21 Observation N°21

'With respect to paragraph 7.14, on 7 October 2011, FETRAPESCA withdrew its action against the 71 Fund. We are filing a certified copy of the withdrawal order with the Secretariat.'

Director's comment

The Director notes that on 7 October 2011, the FETRAPESCA fishermen's union requested the Maritime Court of First Instance to withdraw its claim. In a judgement issued later on 17 October 2011, the Maritime Court of First Instance rejected the claimant's request. So far as the Director is aware, therefore, the judgement requiring the 1971 Fund to pay compensation to FETRAPESCA remains in force. The 1971 Fund has not yet been notified formally of this judgement, nor has it received the certified copy of the withdrawal.

2.22 Observation N°22

'Lastly, with regard to paragraph 7.15, the Courts of Venezuela have already handed down a final judgement in the two extraordinary appeals filed by the Fund, therefore the Administrative Council or the Governing Bodies of the 1992 Fund, under the Protocol which amended the 1971 Fund Convention, must issue instructions for the immediate payment of compensation to the Venezuelan victims.'

Director's comment

Instructions regarding the payment of compensation are a matter for the 1971 Fund Administrative Council. The Director also wishes to note that the 1971 Fund has appealed to the Constitutional Section of the Supreme Court for a second time, as the judgement referred to by the Venezuelan delegation is not a final judgement.