INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS

Agenda item: 3	IOPC/OCT12/**3/4/1**	
Original: ENGLISH	7 September 2012	
1992 Fund Assembly	**92A17**	
1992 Fund Executive Committee	**92EC56**	
Supplementary Fund Assembly	**SA8**	
1971 Fund Administrative Council	**71AC29**	●

INCIDENTS INVOLVING THE IOPC FUNDS – 1971 FUND

PLATE PRINCESS

Note by the Director

Summary:	This document contains the legal opinion of Dr Thomas A Mensah, who was engaged by the Director to conduct an analysis on the legal basis for the 1971 Fund to refuse payment under Article X of the 1969 Civil Liability Convention (1969 CLC) following the decision of the 1971 Fund Administrative Council in April 2012 (see document IOPC/APR12/12/1). The opinion also addresses the points raised by the Bolivarian Republic of Venezuela in their third intervention at that meeting.
Action to be taken:	1971 Fund Administrative Council Information to be noted.

1 Background information

1.1 At its April 2012 session the 1971 Fund Administrative Council instructed the Director to:

(a) conduct a further analysis on the legal basis for the 1971 Fund to refuse payment under Article X of the 1969 CLC; and

(b) examine the points raised by the Bolivarian Republic of Venezuela in their third intervention at that meeting (see document IOPC/APR12/12/1, paragraph 3.2.55), with the Legal Affairs and External Relations Division of the International Maritime Organization (IMO).

1.2 The Director engaged Dr Thomas A Mensah, who is an expert on matters relating to the Law of the Sea, Maritime Law, International Environmental Law and Public International Law, to conduct the legal analysis on Article X of the 1969 CLC and also to examine the points raised by the Bolivarian Republic of Venezuela in consultation with IMO. Dr Mensah's biography and legal opinion are attached to this document at Annexes I and II.

2 Action to be taken

1971 Fund Administrative Council

The 1971 Fund Administrative Council is invited to take note of the information contained in this document.

* * *

ANNEX I

Biography of Dr Thomas A Mensah

Dr Thomas A. Mensah was a Judge of the International Tribunal for the Law of the Sea, from 1996 to 2005. He was the first President of this Tribunal from 1996 to 1999.

Prior to election to the Tribunal, Dr Mensah had been a Lecturer of Law at the University of Ghana and Dean of the Faculty of Law; Associate Legal Officer at the International Atomic Energy Agency, Vienna, Cleveringa Professor of Law at Leiden University and Professor of Law and Director, Law of the Sea Institute at the University of Hawaii.

From 1995 to 1996 Dr Mensah was the High Commissioner (Ambassador) of Ghana to the Republic of South Africa. He also served as Chairman of the F4 (Environmental Claims) Panel, United Nations Compensation Commission, Geneva between 2000 and 2005.

Between 1968 and 1990 Dr Mensah was Director of the Division of Legal Affairs and External Relations at the International Maritime Organization (IMO). He was designated Assistant Secretary-General of IMO in 1981.

He is a Member of the Institut de droit International (since 1989); Titular Member of the Comité Maritime International (CMI); Member of the Advisory Council of the British Institute of International and Comparative Law (BIICL); and Member of the Standing Committee on Maritime Arbitration at the International Chamber of Commerce (ICC) in Paris.

Dr Mensah was educated at Achimota School in Ghana (1948 to 1951). He obtained his BA degree (First Class) from the University of Ghana in 1956 and holds an LL.B (Honours) degree from the University of London (1959). He did post-graduate studies at the Yale University Law School from 1961 to 1964 and was awarded a Masters degree (LL.M) in 1962 and a doctorate degree (SJD) in 1964. Dr Mensah was awarded the degree of Doctor of Laws honoris causa by the Burgas Free University in Bulgaria in 2005; and the honorary degree of Doctor of Laws by the World Maritime University Malmö, Sweden in 2008.

He has been been the recipient of many awards and honours which include being awarded by the German Government with the Commander's Cross of the Order of Merit of the Federal Republic of Germany in March 2007. He was the co-laureate of the Elizabeth Haub Prize for International Environmental Law awarded by the Free University of Brussels for 2006 and he received the Onassis Distinguished Scholar Award at the Rhodes Academy of Oceans Law and Policy in 2008. He is the author of many articles and monographs on the Law of the Sea, Maritime Law, International Environmental Law and Public International Law.

* * *

ANNEX II

LEGAL BASIS FOR THE 1971 FUND TO REFUSE TO PAY COMPENSATION FOR DAMAGE RESULTING FROM THE *PLATE PRINCESS* INCIDENT (27 MAY 1997)

Opinion of Dr Thomas A Mensah

1 In his document to the 1971 Fund Administrative Council dated 18 April 2012 (document IOPC/APR12/3/2/Rev.1), the Director set out the two main reasons why he believed that the 1971 Fund is not obliged to pay compensation for damage alleged to have resulted from the *Plate Princess* incident. The reasons were:

i. that the claims for compensation from the 1971 Fund are time-barred, and

ii. that, pursuant to Article 8 of the 1971 Fund Convention and Article X of the 1969 Civil Liability Convention, the judgment of the court in Venezuela that determined the issue of liability and quantum of compensation does not qualify for recognition and enforcement because:

(a) there was an absence of due process in the proceedings in the court in Venezuela that decided on the issue of liability and the quantum of compensation to be paid by the 1971 Fund; and

(b) the judgment of the court in Venezuela is vitiated by fraud, since the evidence presented to the court to support the claims was in many instances falsified.

The claims for compensation are time-barred

2 Although I have not been specifically requested to comment on the issue of time bar, I felt that it would be helpful to make some comments on the decisions of the Venezuelan courts on that point.

3 The Director noted that the incident alleged to have caused the damage for which compensation is being claimed occurred on 27 May 1997 when the *Plate Princess* spilled some 3.2 tonnes of crude oil in Puerto Miranda, Venezuela. However, no action was brought against the 1971 Fund by any of the claimants. The Director further noted that, although claims were brought against the shipowner and the Master by two fishermen's trade unions, formal notification of these claims was only given to the 1971 Fund (as an interested third party) in October 2005. A second notification was given to the 1971 Fund in March 2007.

4 The Director referred to Article 6, paragraph 1 of the 1971 Fund Convention which deals with the question of time bar for claims to compensation brought against the 1971 Fund. That Article reads as follows:

> Rights of compensation under Article 4 or indemnification under Article 5 shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 7, paragraph 6, within three years from the date when the damage occurred.

5 The Director also noted that no action was at any time brought against the 1971 Fund by any of the alleged victims of damage. Furthermore, even though claims were brought against the owner of the ship (and his insurer) within the three year time- limit specified in the Convention, no notification of the claim was given to the 1971 Fund within the three year time limit specified in Article 6, paragraph 1, of the 1971 Fund Convention.

6 Thus, according to the Director, since no action was brought against the Fund by any claimant under Article 4 of the Convention, and no notification of action against the owner or his insurer was given to the 1971 Fund within three years from the date when the damage is alleged to have occurred, the requirements of Article 6, paragraph 1, of the 1971 Fund Convention had not been satisfied and, accordingly, any right of compensation from the 1971 Fund had become extinguished.

7 The submission of the 1971 Fund on this point was not accepted by the Supreme Court to which the matter was presented, and an appeal by the 1971 Fund against the decision of the Supreme Court was rejected by the Constitutional Section of the Supreme Court. In support of its decision to affirm the ruling of the Supreme Court, the Constitutional Section of the Supreme Court stated, among others, that "Article (4) of the 1971 Fund Convention 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 the automatic application (ie automatic extinction of the right to compensation) since there is an inconsistency as to against whom the time bar operates".

8 The Constitutional Section of the Supreme Court further stated: "In effect, the Article referred to (Article 6(1) of the 1971 Fund Convention) 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 of the Article referred to, this would have been expressly established".

9 The Constitutional Section of the Supreme Court concluded that, there is a "lack of precision" in the Article. It also states 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 insurer), and that "Article 6.1 eiusdem indicates that the time bar on the right of compensation occurs if the legal action in the application of those Articles has not been taken within three (3) years of the damage occurring".

10 Accordingly, the Court concluded that "since there is no other provision in the 1971 Fund Convention which defines the time-bar point ... it is logical to conclude ... that the time bar referred to in the Article concerned (ie Article 6.1) 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".

11 In my view, the reasoning of the Constitutional Section of the Supreme Court on this point is deeply flawed. In the first place, there is no lack of precision (and certainly no "inconsistency") in Article 6 of the 1971 Fund Convention with regard to the condition for the loss of the right to compensation. The content of the Article could not be clearer as to the party against whom a claim has to be brought in order to prevent the application of the time-bar provision.

12 Under Article 4 of the 1971 Fund Convention, the 1971 Fund has the obligation to pay compensation to the victim of pollution damage if the victim has not been able to obtain adequate compensation from an owner or his insurer. Hence an action by the victim for compensation against the 1971 Fund can only be brought under Article 4 of the Convention; and Article 6 categorically states that action for compensation by the victim should be brought under Article 4 (thereunder). Conversely, an action

for indemnification (which may only be brought against the 1971 Fund by the owner of the ship or his insurer) can only be brought under Article 5 which deals with indemnification. Thus, there is no justification to lump together the time bar provision in Article 4 which relates to the bringing of claims for compensation by the victim against the 1971 Fund and the provision in Article 5 which relates to the bringing of claims for indemnification by the shipowner against the 1971 Fund.

13 In any case, it is undeniable that no claim for compensation under the 1971 Fund Convention was brought against the 1971 Fund. Regardless of whether there is any reasonable doubt with regard to the party against whom the action referred to in Article 6, paragraph 1 of the 1971 Fund Convention is to be taken, that Article makes it clear that the action is to be taken "thereunder" ie, under either Article 4 or Article 5 of the 1971 Fund Convention. The claim brought by the claimants against the owner and the Master (and their guarantors) was not made under either of the two Articles referred to in Article 6, paragraph 1 of the 1971 Fund Convention. Rather, it was brought (and could only be brought) under the 1969 Civil Liability Convention. Hence, the only way in which it could have satisfied the requirements of the 1971 Fund Convention was if notice of the action against the owner and Master and their guarantors had been given to the 1971 Fund within the time limit set in the 1971 Fund Convention.

14 The 1971 Fund Convention makes it abundantly clear that the two actions are different and are governed by different procedures. For example, the grounds on which the Fund may be exonerated from liability towards a victim of damage (under Article 4, paragraphs 2, 3 and 4) of the 1971 Fund Convention are quite different from those that are available to the 1971 Fund (under Article 5, paragraph 3) in a claim for indemnification by a shipowner or his insurer. Similarly the grounds on which a shipowner or his insurer may be exonerated from liability to a victim of damage (under Article III, paragraphs 2 and 3 of the 1969 Civil Liability Convention) differ significantly from the defences available to the 1971 Fund in a claim for compensation by a victim of damage against the 1971 Fund under Article 4 of the Fund Convention. As was cogently and correctly argued by the Director, the interpretation of Article 6 of the 1971 Fund Convention could not be correct since, "if all that a claimant had to do to avoid the time bar was to take action against the shipowner within three years of the damage occurring, there would have been no need to include a clause requiring the claimant to formally notify the 1971 Fund of that action within the same time period".

15 It is also not correct to say 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 of the incident causing the damage". As previously pointed out, the action referred to in Article 6, paragraph 1 must be taken under either Article 4 or Article 5 of the 1971 Fund Convention. An action under Article 4 of the 1971 Fund Convention can only be taken against the 1971 Fund by the person who suffered pollution damage; while action under Article 5 can only be taken by the owner of the ship against the 1971 Fund. Thus, the action referred to in Article 6 can in no case refer to action brought by the victim of damage against the shipowner or his insurer. The provision regarding the bringing of actions against the shipowner or his insurer is in the 1969 Civil Liability Convention, whilst the provision on the bringing of actions against the Fund is contained in the 1971 Fund Convention. The only link between the two actions is the provision in Article 6, paragraph 1 of the 1971 Fund Convention which states that the 1971 Fund will only be involved in an action brought by the victim against the shipowner or his insurer if the Fund receives formal notification as prescribed in Article 6, paragraph 1 of the 1971 Fund Convention.

16 In this connection, it appears disingenuous to link the obligation of the 1971 Fund to pay compensation to the victim in certain circumstances, with the obligation of the 1971 Fund to indemnify a shipowner (or his insurer) in respect of a part of the compensation that may have been paid to the victim of damage. Although it is true that the obligation of the 1971 Fund to pay compensation only arises where compensation from the owner is either not obtainable or not

sufficient, there can be no doubt that the obligation of the 1971 Fund to a victim of damage is generically and legally different, in form and basis, from the obligation of the 1971 Fund to indemnify the owner of the ship (or his insurer) for part of the compensation that might have been paid to the person who suffered the damage.

The judgment of the Venezuelan court is not entitled to recognition and enforcement pursuant to Article 8 of the 1971 Fund Convention and Article X of the 1969 Civil Liability Convention.

17 The Director's document stated that the decision of the Venezuelan court with respect to the quantum of compensation to be paid by the 1971 Fund to the claimants is not entitled to recognition and enforcement within the terms of Article 8 of the 1971 Fund Convention, read together with Article X of the 1969 Civil Liability Convention. The reason given for the contention are first because the decision was obtained by fraud, and second because there was an absence of due process in that the 1971 Fund was not given a fair opportunity to present its case.

18 On this point the Director referred to the provisions of Article 8 of the 1971 Fund Convention. This Article provides that a judgment of a court of competent jurisdiction 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". Article X of the 1969 Civil Liability Convention stipulates that a judgment is to be recognised and enforced in any Contracting State except,

(a) where the judgment was obtained by fraud; or

(b) where the defendant was not given reasonable notice and a fair opportunity to present his case.

19 The Director affirmed that both these exceptions apply in relation to the judgment of the Venezuelan court which determined the issues of liability of the Fund to pay compensation and the quantum of compensation payable to the claimants.

The judgment was obtained by fraud

20 On the issue of fraud, the Director asserted, among others, that some of the documentation presented to the Maritime Court of Appeal "was known not to be genuine and to have been falsified for the purpose of obtaining compensation in support of the claim". The Director averred that "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". Further the Director 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".

21 Notwithstanding these obvious discrepancies, the Maritime Court of Appeal accepted that the information in those documents should be used in the calculation of the losses.

22 Article 8 of the 1971 Fund Convention, read together with Article X of the 1969 Civil Liability Convention, expressly states that a judgment given by a court of competent jurisdiction which is otherwise enforceable under the Convention, may nevertheless not be recognised or enforced if, *inter alia*, the judgment was obtained by fraud. Thus, to the extent that there is evidence that a judgment was obtained by fraud, that judgment may be challenged by the 1971 Fund as not entitled to recognition and enforcement in another Contracting State.

23 In the discussions at the Administrative Council the delegation of Venezuela questioned whether the 1971 Fund has "the power to question judicial decisions of its Member States" or "the authority to ignore the principle of *pacta sunt servanda"*. The same question was raised in a different form by another delegation. This delegation wondered "who had the responsibility to decide whether there was evidence of fraud, whether it was the national courts or if there were other procedures in place".

24 The answer to the question raised by the delegation of Venezuela (and other delegations) is simple and straightforward. The 1971 Fund does not have the power or authority to decide whether a judgment of a court of competent jurisdiction should be recognised or enforced in another Contracting State. However, the 1971 Fund has the right, and indeed the obligation, to raise the issue whether a judgment by a national court is entitled to be recognised and enforced in another State Party to the 1971 Fund Convention. The final arbiter in any case will be the court to which the issue of recognition and enforcement of the judgment is submitted. Where the issue of enforcement of a judgment comes before a court in the State in which the judgment was given, there may normally be no question as to the enforceability of the judgment, so long as the judgment is accepted as final and no longer subject to review within the jurisdiction in which it was delivered. However, where the issue of the recognition or enforcement of a judgment is raised in the court of a foreign State, the decision as to whether the judgment is entitled to recognition and enforcement in that State is no longer for the courts of the State in which the judgment was originally delivered. The final decision will rest with the court of the State in which the judgment is sought to be recognised and enforced.

25 In this regard, it is to be noted that the 1992 Fund Assembly, in its Resolution N°8 of May 2003 on the interpretation and application of the 1992 Civil Liability Convention and the 1992 Fund Convention, encourages courts of States Parties when rendering judgments on the Conventions to take into account the decisions by the governing bodies of the 1992 Fund and the 1971 Fund relating to the interpretation and application of these Conventions. One reason for this Resolution is the need for a uniform interpretation, as indicated in the Resolution. For ease of reference the text of Resolution N°8 is attached to this Opinion.

26 From Resolution N°8, two conclusions can be reached. The first is that the governing bodies of the IOPC Funds accept the principle that the final arbiter is the national court, and the second is that national courts when rendering their decisions, should take into account the decisions by the governing bodies of the IOPC Funds relating to the interpretation and application of the Conventions.

27 Hence, although the 1971 Fund may not be able to challenge the enforcement of the judgment of the Venezuelan courts in the State of Venezuela, there is little doubt that the 1971 Fund would have the right to challenge recognition or enforcement of that judgment in the court of any other Contracting State of the Convention. Accordingly, if the Fund fails to honour the judgment of the Court in Venezuela, and if the Venezuelan claimants seek to enforce the judgment in the court of another Contracting State, the Fund will be able to challenge the enforceability of the judgment before the court of that other Contracting State and, if the Fund is able to demonstrate that there is a valid ground for the challenge, the claimants will be unable to enforce the judgment against the 1971 Fund in that Contracting State. For while in most jurisdictions it is not permissible to prevent the enforcement of a foreign judgment by showing that the court which gave the judgment was mistaken in its construction or understanding of the law, it is possible to challenge the enforceability of a judgment if it can be demonstrated that the judgment was obtained by fraud.

28 If an action to enforce the Venezuelan judgment is brought before a court in England, that court will be obliged to apply the relevant provisions of the 1971 Fund Convention and the 1969 Civil Liability Convention, since these Conventions were binding on both the United Kingdom and Venezuela at the material time. It is expressly provided in Article 8 of the 1971 Fund Convention (read together with Article X of the 1969 Civil Liability Convention), that one of the grounds for challenging the

enforceability of a judgment of a court of competent jurisdiction in another Contracting State is proof that the judgment in question was obtained by fraud. As the Director pointed out in his document to the Administrative Council, the 1969 Civil Liability and the 1971 Fund Conventions are not alone in providing that a judgment of a court of competent jurisdiction should not be recognised or enforced if it was, *inter alia*, obtained by fraud. The same (or similar provisions) are to be found in a large number of international conventions. Other Conventions which do not provide for the non-enforcement of foreign judgments because they were obtained by fraud, nevertheless give authority to courts of Contracting States to deny enforcement of judgments that are "contrary to public policy". In this regard, it is pertinent to note that, in such cases, the notion of fraud may be subsumed under the "public order" exception. Thus, according to Professor Dr Peter Schlosser "there is no doubt that to obtain a judgment by fraud can in principle constitute an offence against public policy of the State addressed" (Report on the Accession of Denmark, Ireland and the United Kingdom to 1978 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and the Protocol on its Implementation by the European Court of Justice, page 128, paragraph 192).

29 Indeed, the proposition that a foreign judgment that has been obtained by fraud may not be enforced by a foreign court is accepted as a well-established principle of Private International Law (or Conflict of Laws) and also of public international law. In the authoritative volume of Cheshire on Private International Law, it is stated that "it is a well-settled rule that a domestic judgment may be impeached on the ground that it was obtained by fraud" (Cheshire, North and Fawcett, *Private International Law* 14th Edition, p.551). And Professor Bin Cheng, in his publication entitled *General Principles of Law applied by International Courts and Tribunals* explains: "Fraud is the antithesis of good faith and indeed of law, and it would be self-contradictory to admit that the effect of fraud could be recognized by law" (p.158). And he points out that "a judgment which in principle calls for the greatest respect will not be upheld if it is the result of fraud" and "when it is alleged that an international tribunal has been misled by fraud on the part of witnesses and suppression of evidence on the part of some of them ... no tribunal worthy of its name or of any respect may allow its decision to stand if such allegations are well-founded" (p. 159).

30 Although there are differences in the approaches adopted in different countries, particularly with respect to the nature of the fraud that can validly displace the enforcement of a foreign judgment, the general principle that a judgment obtained by fraud can be impeached in a foreign State appears to be generally accepted in most legal jurisdictions; and that principle is incorporated in numerous international conventions on the recognition and enforcement of international judgments and arbitral awards. In addition to the many Conventions and Instruments mentioned by the Director in his document to the Administrative Council, reference may be made to legislation in a number of States that embody that principle. For example, the Foreign Judgments Act of 1991 of Australia provides in Section 7(2) thereof that one of the grounds on which a judgment debtor may apply to have a foreign judgment set aside is if he satisfies the court dealing with the case that "the judgment was obtained by fraud". A similar provision is in the Uniform Foreign Money-Judgments Recognition Act (UFMJA) which has been adopted by the majority of jurisdictions in the United States. The Act provides, in Section 4(b), that a foreign judgment need not be recognised if, *inter alia*, "the judgment was obtained by fraud". The purpose of the Act was "to restate the rules that have long been applied by the majority of courts in this country".

31 In England it is well-settled in the law that a judgment that was obtained by fraud will not be enforced. In the words of Cheshire, "It is firmly established that a foreign judgment is impeachable for fraud in the sense that upon proof of fraud to a higher degree of probability by the person alleging it, the judgment cannot be enforced in England" (*Conflict of Laws*, 14th Edition, p.551). Another treatise on the subject states that an English Court "will not recognize or enforce a (foreign) judgment which was obtained by fraud" (Clarkson and Hill, *Conflict of Laws*, Fourth Edition, Oxford University

Press 2006, p.162). This rule of the law is supported by a long line of cases. In the seminal case of *Abouloff v. Oppenheimer* ((1882) 10 QBD 295) it was ruled that a foreign judgment cannot be enforced in England if the judgment was obtained by fraud. In that case, Lord Coleridge CJ stated: "Where a judgment has been obtained by fraud of a party to a suit in a foreign country, he cannot prevent the question of fraud from being litigated in the courts of this country when he seeks to enforce the judgments so obtained. The justice of that proposition is obvious. If it were not so, we would have to disregard a well-established rule of law, that no man shall take advantage of his own wrong, and we should have to lay down as a legal proposition that where a judgment has been obtained by fraud and by wrongful act, nevertheless the person obtaining it can take advantage of that fraud and of that wrongful act, and in the courts of this country can enforce the judgment so obtained" (1882) 10 QBD 295, at page 300. That decision was followed in 1890 in the case of *Vadala v. Lawes* (1890) 25 QBD 310. This judgment also confirmed that an allegation of fraud that has already been investigated by a foreign court can once again be investigated by a court in England.

32 This principle of the law, established in the nineteenth century, has recently been confirmed by decisions of the Court of Appeal (*Jet Holdings Inc v. Patel* ([1990] 1 QB 335)) and of the House of Lords (*Owens Bank Ltd v. Bracco* ([1992] 2 A.C.443)). In the Jet Holdings case, a party sought to recover moneys awarded in a judgment given in California. The action in California was to recover money allegedly misappropriated by the defendant. Part of the defendant's defence was that he had been threatened with violence by or on behalf of the plaintiff. The plaintiff presented evidence in the California court to convince the court that the defendant's account of violence and threats was untrue. The Court of Appeal held that since the defendant's allegations were true, the false evidence procured by the plaintiff amounted to fraud and the judgment could not be enforced for that reason. In his judgment, Lord Chief Justice Staughton declared that the decisions in the *Abouloff* and the *Vadala* cases showed plainly that "a foreign judgment cannot be enforced if it was obtained by fraud, even though the allegation of fraud was investigated and rejected by the foreign court" ([1990] 1 QB 335, pp. 344-345). In the *Owens Bank* case, the plaintiff sought to enforce a judgment given by a Russian court that awarded to the plaintiff the right to the value of goods alleged to be wrongly withheld by the defendant. In the proceedings to enforce the Russian judgment in England, it was held that the defendant was entitled to contend that the plaintiff had fraudulently testified in the Russian proceedings that the defendant had the goods when in fact the goods were in the plaintiff's possession. The challenge of the defendant was upheld even though the defendant had unsuccessfully made the same allegations in the Russian proceedings. A judgment to the same effect was given in *Syal v. Heyward* ([1948] 2 KB 443; [1948] 2 All E.R. 576) which also clarified that it is immaterial that the facts supporting the allegation of fraud were known before the foreign judgment was given.

33 These cases show that English law allows the impeachment of a foreign judgment on grounds of fraud even if (a) the fraud alleged is such that it can only be proved by retrying the issues adjudicated in the foreign court or (b) the point could have been taken in the foreign court and was not taken, or was taken but rejected by the foreign court. As stated by the authors in a publication on the law as applicable in Canada, "the evidence (in the case before the foreign court) will be challenged, for example, on the basis that a witness had lied or that documents had been forged. The defendant can raise this challenge even if he or she did not challenge the evidence in the foreign court or, in contrast, he or she did challenge it and the court rejected the challenge" (Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws*, Irwin Law Inc. 2010, at p.181).

34 The reasoning of the English Courts on this point was followed in Australia in a case decided in 2000 by the Supreme Court of New South Wales (Judgment of 8 December 2000 by Dunfold J. in *Yoon v. Soon* ([2000] NSWSC 1147)). The English judgments have also been followed in New Zealand. In *Svirskis v. Gibbon* ([1997] NZLR 4) the New Zealand court held that a foreign judgment should be set aside if the court is satisfied that the judgment was obtained by fraud. In that case the allegations of fraud concerned the plaintiff's evidence about the value of the claims and on the question whether the damage could be restored.

35 It is also interesting to note that an English court will not hesitate to examine an allegation of fraud against a foreign judgment even if doing so would appear to question the integrity of the foreign court. In the recent case of *Korean National Insurance Corporation v. Allianz Global Corporate and Specialty AG* ([2009] Lloyd's Rep. IR 480) it was argued that a judgment in favour of a North Korean insurance company against foreign insurers should not be enforced because the judgment had been procured by fraud instigated or approved by senior officials of the North Korean State. The Court of Appeal in England decided that, notwithstanding the fact that the allegations might embarrass the North Korean State and affect the diplomatic relations between the United Kingdom and North Korea, the English court should look into the allegations in the normal way.

36 It would thus appear that the 1971 Fund would be in a strong legal position if it challenged an attempt by the claimants to enforce the judgment of the Venezuelan court against the Fund in the courts of England. Such a challenge will have a strong legal basis under the common law of England, but its basis would be even stronger because the court will be obliged to apply the 1971 Fund and 1969 Civil Liability Conventions which were applicable to both the United Kingdom and the State of Venezuela at the time of the incident giving rise to the damage.

37 It is necessary to stress, however, that the fact that the law of England (as well as the applicable Conventions) permit the 1971 Fund to challenge the enforcement of the judgment of the Venezuelan court does not mean that a challenge will necessarily succeed. The success of any such challenge will depend on whether the 1971 Fund is able to demonstrate to the satisfaction of the English court that the judgment in Venezuela was obtained by fraud.

The challenge to the enforceability of the judgment because of the "absence of due process" in the proceedings in Venezuela

38 The second ground relied on by the Director for the contention that the judgment of the Venezuelan court should not be enforced is the contention that the 1971 Fund was not given reasonable notice of the claim by the Venezuelan claimant and also that the Fund was not afforded a fair opportunity to present its case.

39 The Director referred to Article 8 of the 1971 Fund Convention which, read together with Article X of the 1969 Civil Liability Convention, expressly provides that a judgment of a court of competent jurisdiction may not be enforced where, *inter alia*, the Fund was not given reasonable notice of the claim or was not afforded a reasonable opportunity to present its case in the proceedings leading to the judgment.

40 The interpretation of Article (X)(1)(b) may be different in the courts of Member States. Some courts may interpret this provision to mean that paragraph 1(b) would apply to notice given by the court of the legal proceedings, ie that the formal procedural rules of the State where the judgment was rendered, were followed. Other courts might take a wider interpretation, and deny the enforcement of a judgment when one of the parties is not provided access to fundamental evidence on which to base its defence. In such a case, this could be perceived as a breach of natural justice since that party has not been given a reasonable opportunity to present its case.

41 In general, English courts take the latter approach and permit a challenge to the enforcement of a foreign government if there is evidence that a litigant was not given appropriate opportunity to present its case. In *Pemberton v Hughes* ([1899] Ch. 781; 15 TLR 211) Lord Lindley MR in effect ruled that even where a judgment has been pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, an English court will still be entitled to investigate the propriety of proceedings in the foreign if "they offend against English views of substantive justice" ([1879] Ch 781 at p.790). As Cheshire puts it, "it is a violation of natural justice if a litigant, though present at the proceedings, was unfairly prejudiced in the presentation of its case" (p. 565).

42 This is also the law in Australia. As stated by the authors Tilbury, Davis and Opeskin in their book *Conflict of Laws in Australia*, "a foreign judgment is opposed to natural justice and unenforceable in Australia where one party did not receive due notice of the proceedings or was denied the opportunity of presenting his or her case, or where the proceedings violated the requirements of substantial justice" (*Conflict of Laws in Australia*, Michael Tilbury, Gary Davis & Brian Opeskin, Oxford University Press 2002, p.239). The authors explain that "the substantive justice referred to by Lord Lindley (in *Pemberton v. Hughes*) "refers to regularity and propriety in the proceedings of the foreign court" (p. 252). This was clarified in the case of *Crawley v. Isaacs* ([1867] 16 LT 529) where Bramwell B explained that even "if the proceedings be in accordance with the practice of the foreign court, but that practice is not in accordance with natural justice, this court will not allow itself to be concluded by them" (p.531). Other cases in which the courts have decided that a judgment of a foreign court cannot be enforced in England if the defendant had not been given a fair chance to present its case in the proceedings leading to the judgment, include *Maronier v. Larmer* [2003] QB 620 C.A; *Jacobson v. Franchon* (1928) 138 LT 386; and *Adams v. Cape Industries plc* ([1990] Ch. 433). In *Jacobson v. Franchon* it was explained that the expression "principles of natural justice" involved, first, that the foreign court has given notice to the litigant that it is about to proceed to determine the rights between him and the other litigant and, secondly, that, having given the litigant that notice, the court affords him an opportunity of substantially presenting his case before the court. In *Adams v. Cape Industries plc* the Court of Appeal refused the enforcement of a foreign judgment because the assessment of the damages was not done judicially. The Court stated: "The defendants were entitled to a judicial assessment of their liability. They did not have one" (p.500).

43 Thus, if an application to enforce the Venezuelan judgment were brought against the 1971 Fund in an English court, the 1971 Fund could challenge the enforcement of the judgment on the ground that it was not given a fair opportunity to present its case in the proceedings before the court in Venezuela. And the Fund will succeed in preventing the enforcement of the judgment if it is able to prove to the satisfaction of the court that, in the particular circumstances of the case, it was not given a reasonable opportunity to present its case.

COMMENTS ON THE POINTS RAISED BY THE BOLIVARIAN REPUBLIC OF VENEZUELA IN ITS THIRD INTERVENTION

44 In its third intervention at the April 2012 session of the Administrative Council of the 1971 Fund, the delegation of the Bolivarian Republic of Venezuela made a statement the main elements of which were:

(1) that following the entry into force of the 1992 Protocols amending the 1971 Fund Convention "Venezuela automatically became a party to the 1992 Protocols" and, accordingly, that "the *Plate Princess* incident falls within those which involve the 1992 Fund"; and

(2) that, having regard to Article 28(6) of the 1992 Protocol relating to the 1971 Fund Convention, "it can be deduced that Member States of the 1992 Protocol to the Fund, which at any time belonged to the 1971 Fund, would be bound by the provisions of the Protocol which amended the Convention, with respect to Member States of that Protocol who were party to the Convention prior to its amendment".

45 In support of the first proposition, the delegation of Venezuela stated: "The 1971 Fund Convention was amended by the1992 Protocol to the Fund, through the International Conference convened by the IMO. These Protocols entered into force in 27 November 1992. For Venezuela, the 1971 Fund Convention and its 1984 Protocol to amend it, entered into force on 28 November 1992 (that is, one day after the entry into force of the 1992 Protocol)". The delegation also referred to "Article 38" [in fact Article 28] of the 1992 Protocol to the 1971 Fund Convention which states that "Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to the 1971 Fund Convention as amended by this Protocol shall be deemed to apply to the Convention so amended, as modified by such amendment". On the basis of the "facts" alleged (and the provision quoted), the delegation of Venezuela contended that "Venezuela was always a Party to the 1992 Fund Convention".

46 The claim that "Venezuela was always a Party to the 1992 Fund Convention" has no valid factual or legal basis. In the first place, the various dates cited by the delegation of Venezuela are incorrect. Information in the document entitled "Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary General Performs Depositary and Other Functions" indicates that;

(a) The 1992 Protocol to the 1971 Fund Convention did NOT enter into force on 27 November 1992. Rather the Protocol was adopted on that date.

(b) The 1971 Fund Convention and its 1984 Protocol to amend it did NOT enter into force for Venezuela on 28 November 1998 as claimed. In fact the 1984 Protocol to the 1971 Fund Convention did not enter into force at any time.

(c) Venezuela did not become a Party to the 1971 Fund Convention on 28 November 1992 as claimed. Venezuela became a party to the 1971 Fund Convention on 20 April 1992, having deposited its instrument of accession to the Convention on 21 January 1992. Venezuela remained a Party to the 1971 Fund Convention until the effective date of its denunciation of the Convention on 22 July 1999. The instrument of denunciation was deposited on 22 July 1998.

(d) Venezuela deposited its instrument of accession to the 1992 Protocol to the 1971 Fund Convention on 22 July 1998, and the Protocol entered into force for Venezuela on 22 July 1999.

47 Thus, it is factually incorrect to assert either that Venezuela was a party to the 1971 Fund Convention as at 28 November 1992, or that Venezuela was a party to the 1992 Protocol to the 1971 Fund Convention before 22 July 1999. The instrument of accession of Venezuela to the 1992 Protocol was deposited on 22 July 1998 and the Protocol entered into force for Venezuela on 22 July 1999. This means that Venezuela did not become a Party to the 1992 Protocol until July 1999. Since Venezuela was a party to the 1971 Fund Convention at the time of the *Plate Princess* incident in May 1997, there is no justification for the assertion that "the *Plate Princess* incident falls within those which involve the 1992 Fund".

48 In this connection it is necessary to point out that Article 28 of the 1992 Protocol to which the delegation of Venezuela obviously intended to refer, does not address the question as to which States are parties to the 1992 Protocol. Rather, the Article deals with the binding effect of future

amendments to the 1992 Protocol *vis à vis* States which deposit instruments expressing their consent to be bound by the Protocol after the entry into force of the amendments. It is also worth stressing that the Resolution N°3 of the 1992 Diplomatic Conference has no relevance in determining the date on which Venezuela became a party to the 1992 Protocol to the 1971 Fund Convention. The objective of Resolution N°3 was to avoid the complications that could result in the event that the 1984 Protocols would receive sufficient ratifications and acceptances to bring them into force; and also to authorise the Secretary General of IMO to provide assistance to States for this purpose. In the event that objective was achieved and the 1984 Protocols did not ever enter into force.

49 The delegation of Venezuela further asserted that, having regard to Article 28(6) of the 1992 Protocol relating to the 1971 Fund Convention, "it can be deduced that Member States of the 1992 Protocol to the Fund, which at any time belonged to the 1971 Fund, would be bound by the provisions of the Protocol which amended the Convention, with respect to Member States of that Protocol who were party to the Convention prior to its amendment".

50 Article 28, paragraph 6, of the 1992 Protocol to the 1971 Fund Convention reads:

> A State which is a Party to this Protocol but is not a Party to the 1971 Fund Convention shall be bound by the provisions of the 1971 Fund Convention as amended by this Protocol in relation to other Parties hereto, but shall not be bound by the provisions of the 1971 Fund Convention in relation to Parties thereto.

51 The meaning and intent of this provision is clear and fully in accord with international treaty law. What it says in essence is that a State which has accepted the 1992 Fund Protocol (which incorporates amendments to the original 1971 Convention) is bound only by the provisions of that 1992 Protocol (ie the 1971 Fund Convention as amended by the 1992 Protocol) in relation to States which are also Parties to the 1992 Protocol; but such a State does not have any treaty relations with other States which are only Parties to the original 1971 Fund Convention.

52 This provision does not deal with the treaty relations between, on the one hand, States which have ceased to be Parties to the 1971 Fund Convention and, on the other hand, States which are still Parties to that Convention. And it certainly does not say what the delegation of Venezuela claims it says viz. that "Member States of the 1992 Protocol to the Fund *which at any time belonged to the 1971 Fund*, would be bound by the provisions of the Protocol which amended the Convention, *with respect to member States of that Protocol who were party to the Convention prior to its amendment*" (italics supplied).

53 In other words, the statement of the delegation of Venezuela suggests that a Member State of the 1992 Fund will have a liability in respect of an incident which occurred when the 1971 Fund was in force, even if the Member State was not a Party to the 1971 Fund at the time of the incident.

54 In my view, there is no legal basis for this assertion. The 1971 Fund and the 1992 Fund are two different legal entities, established by two different legal instruments.

55 The obligation of former parties to the 1971 Fund Convention for damage caused during their membership of the 1971 Fund Convention is dealt with in Article 41, paragraph 5 and Article 43, paragraph 2 of the 1971 Fund Convention. Article 41, paragraph 5 states that a State formerly Party to the Convention will have an obligation to the Fund with respect to an incident that occurred before it ceased to be a Party. Article 43, paragraph 2 provides that "Contracting States which are bound by this Convention on the date before the day it ceases to be in force shall enable the Fund to exercise its functions as described under Article 44 and shall, for that purpose only, remain bound by the Convention". Article 44 of the 1971 Fund Convention provides (in paragraph 1) that when the Convention ceases to be in force, (a) the Fund shall nevertheless meet its obligations in respect of any

incident occurring before the Convention ceased to be in force and (b) the Fund shall be entitled to exercise its rights to contributions to the extent that these contributions are necessary to meet obligations under sub-paragraph (a), including expenses for the administration of the Fund necessary for this purpose.

56 The implication of these provisions of the 1971 Fund Convention is that a State is obliged to enable the Fund to exercise its functions in respect of incidents that occur while that State is a Party to the Convention. However, when the Convention has ceased to be in force, a State which was at one time a Party to the Convention will continue to have an obligation to the Fund under Article 43, if it was bound by the Convention on the date before the Convention ceased to be in force. In effect, this means that a State which has ceased to be bound by the 1971 Fund Convention two or more days before the Convention ceased to be in force will have no obligation to the Fund in respect of any incident that occurred while that State was no longer a Party to the 1971 Fund Convention.

57 Thus, there is no authority for suggesting that, merely because a State was at one time a Party to the 1971 Fund Convention, such a State would have an obligation under the 1971 Fund Convention with respect to a State that was a Party to the 1971 Fund Convention, either in its original form or as amended. Except in the special case stipulated in Article 43, paragraph 2 of the 1971 Fund Convention, a State which was at one time a Party to the 1971 Fund Convention will only have an obligation under that Convention in respect of damage covered by that Convention if the damage in question occurred at the time when the Convention was in force for that State.

CONCLUSIONS

a) Conclusion on time bar

58 In my opinion, the decision of the courts in Venezuela on the issue of time bar is patently incorrect and the reasoning on which the decision is based is erroneous. Pursuant to the clear terms of the 1971 Fund Convention, the rights of the claimants to compensation under Article 4 was extinguished because no action was brought under Article 4 (thereunder) within three years from the date when the damage occurred, and no notification of action against the owner or his guarantor for compensation under the 1969 Civil Liability Convention was given to the 1971 Fund within that period, as required under Article 7, paragraph 6 of the 1971 Fund Convention.

b) Conclusion on fraud

59 In my opinion, there is strong support for the contention that the judgment of the Venezuelan court relating to the quantum of damages to be compensated by the 1971 Fund was based on evidence that was not genuine and had been falsified for the purpose of obtaining compensation. Accordingly, the 1971 Fund would have a very strong case in challenging the enforcement of the judgment in the courts of other Contracting States based on the grounds that the judgment was obtained by fraud. Before an English court, it will be open to the 1971 Fund to challenge the enforcement of the judgment, both under the 1971 Fund Convention and also under English common law.

c) Conclusion on due process of law

60 The 1971 Fund is fully entitled to challenge the enforcement of the judgment of the Venezuelan court by asserting that it was not afforded a fair opportunity to present its case before the Venezuelan Court. The right to challenge enforcement on this ground is clearly available to the Fund under Article 8 of the 1971 Fund Convention, coupled with Article X of the 1969 Civil Liability Convention. In addition the 1971 Fund will be able to challenge the enforcement of such a judgment by reference to the English common law, which also recognises the right of a party to contest the enforcement of the judgment of a foreign court on the ground that it was not given a reasonable opportunity to present its case.

d) Conclusion on the third intervention of Venezuela

61 In my view, the third intervention of the delegation of Venezuela at the April 2012 session of the Administrative Council is not supportable in fact or in law. The claim that Venezuela "automatically became a party to the 1992 Protocol" when the 1971 Fund Convention entered into force for Venezuela is factually incorrect. Information from the depositary of the Convention clearly demonstrates that Venezuela did not become a Party to the 1992 Fund Convention until July 1999. Further, the claim of Venezuela that 1992 Fund Member States are under any liability in respect of incidents that occurred when the 1971 Fund was in force, even when they were not members of the 1971 Fund, has no basis in law. It is in direct conflict with the express provisions of the 1971 Fund Convention and the principles of the general international law of treaties.

Signed: 
Thomas A Mensah
London, 7 September 2012

* * *

ATTACHMENT

1992 Fund Resolution N°8 on the interpretation and application of the 1992 Civil liability Convention and the 1992 Fund Convention (May 2003)

THE ADMINISTRATIVE COUNCIL, ACTING ON BEHALF OF THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND 1992, set up under the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (1992 Fund Convention),

NOTING that the States Parties to the 1992 Fund Convention are also parties to the International Convention on Civil Liability for Oil Pollution Damage, 1992 (1992 Civil Liability Convention),

RECALLING that the 1992 Conventions were adopted in order to create uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases,

CONSIDERING that it is crucial for the proper and equitable functioning of the regime established by these Conventions that they are implemented and applied uniformly in all States Parties,

CONVINCED of the importance that claimants for oil pollution damage are given equal treatment as regards compensation in all States Parties,

MINDFUL that, under Article 235, paragraph 3, of the United Nations Convention on the Law of the Sea 1982, States shall co-operate in the implementation of existing international law and the further development of international law relating to the liability for and assessment of damage caused by pollution of the marine environment,

RECOGNISING that, under Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties 1969, for the purpose of the interpretation of treaties there shall be taken into account any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions and any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,

DRAWING ATTENTION to the fact that the Assembly, the Executive Committee and the Administrative Council of the International Oil Pollution Compensation Fund 1992 (1992 Fund) and the governing bodies of its predecessor, the International Oil Pollution Compensation Fund 1971 (1971 Fund), composed of representatives of Governments of the States Parties to the respective Conventions, have taken a number of important decisions on the interpretation of the 1992 Conventions and the preceding 1969 and 1971 Conventions and their application, which are published in the Records of Decisions of the sessions of these bodies [<1>], for the purpose of ensuring equal treatment of all those who claim compensation for oil pollution damage in States Parties,

EMPHASISING that it is vital that these decisions are given due consideration when the national courts in the States Parties take decisions on the interpretation and application of the 1992 Conventions,

CONSIDERS that the courts of the States Parties to the 1992 Conventions should take into account the decisions by the governing bodies of the 1992 Fund and the 1971 Fund relating to the interpretation and application of these Conventions.

[<1>] IOPC Funds' website: www.iopcfund.org